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# CASES.

DECIDED IN

## THE COURT OF SESSION,

FROM

NOV. 12, 1836, TO JULY 21, 1837.

REPORTED BY

ALEXANDER DUNLOP, J. M. BELL, AND JOHN MURRAY,  
ESQUIRES, ADVOCATES.

VOL. XV.

EDINBURGH:

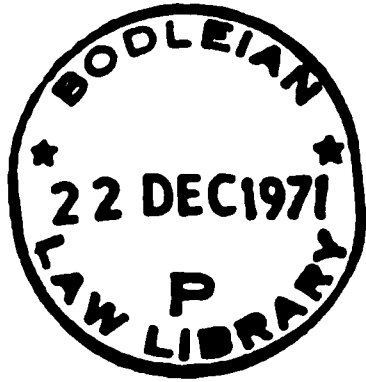
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# JUDGES

OF THE

## COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

---

### FIRST DIVISION.

Lord President HOPE.

Lord BALGRAY.\*

Lord GILLIES.

Lord MACKENZIE.

### PERMANENT LORDS ORDINARY.

Lord COREHOUSE.†

Lord FULLERTON.

### SECOND DIVISION.

Lord Justice-Clerk BOYLE.

Lord GLENLEE.

Lord MEADOWBANK.

Lord MEDWYN.

---

\* On his Lordship's death, Lord Corehouse became one of the Judges of the Inner House, First Division.

† On his Lordship's removal to the Inner House, Lord Cockburn, Ordinary on the Bills, became one of the permanent Lords Ordinary of the First Division.

**PERMANENT LORDS ORDINARY.**

**Lord MONCREIFF.**

**Lord JEFFREY.**

**LORD ORDINARY ON THE BILLS, AND TEINDS.**

**Lord COCKBURN.\***

---

**JOHN HOPE, Esquire, Dean of Faculty.**

**JOHN ARCHIBALD MURRAY, Esquire, Lord Advocate.**

**JOHN CUNINGHAME, Esquire, Solicitor-General.†**

---

\* When his Lordship was attached to the First Division of the Court, Lord Cuninghame became Lord Ordinary on the Bills and Teinds.

† When Mr Cuninghame was elevated to the bench, Andrew Rutherford, Esquire, was appointed Solicitor-General.

# INDEX OF NAMES

IN

VOLUME XV.

A B v. Auld,	468
A. B. v. Berry,	1107
A B v. C D,	158
A B. v. Davidson,	306
Abercorn, Marquis of, and Others (Heritors of the Abbey Parish of Paisley), Brewster v.	991
Aberdeen Banking Company v. Maberly, Cane and Company,	1052
Aberdeen Banking Company, Hutchison and Company v.	1100
Abernethie and Others v. Gordon,	1167
Adam, Calder, v.	570
Adam v. Anderson,	1225
Adamson, Darling and Children v.	672
Adie v. M'Martin, &c.,	1045
Advocate (His Majesty's) v. Bruce,	1184
Advocate (His Majesty's) v. Lord Dunglass, &c.,	314
Advocate (His Majesty's) and Lords Commissioners of the Treasury v. Mackenzie,	701
Advocate (His Majesty's) and Lords Commissioners of the Treasury v. Finnie and Others,	165
Agnew,	1094
Aiken, &c., Campbell v.	1049
Ainslie's Trustees, Robertson v.	1299
Airlie, Earl of, &c. v. Ogilvie,	211
Aitchison v. Patrick,	360
Aitkin v. Finlay and Others,	683
Allan (Thomas Allan's Executor) v. Christie (Robert Allan's Trustee),	1058
Allan and Others (Herriot's Trustees) v. Murray, &c. (Joseph and David Murray's Executor),	1130
Alexander and Others, Macalister, &c. (Caledonian Dairy Co. Directors) v.	1061
A. Adam v.	1225

	Page
Anderson, Broom v. . . . .	997
Anderson and Husband v. Hill and Others, . . . . .	481
Anderson and Husband v. Hill and Others, . . . . .	852
Anderson v. Harvey, . . . . .	875
Anderson, Kerr v. . . . .	928
Anderson v. Garroway and Others, . . . . .	435
Anderson v. Moon, . . . . .	412
Anderson, &c., Gammell, &c. v. . . . .	203
Anderson, Proctor (Judicial Factor on the estate of Carse) v. . . . .	1219
Anderson and Spouse v. Buchanan and Others, . . . . .	1073
Annan, Magistrates of, v. Farish, . . . . .	107
Archer, Keith v. . . . .	116
Auld, A B v. . . . .	468
Bailey and Grindlay v. Young and Others, . . . . .	893
Baird, &c., Swan v. . . . .	251
Bakers' Society of Paisley v. Stentmasters and Magistrates of Paisley, . . . . .	200
Balderston and Others, Murdoch and Mandatary, v. . . . .	1
Ball (Eiston's Curator Bonis), . . . . .	1254
Barbour, Kerr v. . . . .	1041
Barstow, Welsh v. . . . .	537
Bayne v. Steele's Representatives, . . . . .	22
Beattie, . . . . .	157
Begg, &c., Kay v. . . . .	422
Bell and Others, Wright and Spouse v. . . . .	242
Bell, Wotherspoon v. . . . .	1268
Bell, Young v. . . . .	1202
Berry, A. B. v. . . . .	1107
Bett and Others, . . . . .	313
Bissett, . . . . .	4
Blair, Lord Douglas Gordon Hallyburton v. . . . .	704
Blair and Others, Kerr v. . . . .	785
Bogle and Co. and Others, Davidson, &c. v. . . . .	421
Bontine v. Graham, . . . . .	711
Borthwick (Manager of the North British Insurance Co.) v. Langmoor and Others (Ralston's Trustees), . . . . .	1306
Boeswell, . . . . .	490
Boeswell v. Hamilton, . . . . .	1148
Bow, Brownlee v. . . . .	1294
Boeswell, Sir James, . . . . .	425
Breadalbane, Marquis of, &c., Chandos, Marquis of, v. . . . .	48
Breadalbane Trustees, British Linen Company v. . . . .	356
Brewster v. Marquis of Abercorn and Others (Heirs of the Abbey Parish of Paisley), . . . . .	991
Bridges v. Ewing, . . . . .	8
British Linen Company v. Breadalbane Trustees, . . . . .	356
Brodie and Others (Shirreff's Trustees) v. Wilson and Others, . . . . .	1195
Brooks, Clark and Mandatary v. . . . .	1305
Broom v. Anderson, . . . . .	977
Brown v. Moncur, . . . . .	1230
Brown and Others, McDonald and Husband and Others v. . . . .	786
Brown v. Macgregor and Others, . . . . .	837
Brown, Robertson v. . . . .	199
Brownlee v. Bow, . . . . .	1294
Browning v. Hamilton, &c. (Browning's Trustees), . . . . .	999
Bruce and Others, Renny v. . . . .	418
Bruce, Murray (His Majesty's Advocate) v. . . . .	1184

# INDEX OF NAMES.

vii

	Page
Bryden and Husband, and Others, v. Gibson and Husband,	486
Buchanan v. Dennistoun and Co.'s Trustees,	286
Buchanan and Others v. Buchanan,	7
Buchanan, Buchanan and Others v.	7
Buchanan v. Lumsden,	958
Buchanan and Others, Frith and Mandatary v.	729
Buchanan and Others, Anderson and Spouse v.	1073
Buchanan, &c., Macleod v.	1113
Bullock or Thomson, Thomson v.	235
Burns and Others v. Ewing and Magistrates of Glasgow,	996
Burntisland, Magistrates of, Davidson v.	226
C D, A B v.	158
Cairness, Earl of, v. Eaton and Others, and Mandatary,	749
Calder v. Adam,	570
Calder v. Gordon,	463
Cameron v. Young and Others,	1205
Cameron v. Clephane and Shiells,	1220
Campbell v. Aiken, &c.,	1049
Campbell, Thomson v.	1133
Campbell v. M'Neill,	1272
Campbell and Husband, and Others, v. Campbell and Trustees,	679
Campbell and Trustees, Campbell and Husband and Others v.	679
Campbell and Others (Monro's Trustees and Executors) v. Sir Thomas Monro, &c.	310
Campbell or Stewart, &c. v. Stewart,	226
Campbell and Others, Macalister (with his Curator), v.	490
Cargill v. Muir (Smith's Trustee),	408
Carlisle and Others, Kennedy v.	102
Carmichael, &c. (Heritors Symington) v. M'Lean (Minister of Symington),	1020
Carrick, Jaffray v.	43
Cassamajor, &c., Pearson, &c. (Mrs Fotheringham's Trustees) v.	275
Clark, Munro v.	1226
Chalmers and Others, Grant, v.	563
Chandos, Marquis of, v. Breadalbane, Marquis of, &c.	48
Chrichton, Russell and Mandatary v.	1270
Christie (Robert Allan's Trustee), Allan (Thomas Allan's Execu- tor) v.	1058
Christie, Greig and Others, v.	697
Christie, Lyell v.	41
Clark v. Ross,	255
Clarke and Mandatary v. Brooks,	1306
Clerk v. Sir W. F. Elliott,	253
Cleland v. Cleland and Others,	1246
Cleland and Others, Cleland v.	1246
Clephane and Shiells, Cameron v.	1220
Clinie v. Drysdale,	447
Clyne v. Clyne's Trustees,	1051
Clyne's Trustees, Clyne v.	1051
Clyne v. Clyne's Trustees,	911
Clyne's Trustees, Clyne v.	911
Cochran, Falconer v.	891
Cochrane's Representatives, Neilson v.	365
Cockburn, Macallan v.	956
Cochran, Lawson v.	930
Cochran and Husband v. Wilson, &c.,	195



	Page
<b>Collins v. Hamilton and Others,</b>	895
<b>Collins and Others, Robertson v.</b>	572
<b>Commercial Bank v. Paton,</b>	1202
<b>Commissioners (Lords) of the Treasury, see Treasury.</b>	
<b>Connell (Common Agent in locality of Moffat), Johnston and Husband v.</b>	1125
<b>Cowan v. Crawford,</b>	398
<b>Craigie v. Hoggan,</b>	379, 924
<b>Craigie v. Craigie,</b>	836
<b>Craigie, Craigie v.</b>	836
<b>Craigie v. Gordon and Others,</b>	1157
<b>Crawford (Davidson's Trustee),</b>	1254
<b>Crawford, Cowan v.</b>	398
<b>Cundell and Others, Waugh and Ogilvy (Cundell's Trustees) v.</b>	1256
<b>Cunninghame and Others v. Cunninghame,</b>	687
<b>Cuninghame v. Dunlop, &amp;c.,</b>	295
<b>Curle, &amp;c., Scott v.</b>	1035
<b>Currie v. Jardine, &amp;c.,</b>	1047
<b>Dalrymple and Others v. Ranken,</b>	306
<b>Dalrymple,</b>	769
<b>Dalrymple, William,</b>	785
<b>Darling and Children v. Adamson,</b>	672
<b>Darlington v. Gray,</b>	197
<b>Davidson v. Magistrates of Burntisland,</b>	226
<b>Davidson, Union Canal Company v.</b>	194
<b>Davidson, &amp;c. v. Bogle and Co. and Others,</b>	421
<b>Davidson, A B v.</b>	306
<b>Dennistoun and Co.'s Trustees, Buchanan v.</b>	286
<b>Dempster v. Potts,</b>	361
<b>Dick v. Frame, &amp;c. (Lang's Trustees),</b>	256
<b>Dixon, Mack v.</b>	272
<b>Downie, James, &amp;c. v.</b>	1151
<b>Downie, James, &amp;c. v.</b>	12
<b>Douglas, Murray v.</b>	890
<b>Duncan (Treasurer to the Dundee and Perth Road-Trustees), Findlater v.</b>	1304
<b>Duncan and Spouse, Tait v.</b>	1273
<b>Dundas v. Robertson,</b>	1191
<b>Dundas's Trustees, Johnston v.</b>	904
<b>Dundas v. Dundas,</b>	427
<b>Dundas, Dundas, v.</b>	427
<b>Dundas,</b>	398
<b>Dunglas, Lord, &amp;c. King's Advocate v.</b>	314
<b>Dunlop and Company v. Lambert and Others,</b>	884
<b>Dunlop, &amp;c., Cuninghame v.</b>	295
<b>Dunlop and Co. v. Lambert and Others,</b>	1232
<b>Dunmore's, Earl of, Trustee, Stewart (Judicial Factor on Harris) v.</b>	1059
<b>Dunn v. Hamilton and Others,</b>	853
<b>Dunn and Others, Scott v.</b>	924
<b>Drysdale, Clunie v.</b>	447
<b>Dykes,</b>	156
<b>Eaton and Others, and Mandatary, Earl of Caithness v.</b>	749
<b>Eaton, Hammond, and Sons v. Macgregor's Executors,</b>	1012
<b>Edinburgh Improvement Commissioners, Strachan v.</b>	637
<b>Edrom, Minister of Parish of, v. Heritors of Parish of Edrom,</b>	301

# INDEX OF NAMES.

ix

	Page
Elliott, Sir William F., Clerk v.	253
Elliot, Murray v.	1141
Ellis,	262
Erskine Scott, Nicolson v.	191
Erskine, Ogilvy v.	1027
Ewing, Bridges v.	8
Ewing and Others v. Glasgow Commissioners of Police,	389
Ewing v. Stirlingshire Road Trustees,	419
Ewing and Others v. Glasgow Police Commissioners,	553
Ewing and Magistrates of Glasgow, Burns and Others v.	936
Fairweather and Merchant, Hunter v.	693
Falconer v. Cochran,	891
Farish v. Magistrates of Annan,	107
Farquharton and Others, Macdonald v.	259
Fergusson v. Smith and Others,	25
Fergusson v. Glenly,	1241
Ferrier and Others, M'Gill v.	178
Ferrier (Common Agent in Ranking of Cromarty), Mackenzie (Judicial Factor on Ross's Trust Estate) v.	241
Ferrier and Others, M'Gill v.	882
Findlater v. Duncan (Treasurer to the Dundee and Perth Road-Trustees),	1304
Finlay and Others, Aitkin v.	683
Finlay, Keith v.	1152
Finnie and Others (Campbell's Trustees) v. Lords Commissioners of the Treasury and Mandatary,	165
Fisher, M'Farlane v.	978
Flowerdew v. Taylor,	263
Forbes and Others v. Lord Provost, Magistrates, and Council of Glasgow,	628
Forlong v. Taylor's Executors,	126
Forrester v. Forrester and Others,	690
Forrester and Others, Forrester v.	690
Forsyth v. His Creditors,	927, 950
Fowlds or Wodrow, &c. v. Hodges, &c.	244
Frame, &c. (Lang's Trustees), Dick v.	256
Fraser, Walker v.	526
Fraser, Sibbald v.	591
Fraser,	692
Fraser, Williamson's Executors v.	1201
Fraser v. His Creditors,	1244
Fraser and Others v. Rose and Others,	1250
Frith and Mandatary v. Buchanan and Others.	729
Fyfe (Trustee of Steele and of Baxter) v. Miller,	1188
Galbraith and Others v. Smith and Others,	808
Galloway, Earl of, Paget, &c. v.	667
Gammell, &c. v. Anderson, &c.,	233
Gardner and Others, Stocks v.	1095
Garroway and Others, Anderson v.	435
Gibson (Wilson and Son's Trustee) v. Stephenson and Others,	143
Gibson and Husband, Brydon and Husband, and Others, v.	486
Gifford and Mandatary v. Gifford,	592
Gifford, Gifford and Mandatary, v.	592, 1255
Gillan v. His Creditors,	149
Glasgow Commissioners of Police, Ewing and Others v.	389, 553
Glasgow Commissioners of Police, Morrison and Others v.	1128

	Page
Glasgow, Magistrates of, Forbes and Others, v.	628
Glasgow, University of, and Others, v. Physicians and Surgeons of Glasgow,	763
Glenny, Fergusson v.	1241
Goodall v. Low,	1
Gordon v. Trustees of Ministers' Widows' Fund,	15
Gordon, Lady, and Curator, v. Kemp (Napier's Trustee),	187
Gordon, Calder v.	463
Gordon v. Suttie, Sir James Grant,	549
Gordon, Magistrates of Stirling, &c. v.	657
Gordon, Suttie v.	1037
Gordon and Others, Craigie v.	1157
Gordon, Abernethie and Others v.	1167
Gourlay (Marshall's Factor Loco Tutoris), Jackson or Marshall v.	313
Graham, Bontine v.	711
Grant, Shepherd, W.S. v.	173
Grant v. Smith,	558
Grant v. Chalmers and Others,	563
Grant v. Robertson,	1098
Grassie,	116
Gray, Darlington v.	197
Gray, Railton, Pullman, and Mandatary, v.	487
Gray v. Kerr and Others,	494
Gray v. Walker,	1296
Greig and Others v. Christie,	697
Gye and Company, Hallam v.	950
Hackston v. His Creditors,	411
Hallam v. Gye and Company,	950
Hallyburton, Lord Douglas Gordon, v. Blair,	750
Hamilton,	190
Hamilton,	408
Hamilton, Ure (Sir John Lowther Johnston's Trustee) v.	489
Hamilton,	570
Hamilton and Others, Collins v.	895
Hamilton and Others, Dunn v.	853
Hamilton, &c. (Browning's Trustees), Browning v.	999
Hamilton v. Henderson,	1105
Hamilton, Boswell v.	1148
Harvey Anderson v.	875
Harvie v. Inglis,	964
Hay and Mandatary v. Murray,	850
Henderson, Rae v.	653
Henderson and Thomson v. Stewart and Others,	868
Henderson, Hamilton v.	1105
Henry v. Mather,	676
Herbertson, Heritors and Magistrates of Annan v.	645
Hercules Insurance Company and Others v. Hunter,	800
Heritors of Abbey Parish of Paisley, Brewster (Minister) v.	991
Heritors of Parish of Edrom, Minister of Parish of Edrom v.	301
Heritors and Magistrates of Annan v. Herbertson,	645
Hill and Others, Anderson and Husband, v.	481
Hill and Others, Anderson and Husband v.	852
Hodges, &c., Fowlds or Wodrow, &c. v.	244
Hog v. Hog,	532
Hoggan, Craigie v.	378, 924
Hope v. Speares,	1288
Horne v. Rennie,	372

# INDEX OF NAMES.

xi

Horne and Others, Mackenzie and Munro v.	Page 894
Hotchkiss and Others, Ker v.	983
Hume v. Middlemas (Hume's Trustee),	30
Hunter and Others (Macalister's Trustees) v. Nicolson or Macalister,	159
Hunter v. Fairweather and Merchant,	693
Hunter, Hercules Insurance Company and Others v.	900
Hutchison and Company v. Aberdeen Banking Company,	1100
Inch v. Thomson and Others,	126
Incorporation of Tailors of Dundee, Marison v.	179
Inglis (Common-Agent in Locality of South Leith), Moray, Earl of, v.	2
Inglis, Harvie v.	964
Irving v. Irving,	993
Jack v. Umpherston and Kerr,	833
Jackson or Marshall v. Gourlay (Marshall's Factor Loco Tutoris),	313
Jaffray v. Carrick,	43
James, &c. v. Downie,	12, 1151
Jamieson and Others, Kerr v.	425
Jamieson v. Stuart,	805
Jardine, &c., Currie v.	1047
Johnstone (Moir's Trustee), Thomson, Bonar, and Co. and Mandatary v.	173
Johnson, National Bank of Scotland v.	369
Johnston v. Dundas's Trustees,	904
Johnston and Husband v. Connell (Common Agent in locality of Moffat),	1125
Keith v. Archer,	116
Keith v. Finlay,	1152
Kemp (Napier's Trustee), Lady Gordon and Curator v.	187
Kennedy v. Carlyle and Others,	102
Kennedy v. His Creditors,	1294
Ker v. Hotchkiss, and Others,	983
Kerr and Others (Scrimgeour's Trustees), Scrimgeour or Furman, &c.	245
Kerr v. Jamieson and Others,	425
Kerr and Others, Gray, v.	494
Kerr v. Blair and Others,	784
Kerr v. Anderson,	928
Kerr v. Barbour,	1041
Keay v. Begg, &c.,	422
King's Advocate—see (Advocate) his Majesty's.	
Kirkpatrick, Minto, &c. v.	1094
Knight's Trustees and Others, Morrison and Others v.	560
Laing v. Mackenzie,	258
Laird and Company's Assignees v. Murray's Trustees and Others,	120
Lambert and Others, Dunlop and Company v.	884, 1232
Langmoor and Others (Raketon's Trustees), Borthwick (Manager of the North British Insurance Co.) v.	1306
Langton, &c., Macdonald and Others v.	803
Lawson v. Coldstream,	930
Lockhart v. Macdonald,	876
Lockhart,	417
Lockhart and Others,	498
Lockie and Others v. Mason and Others,	547
Logan v. Logan and Others,	291
Logan and Others, Logan v.	291

	Page
Low, Goodall v.	1
Low,	290
Lumsdaine, &c. (Lumsdaine's Representatives), Wilson v.	1211
Lyell v. Christie,	41
Lyell, &c., Thomson (Cashier of Royal Bank) v.	32
Maben (Arnott's Trustees) v. Perkins, &c.,	1087
Maberly, Cane and Company, Adie v.	1052
Mabon v. Montgomery,	19
Macalister (with his Curator) v. Campbell and Others,	490
Macalister's Trustees and Others v. Trustees of General Keith Mac-	
alister,	170
Macalister's, General Keith, Trustees, Macalister's Trustees and Others v.	170
Macalister, &c. (Caledonian Dairy Co. Directors) v. Alexander and	
Others,	1061
Macallan v. Cockburn,	956
Macdonald v. Farquharson and Others,	259
Macdonald and Others v. Langton, &c.,	303
Macdonald, Lockhart v.	376
Macgregor v. Macgregor,	681
Macgregor's Executors, Eaton, Hammond, and Sons v.	1012
Macgregor, Macgregor v.	681
Macgregor and Others, Brown v.	837
Macgregor,	1092
Mack v. Dixon,	272
Mackenzie (Judicial Factor on Ross's Trust Estate) v. Ferrier (Com-	
mon Agent in Ranking of Cromarty),	241
Mackenzie, Lords Commissioners of the Treasury and Lord Advocate v.	701
Mackenzie, Laing v.	958
Mackenzie and Munro v. Horne and Others,	894
Mackersy, White and Others v.	312
Mackintosh's Trustees v. Macqueen's Trustees, &c.,	255
Maclaren v. Symers,	51
Macleod and Mandatary, Macleod v.	248
Macleod v. Rose,	236
Macleod v. Macleod and Mandatary,	248
Macleod v. Buchanan, &c.,	1113
Macleod v. Wilson and Others,	1043
Macqueen's Trustees, &c., Mackintosh's Trustees v.	255
Macrae v. Macrae or Hyndman and Others,	54
Macrae or Hyndman and Others, Macrae v.	54
M'Athur, &c. v. Scott,	270
M'Aulay, M'Cuaig and M'Rae v.	586
M'Cuaig and M'Rae v. M'Aulay,	586
M'Donald and Husband and Others v. Brown and Others,	786
M'Dougall,	1255
MacEwan or Munnoch v. Munnoch (Munnoch's Tutor),	302
M'Farlane v. Fisher,	978
M'Farlane, Russel and Aiken v.	989
M'Gill v. Ferrier and Others,	178
M'Gill v. Ferrier and Others,	882
M'Lachlan's Trustees, Milligan and Spouse v.	30
M'Lean (Minister of Symington), Carmichael, &c. (Heritors Sy-	
myngton) v.	1020
M'Lelland, Nisbet v.	493
M'Martin, &c., Adie v.	1045
M'Millan and Husband and Others v. Price and Mandatary,	916



	Page
McNeill, Campbell, . . . . .	1272
M'Whir v. Maxwell, . . . . .	299
M'Whir v. Maxwell, . . . . .	873
Marjoribanks, Watson, &c. v. . . . .	586
Martin v. Thoms and Others, . . . . .	227
Marr, Earl of, Mill v. . . . .	147
Mason and Others, Lockie and Others, v. . . . .	547
Mather, Henry v. . . . .	676
Maxwell, M'Whir v. . . . .	873
Maxwell, M'Whir v. . . . .	299
Maxwell, Sir David, and Others, (Thomson Mure's Trustees) v. . . . .	
Wylie, &c. (Executor-creditor of Adam Wylie), . . . . .	1005
Menzies, Stewart and Others v. . . . .	1198
Middlemas (Hume's Trustee), Hume v. . . . .	30
Mill v. Earl of Mar, . . . . .	147
Miller, . . . . .	147
Miller, Fyfe (Trustee of Steele and of Baxter) v. . . . .	1188
Milligan and Spouse v. M'Lachlan's Trustees, . . . . .	30
Milne, . . . . .	1104
Minto, &c. v. Kirkpatrick, . . . . .	1094
Moncur, Brown v. . . . .	1230
Monro, Sir Thomas, &c., Campbell and Others (Monro's Trustees and Executors) v. . . . .	310
Montgomerie, Southgate and Mandatary v. . . . .	507
Montgomery, Mahon v. . . . .	19
Monypenny (late Earl of Buchan's Trustee), Rowe and Mandatary v. . . . .	500
Moon, Anderson v. . . . .	412
Moray, Earl of, v. Inglis (Common-Agent in Locality of South Leith), . . . . .	2
Morrison and Others v. Knight's Trustees and Others, . . . . .	560
Morrison v. Munnoch, . . . . .	1293
Morrison and Others v. Glasgow Commissioners of Police, . . . . .	1128
Muir v. Muir, . . . . .	540
Muir (Smith's Trustee), Cargill v. . . . .	408
Munnoch (Munnoch's Tutor), MacEwan or Munnoch v. . . . .	202
Munnoch, Morrison v. . . . .	1293
Munnoch, . . . . .	1267
Munro v. Clark, . . . . .	1262
Murdoch and Mandatary v. Balderston and Others, . . . . .	1
Mure and Mandatary v. Mure, jun. and Curator ad Litem, . . . . .	581
Murison v. Incorporation of Tailors of Dundee, . . . . .	179
Murray's Trustees and Others, Laird and Company's Assignees, v. . . . .	120
Murray, . . . . .	499
Murray v. Douglas, . . . . .	890
Murray, Hay and Mandatary v. . . . .	850
Murray, &c. (Joseph and David Murray's Executor), Allan and Others (Herriot's Trustees) v. . . . .	1130
Murray v. Elliot, . . . . .	1141
Murray. His Majesty's Advocate v. Bruce . . . . .	1184
Napier, . . . . .	745
National Bank of Scotland v. Johnston, . . . . .	289
Nelson v. Cochrane's Representatives, . . . . .	365
Nicolson or Macalister, Hunter and Others (Macalister's Trustees) v. . . . .	159
Nicolson v. Erskine Scott, . . . . .	191
Nisbet v. M'Lelland, . . . . .	439
Northumberland, Duke of, &c. (Lord Glenlyon's Trustees), Viscountess of Strathallan and Others v. . . . .	971

	Page
Ogilvie, Earl of Airlie, &c. v.	211
Ogilvie, Robertson v.	43
Ogilvie and Company v. Simpson and Todd,	740
Ogilvy v. Erskine,	1027
Paget, &c. v. Earl of Galloway,	667
Paisley (Minister of Abbey parish of) v. Marquis of Abercorn and Others (heritors of parish),	991
Paton, Commercial Bank v.	1202
Patrick, Aitchison v.	360
Paul, Ross and Husband v.	780
Pearson, &c. (Mrs Fotheringham's Trustees) v. Casamajor, &c.	275
Pedie, Swinton and Others v.	775
Perkins, &c., Maben (Arnott's Trustees) v.	1087
Philp v. Pitcairn and Others,	617
Physicians and Surgeons of Glasgow, University of Glasgow and Others v.	768
Pitcairn and Others, Philp v.	617
Plaine v. Thomson, W.S.,	194
Pollock, Gilmour, and Company, Potts and Scurfield v.	879
Ponton v. Ponton,	554
Potts and Scurfield v. Pollock, Gilmour, and Company,	879
Potts, Dempster v.	364
Price and Mandatary, McMillan and Husband and Others v.	916
Proctor (Judicial Factor on the estate of Carse) v. Anderson,	1219
Rae, Russell v.	1263
Rae v. Henderson,	653
Railton, Pullman, and Mandatary, v. Gray,	487
Ranken, Dalrymple and Others v.	306
Rannie v. Taylor,	1049
Rendall v. Robertson,	1145
Rendall v. Robertson's Representatives,	265
Rennie, Horne v.	872
Renny v. Bruce and Others,	418
Renny v. His Creditors,	852
Renwick and Wilkie v.	686
Ridley and Company v. Sloan,	469
Richardson v. Roscoe and Rigg,	952
Robertson v. Collins and Others,	572
Robertson v. Ogilvie,	43
Robertson, Grant v.	1098
Robertson, Rendall v.	1145
Robertson, Dundas v.	1191
Robertson (Trustee of Lord Fife and his Creditors) v. Souter (Trus- tee of Personal Creditors of Lord Fife),	1052
Robertson v. Ainslie's Trustees,	1299
Robertson v. Brown, W.S.,	199
Robertson's Representatives, Rendall v.	265
Roscoe and Rigg, Richardson v.	952
Rose and Others, Fraser and Others v.	1250
Rose, Maclean v.	236
Ross, Clark v.	255
Ross v. Webster,	1238
Ross v. Waddell,	1219
Ross and Husband v. Paul,	780
Rowe and Mandatary v. Monypenny (late Earl of Buchan's Trustee),	500
Russell v. Rae,	1263

	Page
Russell and Mandatary v. Crichton,	1270
Russel and Aitken v. M'Farlane,	989
Russel v. Shirreffs,	881
Sandeman v. Shepherd,	416
Sawers,	2
Scarlett, Tainsh and Others v.	1120
Scott v. Curle, &c.,	1085
Scott v. Dunn and Others,	924
Scott, M'Arthur, &c. v.	270
Scrimgeour or Furman, &c. v. Kerr and Others (Scrimgeour's Trustees),	245
Shepherd, v. Grant,	173
Shepherd, Sandeman v.	416
Sheridan and Mandatary, Young v.	664
Shirreff v. Shirreff's Trustees,	115
Shirreffs, Russel v.	881
Sibbald v. Fraser,	591
Simpson v. Skene and Tutors,	1163
Simpson and Todd, Ogilvie and Company v.	746
Sir Henry Steuart's Representatives, Wishaw and Coltness Railway Co. v.	703
Skene and Tutors, Simpson v.	1163
Sloan, Ridley and Company v.	469
Smith or Adam, and Husband, Waddell or Rymer, and Husband, v.	151
Smith, Grant, v.	558
Smith and Others, Fergusson v.	25
Smith and Others, Galbraith and Others v.	808
Southgate and Mandatary v. Montgomerie,	507
Souter (Trustee of Personal Creditors of Lord Fife), Robertson (Trustee of Lord Fife and his Creditors) v.	1052
Speares, Hope v.	1288
Speid v. Speid,	618
Steele's Representatives, Bayne v.	22
Stentmasters and Magistrates of Paisley, Bakers' Society of Paisley v.	200
Stephenson and Others, Gibson (Wilson and Sons' Trustee) v.	143
Stewart v. Stewart,	112
Stewart, Campbell or Stewart, &c. v.	226
Stewart and Others, Henderson and Thomson v.	886
Stewart v. Traill and Pollexfen (Stewart's Trustees),	1158
Stewart and Others v. Menzies,	1198
Stewart (Judicial Factor on Harris) v. Earl of Dunmore's Trustee,	1059
Stirling, Magistrates, &c. of, v. Gordon,	657
Stirlingshire Road Trustees, Ewing v.	419
Stocks v. Gardner and Others,	1095
Strachan v. Edinburgh Improvement Commissioners,	637
Strathallan, Viscountess of, and Others v. Duke of Northumber- land, &c. (Lord Glenlyon's Trustees),	971
Strathmore v. Strathmore's Trustees,	449
Strathmore's Trustees, Strathmore v.	449
Strathers and Son, Wilson and Son v.	523
Stuart, Jamieson v.	805
Suttie v. Gordon,	1037
Suttie, Sir James Grant, Gordon, v.	549
Swan v. Baird, &c.,	251
Swinton and Others v. Pedie,	775
Symon, Maclaren v.	51
Tait and Others v. Scarlett,	1120

	Page
Tailors (Incorporation of Dundee) Murison v. . . . .	179
Tait and Others (Moffat's Trustees) v. Wilson, . . . . .	221
Tait v. Duncan and Spouse, . . . . .	1273
Taylor, v. Flowerdew, . . . . .	263
Taylor's Executors, Forlong v. . . . .	126
Taylor v. His Creditors, . . . . . 486, 753, 1157,	1254
Taylor, Rannie v. . . . .	1049
Taylor v. His Creditors, . . . . .	1157
Thom v. Turner, . . . . .	1098
Thoms and Others, Martin v. . . . .	227
Thomson, . . . . .	807
Thomson v. Campbell, . . . . .	1133
Thomson, Plaine v. . . . .	193
Thomson v. Bullock or Thomson, . . . . .	235
Thomson, Bonar, & Co., and Mandatary v. Johnstone (Moir's Trustee),	173
Thomson (Cashier of Royal Bank) v. Lyell, &c. . . . .	32
Thomson and Others, Inch v. . . . .	126
Torrance and Husband, . . . . .	506
Traill and Pollexfen (Stewart's Trustees), Stewart v. . . . .	1153
Traquair, Earl of, and Others v. Williamson's Executors, . . . . .	475
Treasury (Lords Commissioners of) and his Majesty's Advocate v. Mackenzie, . . . . .	701
Treasury (Lords Commissioners of) and his Majesty's Advocate v. Finnie and Others, . . . . .	165
Trustees of Ministers' Widows' Fund, Gordon v. . . . .	15
Turner, Thom v. . . . .	1098
Umpherston and Kerr, Jack v. . . . .	833
Union Canal Company v. Davidson, . . . . .	194
University of Glasgow and Others v. Physicians and Surgeons of Glasgow,	763
Ure (Sir John Lowther Johnston's Trustee) v. Hamilton, . . . . .	489
Waddell or Rymer, and Husband, v. Smith or Adam, and Husband,	151
Waddell, Ross v. . . . .	1219
Walker v. Fraser, . . . . .	526
Walker, Gray v. . . . .	1296
Watson v. Watson and Others, . . . . .	753
Watson, &c. v. Marjoribanks, . . . . .	586
Waugh and Ogilvy (Cundell's Trustees) v. Cundell and Others,	1256
Webster, Ross v. . . . .	1238
Webster and Spouse v. Wright's Trustees, . . . . .	767
Welsh v. Barstow, . . . . .	537
White and Others v. Mackersy, . . . . .	312
Wight and Others, . . . . .	1197
William Dalrymple, . . . . .	785
Williamson's Executors, Earl of Traquair and Others v. . . . .	475
Williamson's Executors v. Fraser, . . . . .	1201
Wilkie v. Wilkie, . . . . .	430
Wilkie and Renwick, . . . . .	686
Wilson and Others, Brodie and Others (Shirreff's Trustees) v. . . . .	1195
Wilson, Tait and Others (Moffat's Trustees) v. . . . .	221
Wilson, &c., Collier and Husband v. . . . .	195
Wilson and Son v. Struthers and Son, . . . . .	523
Wilson and Others, Macleod v. . . . .	1043
Wilson v. Lumsdaine, &c. (Lumsdaine's Representatives), . . . . .	1211
Wishaw and Coltness Railway Co. v. Sir Henry Steuart's Representatives,	703
Wotherspoon v. Bell, . . . . .	1268

# INDEX OF NAMES.

xvii

	Page
Wright and Spouse v. Bell and Others, . . . . .	242
Wright's Trustees, Webster and Spouse v. . . . .	767
Wylie, &c. (Executor-creditor of Adam Wylie), Sir David Maxwell and Others (Thomson Mure's Trustees) v. . . . .	1005
Yeatts v. His Creditors, . . . . .	571, 836
Young v. Bell, . . . . .	1202
Young and Others, Cameron v. . . . .	1205
Young v. Sheridan and Mandatary, . . . . .	664
Young and Others, Baillie and Grindlay v. . . . .	893





*Anna Macdonald*  
*Cherbury.*

CASES

DECIDED IN

THE COURT OF SESSION.

WINTER, 1836.

JAMES GOODALL, Pursuer.—

WILLIAM LOW, Defender.—*Pyper.*

No. 1.

Nov. 12, 1836

Goodall v.

Low.

1ST DIVISION.

Ld. Fullerton.

B.

Murdoch v.

Balderston.

*Process—Reclaiming Note.*—A cause, standing on summons and defences, was submitted to judicial reference; a record was made up before the referee; the Lord Ordinary afterwards gave judgment in terms of the referee's report; and a reclaiming note was presented, without any of the papers in the cause being appended—Held incompetent.

J. B. BRODIE, W.S.—J. RICHARDSON, W.S.—Agents.

WILLIAM and JAMES MURDOCH, and MANDATARY, Pursuers.—*Ivory.*

No. 2.

DAVID BALDERSTON and OTHERS, Defenders.—*Rutherford—Penney.*

*Proof—Insurance—Diligence.*—In an action against the underwriters of a policy of insurance for loss sustained at sea on the goods insured, where the defence was, that the pursuers had misrepresented the class of the vessel, a record having been closed and an issue prepared,—Diligence at the instance of the defenders refused to recover correspondence between the pursuers and the shippers of the goods, posterior to the loss, and to the raising of the question between the parties.

THIS was an action on a policy of insurance at the instance of William Nov. 12, 1836.  
and James Murdochs of Nova Scotia, against Balderston and others of 2D DIVISION.  
Glasgow, underwriters, concluding for the loss sustained on certain Ld. Cockburn.

No. 2. goods insured, which were shipped by Morrison and Company of London on board a vessel subsequently wrecked off the harbour of Ostend.  
 Nov. 12, 1836. The defence was, misrepresentation of the class of the vessel, which  
 Earl of Moray was alleged to have been stated to be A 1., or first class, whereas it was  
 Inglis. truly E 1., or second class.

A record having been closed and an issue prepared, whether the defenders were liable under the policy, the defenders moved for a diligence to recover correspondence relative to the insurance, between the pursuers and Morrison and Company, posterior to the loss and to the commencement of the dispute in question between the parties. The Lord Ordinary refused to grant a diligence to that effect, whereupon the defenders reclaimed, and contended that, as the objection of confidentiality was not applicable here, there was nothing to prevent them getting at letters or documents which might contain admissions as to the pursuers' knowledge of the class of the vessel, and which might be used as evidence at the trial. The pursuers answered, That the only question was as to the constitution of the contract, and that what passed after the completion of the contract was irrelevant.

The Court being of opinion that the only point was, whether there had been a representation by the insured that the vessel was of the first class, when it was not so in fact, held that correspondence taking place after the date of the loss, and the raising of the question between the parties, was not a proper subject for a diligence, and

ADHERED, with expenses.

CAMPBELL and MACDOWALL, S.S.C.—SMITH and KINNEAR, W.S.—Agents.

No. 3. THE EARL OF MORAY, Objector.—*Sol.-Gen. Cuninghame—Rutherford—Walker.*

HENRY INGLIS (Common-Agent in Locality of South Leith), Respondent.—*Robertson—Inglis.*

*Teinds—Valuation.*—In a process of augmentation, a rental was given in, stating the lands of one of the heritors at a certain value, and the heritor held as confessed, upon which rental the augmentation was granted: Found that this rental did not necessarily form the rule according to which the heritor must be localled upon, but that he was entitled to have the true value of his lands ascertained in the process of locality.

Nov. 12, 1836. In the year 1832, an augmentation was granted to the minister of  
 2D DIVISION. South Leith, on which occasion a rental was given in, stating the lands  
 A. Cockburn. of the Earl of Moray in that parish, under leases then subsisting, at  
 Final Cause. £1590 per annum, and upon this valuation his lordship was held as confessed. In 1834, an interim scheme of locality was framed upon the rental produced in the process of augmentation. In adjusting a final

scheme, the common-agent proposed that the Earl's lands should be localled on, according to the above valuation, making an allowance for a deduction of rent obtained by the principal tenant, during some years previous to 1832.

No. 3  
Nov. 12,  
Earl of M  
v. Inglis.

The Earl of Moray objected, that he was not bound by the rental on which the augmentation proceeded, which was intended merely to give a general vidimus to the Court of the state of the parish, to be taken into consideration in awarding the augmentation; and his Lordship produced leases, dated in January 1833, whereby it appeared that his lands of Lochend, formerly let at £1500, were now let at a rent of £888, and his remaining lands in South Leith, formerly let at £90, were now let at £70.

In these circumstances he pleaded, that the rent actually due under the existing leases was the only rule according to which the final locality could be adjusted.

The common-agent in answer pleaded, inter alia, that as the decree of augmentation had proceeded on a rental, in which Lord Moray's lands were stated at the yearly value (under tacks then subsisting) of £1590, the final scheme of locality must be adjusted, with reference to his Lordship, on the footing of such rental, and that no tack of the lands entered into subsequently to the decree of augmentation could affect the present question.

The Lord Ordinary found, "That the valuation on which the Earl of Moray was held as confessed in the augmentation, does not necessarily form the rule according to which he must be localled upon in the locality, but that he is entitled to have the true value of his lands ascertained now: Repels the pleas of the common-agent, and appoints the cause to be enrolled, in order that the parties may state how they propose to proceed in following out this finding." \*

The Common-agent having reclaimed,—

The Court were of opinion, that Lord Moray having been held as confessed in the process of augmentation was no reason why he should be held as confessed in the process of locality, and that there was nothing to prevent him now having a true valuation made of his lands.

THEIR LORDSHIPS accordingly adhered, inserting the words "in so far" before that part of the interlocutor beginning with "Repels the pleas," and found the Common-agent liable in expenses.

WALKER, RICHARDSON, and MELVILLE, W. S.—H. INGLIS, W. S.—Agents.

NOTE.—The best way of proceeding would be for Lord Moray to raise a valuation; if not, there should be a remit to some person of skill to say what is the value.

No. 4.

Nov. 15, 1836.  
Bissett.JAMES and THOMAS BISSETT, Petitioners.—*Neaves*.

Sawers.

Nov. 15, 1836.

1st Division.

*Curator Bonis—Clergyman.*—Where a petition for a curator bonis suggested a clergyman of the Established Church as the nominee, the Court intimated, at moving it in the Single Bills, that though he was one of the brothers of the fatuous person, yet they would, in conformity to previous cases,<sup>1</sup> decline to appoint him, as the duties and character of his office might prove incompatible with the adequate discharge of the business of the curatory.

The petition was therefore superseded till a note should be lodged proposing a new nominee.\*

H. INGLIS and DONALD, W.S.—Agents.

No. 5.

JAMES SAWERS, Petitioner.—*Stark*.

*Cessio Bonorum—Personal Protection—Diligence.*—Where a debtor, who was under horning on a bill of exchange, and against whom a sheriff small-debt decree had been taken out, raised a process of cessio, during the vacation of the Court of Session, and made intimation in terms of the statute 6 and 7 W. IV. c. 56—Warrant granted by the Lord Ordinary on the Bills (after intimating the application) for his personal protection until the third sederunt-day of the ensuing session, but such warrant not to issue till a bond of caution to attend all diets of Court was lodged with the clerk in terms of section 15 of said statute; and the time of protection afterwards prorogated by the Court.

Nov. 15, 1836.

1st Division.  
Lda. Mackenzie  
and Corehouse.  
D.

By the late statute, 6 and 7 W. IV. c. 56, which was passed for amending the law relative to the process of cessio bonorum, it is enacted (§ 56) that it shall be competent for the Inner-House, during session, and for the Lord Ordinary on the Bills, during the vacation or the Christmas recess, on production of a copy of the Gazette, containing the statutory intimation as to the raising of the summons of cessio, &c., and of the statutory certificate as to transmission, through the post-office, of letters to all the creditors, or execution of citation against them, in cases where “the debtor is not in prison, to grant warrant for his personal protection against the execution of diligence, for such space of time as shall be proper; provided that, before any such warrant be issued, the debtor shall

<sup>1</sup> See Whitson, &c. Jan 31, 1832 (ante, X. 268).

\* A new nominee being afterwards suggested, the Court (Nov. 25) ordered fresh intimation.

lodge with the clerk of Court a bond, with a sufficient cautioner, binding themselves that he shall attend all diets of Court whenever required, under such penalty as may be reasonable, and which, if forfeited, shall be divided among the creditors." No. 5.  
Nov. 15, 1836  
Sawers.

James Sawers, farmer, presented a petition to the Lord Ordinary on the Bills (Mackenzie), stating that one of his creditors (James Marshall) had given him a charge of horning on a bill of exchange; that another (William Russell) held a small-debt decree against him; and that, on 3d October, 1836, he had raised a process of cessio in the Court of Session, which had been duly intimated "by letters having been put into the post-office, addressed to each of the creditors specified in the summons, and also by the requisite notice having been published in the Edinburgh Gazette, in terms of the act 6 and 7 William IV. cap. 56, § 11, conform to copy of the Gazette, and a certificate of transmission of the said letters produced;" and that he was apprehensive of incarceration. He therefore prayed the Lord Ordinary "to grant him a personal protection from the diligence of his creditors aye and until the 1st day of December next, or for such period more or less as to his Lordship should seem proper."

The Lord Ordinary "appointed this application to be intimated on the walls of the Bill-Chamber and in the minute-book for eight days, as in the case of an application for protection under the bankrupt statute; as also to James Marshall and William Russell; and, in the mean time, ordained the petitioner to state what he alleged to be the amount of his debts and of his funds, according to the best of his knowledge."

A certificate being produced of due intimation in terms of this order, and a statement of affairs being also lodged as ordered, the petition was resumed on 28th October by the Lord Ordinary on the Bills (Corehouse), who pronounced this interlocutor:—"In respect it appears that the petitioner has instituted a process of cessio in the Court of Session, and made production of a copy of the Gazette containing the notice to his creditors, and of the certificate required by section 11 of the act founded on—Grants warrant for the petitioner's personal protection against the execution of diligence for any civil debt contracted prior to the 4th day of October current, the date of notice in the Gazette, and that until the third sederunt-day in November next; but appoints the petitioner, before said warrant shall be issued, to lodge with the clerk of Court a bond of caution, in terms of the fifteenth section of the said Act of Parliament: Farther, appoints this petition and deliverance to be printed and boxed to the Court on or before Tuesday the 15th of November next."

The petition was now laid before the Court, and no party appeared to oppose it.

No. 5.  
—  
Nov. 15, 1836.  
Sawers.

**LORD PRESIDENT.**—I am not aware that any peculiar difficulty presents itself, in disposing of this petition. I think there may be many difficulties arising out of the new statute, but not under this application. It ought to be granted.

**LORD MACKENZIE.**—It can only be granted on caution being found by the petitioner to attend all diets of Court. And I am at a loss at present to see how the duty of fixing the amount of caution in each case can be devolved on the clerks.

**LORD PRESIDENT.**—The amount in this case, having been already fixed in reference to that period of the vacation which was still to run, after the interlocutor of Lord Corehouse, I think the same amount of caution should still be continued, as no reason is alleged for altering it.

**LORDS BALGRAY and GILLIES** concurred.

**THE COURT** granted the petition as craved.\*

**J. NAIRN, S.S.C.**—Agent.

\* In consequence of an application by the Sheriff of Edinburgh to Mr John Parker, assistant Clerk of Session, asking information respecting petitions which, under the statute above referred to, 6 and 7 W. IV. c. 56, might have been presented to the Lord Ordinary on the Bills, Mr Parker mentioned, inter alia, two other cases, besides that of Sawers, which were disposed of in vacation, and which were thus described by him :—

“ The first (Lord Meadowbank, Ordinary) was refused *de plano*, in respect that it was not stated with sufficient precision that there was a depending process of *cessio*, though the Gazette, a certificate, and a bond, all as mentioned in section 15, were produced.

“ The second, being for liberation and protection (Lord Mackenzie, Ordinary), was ordered to be intimated to the incarcerating creditor, with an allowance to answer in four days. Answers were lodged. They are not before me, but the substance of them was, 1st, That the Court had last session, on advising a condescence for the pursuer, with answers for the opposing creditors, granted diligence for the recovery of writings in proof of averments which, if established, would in law deprive the pursuer of the benefit of the process. 2d, It was broadly asserted that the pursuer's design in seeking liberation (he had been in jail for nearly twelve months) was to fly to America, whither he had once fled before. 3d, That the cautioner in a bond which he had lodged along with his petition, and which contained a penalty of £100 in case of forfeiture, was insufficient even for that sum—that the bankrupt's debts amounted to £1200, and therefore, in any circumstances, the amount of the penalty was inadequate. And, 4th, That the caution being *de judicio sisti*, the bond fell, like all other judicial bonds, to be prepared, and the sufficiency of the security to be judged of, by the clerks of Court in the usual way. The petition was refused, and the Lord Ordinary added the following to his interlocutor :—

“ ‘ *Note.*—The Lord Ordinary has some doubts of the competency of the present application under the Act of Parliament referred to. But, at any rate, holding that there is power in him, as Lord Ordinary on the Bills, to entertain this application, he thinks himself bound, in sound judicial discretion, under the circumstances of this case, to refuse the liberation prayed for. The Lord Ordinary may remark, that if the petitioner's health is suffering he has other remedies.’ ”

Mr Parker farther mentioned, that he understood the purpose of that part of the interlocutor of Lord Mackenzie, in the case of Sawers, which directed the lodging of a state of his debts and effects, “ was to enable those, whose duty it may be, to judge of the reasonableness of the caution to be received under the 15th section.”

Mrs M'DONALD BUCHANAN and OTHERS, Objectors.—*Rutherford—A. No. 1*  
*Dunlop.*

JOHN BUCHANAN, Respondent.—*D. F. Hope—A. Wood, Jun.* Nov. 15, 1  
 Buchanan  
 Buchanan

*Interest—Teinds—Locality.*—In an accounting between over-paying and under-paying heritors, under an interim locality,—Held, That the over-paying heritors were entitled to interest on their over-payments from the heritors under-paying.

THE minister of Kilmaronock having obtained an augmentation of sti- Nov. 15, 1  
 pend in 1793, a scheme of locality was prepared and made final in 1799. 2d Divisi  
 Of this scheme, however, a reduction was brought by the respondent, Teinds  
 Buchanan of Ardoch, one of the heritors, who, in 1801, obtained decree Ld. Cock  
 of reduction, and a remit to prepare a new locality, the locality reduced being in the mean while ordained “to stand as the rule of the minister’s payment, aye and until the pursuer furnish him with a new decree of locality.” No steps were taken to have a new scheme prepared, and another augmentation having been obtained in 1808, a scheme, embracing both augmentations, was approved as interim in 1818, and made final in 1829. In the mean while, down till 1818, the augmented stipend of 1793 had been paid under the reduced locality, which varied considerably from that of 1818 ultimately approved as final, so that an accounting became necessary between the over-paying and the under-paying heritors. A state of over-payments and under-payments was accordingly prepared by the clerk, who, in addition to the principal sums, charged the under-paying heritors with interest in favour of those who had paid beyond their proper shares. To this charge of interest Mrs M'Donald Buchanan and others, under-paying heritors, objected, contending that there was no authority for allowing interest in such cases, and that the ordinary principles of law which warranted the charging of interest could not apply, inasmuch as the payments were made under a scheme appointed by the Court, and there was neither blame nor mora on the part of the under-paying heritors, who could not know the amount underpaid by them, or whether they were due any thing at all, and so could not have the benefit even of consigning, open to debtors generally who desired to avoid liability for interest; while, on the other hand, the only over-paying heritor who insisted for interest was Buchanan of Ardoch, on whom the duty of providing a new locality was imposed by the interlocutor reducing that of 1799, but who had taken no steps to have that done. They further contended that the rate ought not to be higher than the current rate of interest at the time.

To this Buchanan of Ardoch answered, that he having advanced his own money for behoof of the objectors, was entitled to full indemnification, which he could only receive by getting interest, which he main-  
 be fixed at the legal rate.



No. 6. **The Lord Ordinary pronounced this interlocutor:—**“ Finds that the objectors, under-payers in the accounting, are liable in interest upon their under-payments : That, in the circumstances of this case, and as the current rate of interest on loans has been variable since 1824, finds that the interest for 1825, and thereafter, should only be exigible at the rate of  $3\frac{1}{2}$  per cent, until a farther change in the current rates shall take place : Therefore, Repels the objections upon this point, subject to the above findings ; but finds no expenses due to either party as regards this discussion, and decerns.”

ov. 15, 1836.  
ridges v.  
wing.

The objectors reclaimed on the general point of liability, and the respondent on the rate to be allowed ; but on the case being called, and the Court intimating a clear opinion on the liability for interest, the objectors withdrew their note on the respondent also withdrawing his.

JOHN MACKENZIE, W.S.—WALTER DICKSON, W.S.—Agents.

No. 7. **DAVID BRIDGES, Claimant.—*D. F. Hope—Whigham.***  
**WILLIAM EWING, Claimant.—*Maitland—Russell.***  
**Competing.**

*Pledge—Arrestment—Executor—Title to Pursue*—1. A deposited certain sealed packets, the property of his debtor, B, in the custody of C, who made them the subject of a multiplepoinding ; D, another creditor of B, claimed and used arrestments in the hands of C ;—Held, in a competition between A's executor-creditor and D, that D could only competently attach the packets subject to the right of pledge or retention vested in A, for satisfying the debt due to him by B. 2. The executor-creditor of A having been confirmed to his moveable property, though not specially to the subject of the fund in medio, and certain additions having been made to the inventory pending the proceedings, specially with reference to the subject of the fund,—Held that, by his confirmation and the additions made thereto, he had a sufficient title and interest to insist in his claim over the fund.

ov. 15, 1836. **ABOUT** the year 1821, the late Mr John Buchan placed in the custody of the late Francis Wilson, W.S., two sealed packets containing jewels, stating them to be the property of Lord Strathmore, and delivered to him by his Lordship in pledge, in security of a debt.

2d DIVISION.  
1. Moncreiff.  
T.

In 1822, on the death of Mr Buchan, the claimant, Ewing, was confirmed executor-creditor of the deceased, though not specially to this subject. On the 20th August 1823, Wilson raised a summons of multiplepoinding, on the narrative of the packets having been placed in his hands by Buchan, and that certain creditors of Lord Strathmore and Ewing were disputing who had right to them. Lord Strathmore was called as common debtor, for his interest. On the 24th August 1824, Bridges, a creditor of Lord Strathmore, used arrestments in the hands of Wilson, and in November following lodged a claim in the multiplepoinding, claiming, as first arrester, to be preferred *primo loco* on the fund in medio, or, at least, that the packets and their contents should be sold under the

authority of the Court, and the claimant be preferred upon so much of the proceeds of the sale as would satisfy his debt. No. 1

Thereafter Ewing, as executor-creditor, also put in a claim to be preferred primo loco, and to receive possession of the packets forming the fund in medio, or at least to be preferred upon the price of them, when they should be sold under the authority of the Court. Nov. 15, 1823. Bridges v. Ewing.

In support of his claim, Bridges pleaded his right to be preferred as first arrester, and that the jewels forming the fund in medio not having been confirmed by Ewing, the latter had no interest or right in them, qua executor-creditor.

Ewing answered that the possession of the jewels having been with Buchan, who had received them in pledge, he had a preferable right to retain the same in payment of any debt due to him by Lord Strathmore,<sup>1</sup> and that the claimant, as standing in the shoes of Buchan, was entitled to be preferred in terms of his claim.

The Lord Ordinary (Mackenzie) thereafter "sisted procedure, in order to allow the claimant, Mr Ewing, to add and eik to his inventory for confirmation of the subjects forming the fund in medio, or the alleged right of pledge thereon." This interlocutor was reclaimed against, whereupon the Court "sisted further procedure in this process, to allow Mr Ewing time to take the steps necessary for confirmation, varying in so far the terms of the Lord Ordinary's interlocutor, without prejudice to the legal rights of all parties."

The cause having returned to the Outer-House, and Ewing having made certain additions to the inventory in the confirmation, specially with reference to the fund in medio, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—" Finds that the

<sup>1</sup> Harriot v. Cuninghame, May 21, 1791, Morr. 4, 160.

\* "NOTE.—It is not difficult to make an appearance of perplexity in such a case, but it appears to be really very simple.

"This multiplepounding was raised by Mr Wilson in 1823. It states, that the two packets in question were placed in his hands by Mr John Buchan, then deceased. This must be assumed as a fact in the case, nothing to the contrary being stated in the record. The summons further states, that Mr Buchan informed Mr Wilson that the packets contained jewels, the property of Lord Strathmore, but delivered in pledge to Mr Buchan, in security of a debt due to him. It is quite clear, therefore, that Mr Wilson's possession of the articles was a possession for Mr Buchan, and that Mr Ewing's claim upon them, as executor-creditor of Buchan, is precisely the same as if they had remained in the custody of Buchan himself. It is not averred in the record that Mr Wilson either got the articles from Lord Strathmore, or held possession of them for him. In short, there is nothing in the record to infer that Mr Wilson could honestly or legally have delivered them to Lord Strathmore, or any one in his right, without the consent of Mr Buchan, or those coming into his right.

"The summons containing the above statement, was raised on the 20th August 1823, and it contains the deliberate statement of Mr Wilson, who died

Mr Bridges did not use arrestment till 24th August 1824, and his claim

**No. 7.** claimant, William Ewing, has a sufficient title and interest, by his confirmation as executor-creditor, with the special eiks or additions made thereto, to insist in his present claim over the packets in question and their contents, forming the fund in medio, as the same were lawfully in the possession of the raiser of the multiplepoinding, as depository, for the behoof of the said John Buchan : Finds it sufficiently established by the decrees produced, so far as the matter is here in issue, that the said John Buchan was, at the time of his death, a creditor of the Earl of Strathmore to a very large amount : Finds that the claimant, David Bridges, found-

v. 15, 1836.  
Bridges v.  
Ewing.

was only lodged in the multiplepoinding on the 19th of November thereafter. Mr Ewing had been confirmed executor creditor of Mr Buchan in 1822, though not specially to this subject.

“ Under such circumstances, it might be matter of doubt whether the arrestment of Mr Bridges in the hands of Wilson was at all competent, seeing that Mr Wilson held the articles not for Lord Strathmore, but for Mr Buchan and his representatives. But at any rate, it could only be competent, on the assumption that Mr Wilson’s possession was the same as the original possession of Buchan.

“ In that state of the case, if Buchan had been alive, and Bridges had arrested in his hands, how would the question have stood in a forthcoming ? Buchan having possession of moveable articles, it might have been doubtful whether it could have been proved whether they were the property of Lord Strathmore, otherwise than by Buchan’s oath : and if he swore that they were Lord Strathmore’s property, but given to him in pledge for his debt, the Lord Ordinary is of opinion, that this quality must have been taken as intrinsic. But supposing the point to stand otherwise, and that it would have been competent to prove, that the articles were the property of Lord Strathmore, without any reference to oath ; the Lord Ordinary conceives it to be clear, that Mr Buchan would have had a right of retention of them in the security of his debt, without being put to prove any special pledge, unless Lord Strathmore, or his arresting creditor, could show that he obtained possession of them by some other title, or on some other footing than the pledge averred. The fact being established, that Buchan was a large creditor of Lord Strathmore, and the packets being deposited with him, sealed up with the seal of the sheriff, there would be the clearest presumption that he held them in security of his debt, unless some other title or ground of possession were shown. But no such thing is averred in this record. Mr Bridges will not admit (see article 4) that the packets were deposited with Mr Buchan in pledge. But he has put no special statement on record, contradictory of Mr Wilson’s statement in the summons, or of the facts there set forth, as averred by Mr Buchan.

“ The Lord Ordinary, therefore, thinks that the case is clear in favour of Mr Ewing, without the necessity of any farther enquiry. It would be in vain to allow Mr Bridges to prove that the articles were Lord Strathmore’s property, both because that fact is admitted, though under qualification, and because he admits, that he could lead no proof which would not land the articles in Mr Buchan’s possession, and so leave the question where it was. The only thing that could possibly throw any light on the case, would be an examination of Mr George Tait, the sheriff, as to the circumstances under which he put his seal to the packets. But as nothing is said on this subject in the record, the Lord Ordinary supposes that Mr Tait knows nothing of the matter, and that, perhaps, the seal was affixed without any reference to Mr Buchan at all. At any rate, the Lord Ordinary does not think that any investigation is necessary to the law or justice of the case. There is evidently no competition of diligence, Mr Ewing being in the position of arrestee, and Mr Bridges’ arrestment being not as creditor of Buchan but as creditor of a different person.”

ing on an arrestment used in the hands of the said Francis Wilson, long after this multiplepoinding was in Court, on the assumption that the packets and their contents were the property of the Earl of Strathmore, could only competently attach the same, supposing such diligence to be otherwise competent, subject to the right of pledge, lien, or retention vested in the said John Buchan, for satisfying the debt due to him by the said Earl of Strathmore: Therefore, prefers the said William Ewing in this competition, to the effect of his receiving payment of the debt due to himself by the said John Buchan, of which evidence is produced or may be produced: Repels the claim of the said David Bridges, in so far as it is made in competition with the said William Ewing, without prejudice to any question between the said David Bridges and any other creditor, or the next of kin of the said John Buchan: Decerns in the preference of the said William Ewing to the effect above expressed. But before further answer, appoints the boxes or packets in question to be opened at the sight of the agents of the parties, Mr George Tait, the sheriff-substitute of Mid-Lothian, whose seal is affixed thereto, and the Clerk of Court, and an inventory of the contents thereof to be made, and the same to be again deposited and secured, to await the further orders of the Court: Finds the claimant, David Bridges, liable in expenses to the claimant, William Ewing, and remits the account, when lodged, to the auditor to be taxed."

No. 7  
Nov. 15, 1881  
Bridges v.  
Ewing.

Bridges reclaimed.

LORD MEDWYN.—I have no doubts in this case. In addition to the evidence of the character of Buchan's possession of the packets, which is furnished by the statement of the raiser of the multiplepoinding, there is the circumstance of Lord Strathmore, who was called in the action as common debtor, making no appearance, and that is conclusive.

LORDS JUSTICE-CLERK, GLENLEE, and MEADOWBANK having concurred,

THE COURT adhered, finding additional expenses due.

JAMES BRIDGES, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

No. 8. JAMES, WOOD, and JAMES, and MANDATARY, Pursuers.—*D. F. Hope—M'Neill.*

iv. 15, 1836.  
mes v.  
Downie.

ALEXANDER and JOHN DOWNIE, Defenders.—*A. Wood—Reid.*

*Partnership—Compensation—Right in Security.*—A tradesman disposed certain premises and machinery absolutely to an individual partner of a company, under a back-bond declaring the conveyance to be in security of advances made and to be made by the disponee; advances were made by the company to the tradesman, for repayment of which the partner sold the subjects; a creditor of the tradesman having used arrestments in the hands of the partner, individually, and of the company: Held, in an action of forthcoming, that the arrestees were entitled to retain the price of the property sold, in liquidation of advances made by the company.

iv 15, 1836.

D DIVISION.  
l. Moncreiff.  
F.

IN the year 1829, John Gilchrist, dyer in Glasgow, granted, “for certain onerous causes and considerations,” a disposition, *ex facie* absolute, in favour of the defender, Alexander Downie, merchant in Glasgow, and his assignees, of certain premises and machinery used as a dye-work. Downie was duly infeft. Of the same date with the disposition, he executed a back-bond in favour of Gilchrist, binding himself to hold the disposition in security “of the sum of £900 instantly advanced,” and also in security of the repayment of whatever sums of money he should disburse “in any way in relation to the premises.” The subjects were declared to be redeemable on payment of the advances made and to be made by Downie, and on the failure of Gilchrist to make such payment within a certain term, Downie was to have right to sell, and the price was to be applied, after liquidation of the expenses attending the sale, “in payment of the whole sums due to him as aforesaid.” This bond was never delivered.

At and subsequent to the date of the disposition, Alexander Downie was a partner of the firm of Alexander and John Downie, which carried on business in Glasgow. All the charges affecting the property disposed were paid by this firm, and advances and furnishings were made by them to Gilchrist for the purposes of his trade. In order to obtain repayment thereof, they sold the property, as in virtue of the powers conferred by the disposition to Alexander Downie, and proposed to apply the price accordingly.

Thereafter the pursuers James, Wood, and James, likewise creditors of Gilchrist, used arrestments in the hands of Alexander and John Downie, as a company and as individuals. They followed up this diligence by an action of forthcoming, against which it was maintained in defence, That the disposition and back-bond in question must be held to have been granted for the purpose of affording security to the company of Alexander and John Downie, for advances to be made by them to the common

debtor, or at all events, that Alexander Downie was entitled to retain, in payment of the advances actually made by the company of which he was a partner, as well as by himself.

No. 8  
Nov. 15, 1  
James v.  
Downie.

The pursuers, on the other hand, contended, *inter alia*, that the disposition taken in connexion with the back-bond conferred only a qualified right, and in favour of Alexander Downie alone, who was not entitled to retain or apply the price of the subjects conveyed, in liquidation of advances made or goods furnished to Gilchrist by the company of Alexander and John Downie; that the plea of compensation was excluded from the case, and the law laid down by the late Lord Meadowbank in *Scott v. Hall and Bisset*,<sup>1</sup> ought to rule the present question.

The Lord Ordinary pronounced the following interlocutor, adding the abjoined note :<sup>2</sup>—Finds, That the defenders are entitled to retain the

<sup>1</sup> June 13, 1809, in Bell, II. 668.

<sup>2</sup> " The Lord Ordinary thinks this case important, but he does not think it difficult.

" The parties differ on some particular facts, and perhaps on some which, if cleared up, would leave no case; but the Lord Ordinary is in the belief, that the case may be determined on grounds independent of any of those disputed matters.

" The pursuers are creditors of Gilchrist. They arrest in the hands of Downie and Company, and also of Alexander Downie. Then the case is, that an absolute disposition was made by Gilchrist to Alexander Downie, under a back-bond, meant and admitted to cover advances by him before or after the date of the disposition. The back-bond was not delivered, for the Lord Ordinary is of opinion, that the pursuers fail in this point, there being no averment of delivery, actual or constructive, in the record. Still, there is a qualified admission that it was a trust for security of advances made or to be made.

" But, taking the right to be so qualified, the question remains, what advances it will cover.

" It was admitted in the debate, and there can be no doubt of it, that the trust will secure advances, whether made before or after the date of the deed. This is the known operation of such an absolute conveyance. The only question, therefore, is, Whether it will cover advances made by the company of A. Downie and Co., though the title is in A. Downie individually, he being a partner of that Company. The Lord Ordinary thinks, that on all the facts of the case, it must be held that the entire transaction was made for the Company, notwithstanding that for manifest reasons the feudal conveyance was taken to an individual, and he should be inclined so to decide upon the ascertained facts; but he must confess, that he is not able to enter into the relevancy of the pleas maintained by the pursuers. To him it is not at all apparent, as a matter of law and common sense, that the pursuers are entitled to seize or arrest the price of this property, supposing it to be strictly in the hands of Alexander Downie as an individual, even for his own behoof, in security of his advances, without paying to him the debt due to himself and his partners by the advances of his Company, to the common debtor Gilchrist. It seems to him that the whole argument for the pursuer, supposing the facts to be granted, proceeds on a fallacy, and on a misunderstanding of the cases of *Smith and Bogle*, *Hall and Bisset*, &c. Those cases rightly considered seem to the Lord Ordinary to prove the reverse of the pursuers' inference. Take Downie to be in possession, with a right of retention or compensation for any debt due to himself, on any sound reason be assigned why he should not retain for the debt due to a company of which he is a member, by advances made by them to Gilchrist at his



No. 8.

Nov. 15, 1836.  
James v.  
Downie.

price of the property sold, under the disposition to Alexander Downie, in liquidation of any advances made by them, whether the same were made by Alexander Downie, or by Alexander Downie and Company, to John Gilchrist, or on his account; but in respect that the parties are not agreed as to some of the particulars in the account founded on by the defenders, before farther answer, appoints the cause to be enrolled, and reserves the question of expenses."

The pursuers reclaimed.

LORD GLENLEE.—I think the interlocutor quite right. We have nothing to do with the heritable rights, as the subjects were sold, and the funds arrested. The pursuers have the very same claim on the funds as Gilchrist would have had. The defenders are undoubtedly bound by the terms of the back-bond, which says that the property shall be held in security of "all sums of expenses disbursed in relation to the premises." It does not require that the advances should be made by Alexander Downie's own hand. If in consequence of his order furnishings and money were advanced to Gilchrist, it makes no difference that they were advanced by a company for him. Gilchrist must have allowed for them, before he could have demanded back the subjects disposed, or the price.

LORD MEADOWBANK.—I am of the same opinion. I am satisfied on the whole facts of the case, that this was a transaction intended for the company.

LORD MEDWYN.—I agree. We are not going against the opinion of Lord Meadowbank, which has been referred to. I do not deny the general rule as given by Mr Bell; \* but the rule is qualified, if there is "room for a presumed or tacit

desire, for which debt, he might have to bring an action the next day? Yet this is the very worst case of the defenders. They have a separate case, in offering to prove by Gilchrist's oath, that it was really a trust for the Company, a thing perfectly consistent with the terms of the back-bond, or in requiring the pursuers to prove by Alexander Downie's oath what the trust was, or otherwise to take it as it is stated. The Lord Ordinary thinks that, at the least, the proof offered by Gilchrist's oath would be competent; but it does appear to him to be unnecessary. He thinks it clear otherwise, that there is a right of retention both in Alexander Downie, and in Alexander Downie and Company, for all the advances made on the faith of the security, whether by the individual or by the Company of which he was a partner. But he is apprehensive that he cannot pronounce a decree of absolver at present, because there are some special points urged as to which he is not sure that he sees clearly the effect of the pleas stated. The pursuers say, 1st, That certain goods furnished to the wife of Gilchrist, after he had left Scotland for a time, are not to be considered as furnished to him, and that, therefore, their value ought not to be reckoned against the price of the subjects disposed; and, 2dly, That the defenders unwarrantably took back some goods which they had furnished. The Lord Ordinary is not sure that he sees the bearing of this point clearly. His impression is, that as Gilchrist does not appear to have been notour bankrupt, the furnishings to his wife in his absence, for conducting the same business, must be taken as furnishings to him, and that nothing hindered the defenders to take back their own goods, though delivered, if they were not to be paid for. But lest he should be under any mistake, the argument having been directed chiefly to the general question, he leaves these points open. Probably expenses will be due."

\* II. 666. "The general rule is, that in the common case, there is no concurrence

migation, by means of which a concourse may be brought about which did not originally exist." Suppose Gilchrist had brought an ordinary action for the price of the subjects, would Alexander Downie not have been entitled to set off the advances made by the company? On the whole I am satisfied that this transaction of the conveyance and back-bond was intended for behoof of the company.

LORD JUSTICE-CLERK having concurred,

No. 8.

Nov. 16, 1836  
Gordon v.  
Trustees of  
Ministers'  
Widows' Fund

THE COURT adhered.

THOMAS LEBURN, S.S.C.—W. B. CAMPBELL, W.S.—Agents.

REVEREND DONALD GORDON, Pursuer.—*Robertson—Inglis.*  
TRUSTEES OF MINISTERS' WIDOWS' FUND, Defenders.—*D. F. Hope—Grant.*

No. 9.

*Church—Ministers' Widows' Fund—Clergyman.*—Held, as the sequel of the case reported ante, XIV. p. 509, that the minister of one of the Parliamentary Churches, who, in ignorance of his right to become a contributor to the Ministers' Widows' Fund, had allowed several years to elapse without claiming such right, was liable as a contributor, as at and from the date of his induction, and that, at the rate fixed by the statute for those who have not duly declared their selection of one of the rates prescribed by the statute; and that he was chargeable with interest on the arrears of such rate, all in terms of the statute.

SEQUEL of the case reported ante, XIV. 509, which see. On that Nov. 16, 1836 occasion the Court found, "that the pursuer is entitled to be admitted and received as a contributor to the Ministers' Widows' Fund; and appointed parties to lodge mutual minutes as to the rate which the pursuer shall be liable to, and the date from which such payment shall commence."

1st DIVISION.  
Ld. Fullerton.

There are four rates of contribution, any one of which may be selected by a contributor; and by 19 Geo. III. c. 20, it was directed that every minister who shall thereafter be admitted to a benefice in the Church of Scotland "shall make his selection of one or other of the four above-mentioned yearly rates, to which he chooses to be subject, during his life, by a writing signed by him, addressed to the trustees hereinafter appointed, and which he shall deliver, or cause to be delivered, at the general collector or receiver's office (under a certain exception) at Edinburgh, on or before the 26th day of January that shall first happen after such minister shall have had right to his benefice for one half-year; and every minister, neglecting to give notice as aforesaid, shall be deemed and adjudged to have made his election of the annual rate," lowest

and credit between the debts of the company and those of the partners, the  
being an entirely different person in law."



No. 9. but one, "and shall be liable for the said rate accordingly during his life." \*

ov. 16, 1836.

orden v. The amount of the several rates was increased by 54 Geo. III. c. 169; but the obligation to make a selection, within a limited time, under the certification of being rated as a contributor at the lowest rate but one, was continued (§ 3) in the same terms as before.

rustees of 'ministers' 'Idows' Fund. In the questions under the interlocutor above quoted, the pursuer now pleaded, (1.) that his liability for rates should not commence sooner than the decree of the Court which found him entitled to become a contributor. Until that date, the defenders had refused to accept of any of the annual rates, even when tendered, and it would be unjust to subject him now in an accumulated sum of arrears. But at least his liability could not draw back beyond the Act of Assembly in 1833. He had not, previously, the whole privileges and status of a parish minister of the Church of Scotland; and the right, or liability of the Parliamentary ministers to become contributors, had never been imagined even by any of themselves, to exist, until after that act was passed. (2.) He ought still to have the selection of the rate, at which he should become a contributor. The obligation imposed by statute on those who did not make a choice of a rate, within a given time after their induction, should not be enforced against him, as he had not negligently omitted to make his selection, but was, without any fault, in a state of complete ignorance that he had a right to become a contributor, until after the period fixed by statute for voluntary selection had elapsed.

The defenders answered (1.) that it was fixed by the statutes on which the pursuer founded his action, and it was now, moreover, *res judicata* in this cause, that it was not merely on parish ministers, but on all ministers of the Church of Scotland, enjoying a permanent benefice, that the right, and the co-ordinate liability, to become contributors, had been laid. It was, therefore, from the date of induction into the benefice, just as in the case of any other minister-contributor, that the liability for rates commenced. It could not commence from the date of the decree in this action, as that decree merely found and declared what already were the legal rights of the pursuer, without bestowing any new right upon him. And it could not commence from the date of the Act of Assembly, as such act could not affect any civil or patrimonial interests, such as a right to this fund; and the pursuer had been inducted into his benefice, for years previously, and was recognised in the act itself as already an inducted minister of the Church of Scotland. (2.) The selection of the rate was no longer in the pursuer's power. His rights and liabilities, like those of

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\* The other sections of the statutes and the Act of Assembly affecting this cause, are fully quoted in the former report.

the other contributors, were fixed by statute, and could not be affected by any pleas of equity or hardship. And the statute had fixed that where the choice of a rate was not duly intimated in writing, within a given period after induction, which period was long elapsed, the minister should be liable for the lowest rate but one.

No. 9.

Nov. 16, 1836

Gordon v.

Trustees of  
Ministers'

Widows' Fund

**LORD BALGRAY.**—The decision of this case has been attended with very great difficulty. I have seldom, if ever, experienced more difficulty, and I own that I have come to entertain considerable doubt as to the soundness of the judgment which the Court has already pronounced. But that judgment is final in this cause, and we cannot go back upon it. We must now carry it out; and, in doing so, if I were allowed to listen to considerations of equity or pleas of hardship, it might not perhaps be very difficult to give a decision which would do substantial justice to all parties. But the rights of parties, hinc inde, are fixed, on all hands, by statutes, and I have no discretionary power left. I must apply the enactments, and, in doing so, it appears to me that the period of the pursuer's induction is clearly pointed out by statute, as that at which his liability commences.

**LORD PRESIDENT.**—I am not free of hesitation in deciding as to the time when the pursuer's liability for rates is to be held to have commenced. I cannot allow myself to be influenced by pleas of mere hardship, but I am doubtful whether the pursuer could be viewed in all respects as a minister of the Church of Scotland, until the act of the General Assembly in 1833. He had no parish, and no Kirk-Session, prior to that time; and consequently no right to exercise ecclesiastical discipline. And as no authority, except that of the General Assembly of our Church, could have bestowed upon him the full status and office of minister, and as it did not do so without reserve or qualification prior to 1833, I doubt whether the liability of the pursuer to become a contributor, can be carried farther back than the date of that Act of Assembly.

**LORD MACKENZIE.**—In disposing of the concluding part of this cause, it is essential for the Court to keep in view that the judgment already pronounced in the earlier part of it, is the law of the case, and that we are bound to follow it out, so that our present decision shall not be inconsistent with what we have already done. There are two questions now remaining; first, the date from which the pursuer's liability commenced; and, second, the rate of contribution for which he is liable. In reference to the first question, I own if I could consider it doubtful, whether the pursuer was a minister of the Church of Scotland, prior to the Act of Assembly 1833, I should think it much more doubtful whether that act could make him a minister, in the sense of the statutes regulating the Widows' Fund, or so as to affect any civil interest. But I remain still of the opinion which I formerly delivered in this cause. I hold that this pursuer, and the class to which he belongs, were ministers of the Church of Scotland prior to the Act of Assembly. They had been regularly ordained and inducted by their Presbyteries; and, indeed, the Act of Assembly itself, in express terms recognises them to be "ministers already inducted or settled as ministers within the said districts," and it so describes them over and over again. But I never held that they were, in any sense, parish ministers, prior to that act. And if I had held that the Acts of Parliament limited the benefit of the Widows' Fund to parish ministers, I should have doubted very much

**No. 9.** whether the General Assembly had either the power, or the intention, to erect new parishes for them, so as to affect any civil or patrimonial interest whatever. **Nov. 16, 1836.** The General Assembly cannot multiply parishes so as to regulate civil interests thereby ; at least I am not at present prepared to hold any such view, and I conceive that their enactment was intended to refer to spiritual interests exclusively. **Gordon v. Trustees of Ministers' Widows' Fund.** But I think that the Act of Parliament gave this benefit of the Widows' Fund, not only to parish ministers, but to all the ministers of the Church of Scotland who were ordained and admitted to a permanent benefice in the church. And on that ground, I held that the pursuer possessed such a character and status, anterior to the Act of Assembly, as entitled him, under the Parliamentary statutes, to the benefit of the fund. Such right he possessed from his induction into the benefice ; and as the liability to contribute, is co-ordinate with the right to do so, I think his liability commenced at the date of his induction. It is true that the party was not aware of his right, or of his liability, for some years after both had come into existence. But although he had overlooked them, the Court cannot be affected by that circumstance, in duly enforcing both, when called on to do so as we now are.

In regard to the second point, which is the rate of contribution, it appears to me to be clear that the pursuer has now no choice remaining in the matter. If the liability commenced, with the date of induction, the limited period allowed by the statute for making a voluntary selection of a rate, is long gone past. As soon as it passed, the statute fixed the rate of contribution, in default of the voluntary selection, and that rate is the lowest on the scale but one.

**LORD GILLIES.**—In disposing of what remains of this case, I do not think the liability can be dated from the passing of the Act of Assembly ; I conceive that it must run from the pursuer's ordination to the pastoral office, and his induction. In regard to the rate for which he is liable, I think it must be the lowest rate but one, just as in the case of other ministers who fail to select a rate within the statutory period, and as to whom, therefore, the law takes its course and fixes the rate.

**LORD PRÉSIDENT.**—It appears, therefore, to be the opinion of the Court, that the pursuer is liable from the date of his induction, and that his rate of contribution is fixed by the statute to be the lowest but one.

**THE COURT** pronounced this interlocutor.—“ Find that the pursuer is liable as a contributor to the Ministers' Widows' Fund, as at and from the date of his induction, and at the rate fixed by the statute for those who have not duly declared their selection of one of the rates prescribed by statute ; and find that he is to be charged with interest on the arrears of such rate, in terms of the act.”

**J. ROBERTSON, W.S.—H. INGLIS, W.S.—Agents.**

AGNES MABON and DAVID MABON, Pursuers.—*M'Neill—Paterson.*  
 DAVID WALKER and JAMES MONTGOMERY, Defenders.—*Rutherford—*  
*Monteith.*

No. 10.

Nov. 16, 1836  
 Mabon v.  
 Walker.

MAGISTRATES of GLASGOW, Compearers.—*Ivory.*

*Burgh—Jurisdiction.*—The magistrates of a royal burgh, besides their ordinary burgh-court, were in use to hold another weekly court for the decision of cases under 40s. in value, originally constituted by an Act of Council in 1772, and in which a summary form of procedure was established; after the passing of the Act of Sederunt in 1825, prescribing a certain form of process for the Scottish burgh-courts, this court was continued under the old regulations; in 1828, the magistrates by an Act of Council extended its jurisdiction to cases of £5 value;—Held, in a reduction of a decree in this court for a debt of £5, that it was incompetent.

THE city of Glasgow was by royal charter erected into a royal burgh, Nov. 16, 1836  
 “cum omnibus et singulis libertatibus privilegiis immunitatibus et juris- 2<sup>D</sup> DIVISION.  
 dictionibus quæ de juribus et regni nostri consuetudine pertinuerunt, per- Ld. Cockburn  
 tinent aut juste pertinere poterint ad aliquem liberum burgum regalem.” T.

As in other Scottish burghs, the Magistrates of Glasgow were in use to hold a weekly town or burgh court for the decision of all questions of debt in which the pleadings were in writing. In 1772, they passed an act of council “to shorten the present forms of the court in small causes not exceeding 20s. sterling.” A court was appointed to be held by any of the bailies each week, on Monday forenoon, for the decision of such causes, to be “summarily discussed.” In cases of intricacy, the bailies were either to take the cause to avizandum, or to remit it to the ordinary burgh court, held on Friday.

In 1796, the magistrates and council passed another act, extending the jurisdiction of this court to claims for debt not exceeding 40s. sterling, and empowered “any of the magistrates” to hear and determine such causes in the same summary manner. This court, which was held as formerly on Monday, continued to be kept up, receiving in 1820 a new set of regulations. Under the powers conferred by the 6 Geo. IV. c. 129, the Court of Session passed the Act of Sederunt of 12th November, 1825, prescribing a certain form of process in civil causes, to be observed in all the burgh courts throughout Scotland. This act provided that such courts “shall sit for the despatch of ordinary business at least one day in every week during the summer and winter sessions, such day to be fixed in each burgh by a regulation of court;” and it was declared that it should be “the duty of the magistrates to enforce in the strictest manner the said form of process, it being competent for them to suggest for the consideration of the Court of Session such other or farther regulations as may appear expedient.” The magistrates of Glasgow, under the authority of the Act, fixed Friday in each week as their ordinary court-day for business in all cases exceeding 40s. They still kept up, how-

No. 10.  
Nov. 16, 1836.  
Mabon v.  
Walker.

ever, the Monday court for the determination of claims under 40s., not observing in it the form of procedure prescribed by the Act of Sederunt.

In February 1828, the magistrates, "as justices of the peace for the City of Glasgow and liberties thereof," passed an act of council, declaring that it should be "competent to bring before the ordinary small-debt court, held on Monday," all causes under £5 sterling; the process to be summary, in terms of the act 6 Geo. IV., c. 48, regulating the justice-of-peace court. This proceeding being complained of by the justices and their clerk as a usurpation, the magistrates, in March following, passed another act, whereby they "repeal the said act of court, so far as it is founded on the act 6 Geo. IV., c. 48; but in virtue of the jurisdiction vested in them by royal charter confirmed by Act of Parliament, and by immemorial usage and the common law of the land, hereby enact and ordain, that from and after the 7th day of April next it shall be competent to bring before the customary weekly small-debt court of the burgh, held on Monday, at eleven o'clock forenoon, all causes and complaints against persons amenable to the burgh courts, concerning the recovery of any debt, or the making effectual any demand, which debt or demand shall not exceed the value of £5 sterling, exclusive of costs; the procedure to be conducted in the same summary way as observed for the last fifty years with regard to causes not exceeding forty shillings in value, and the expenses of suit not to exceed the rates allowed by the general small debt act for Scotland." The proceedings in this court, after its jurisdiction was thus extended, were conducted according to the regulations in force previous to the passing of the Act of Sederunt of 1825.

Under these regulations, on the 23d August 1834, the pursuer David Mabon, amongst with the defender Montgomery, were cited, at the instance of the defender Walker, to appear before the magistrates on Monday the 25th, which was the small-debt court day. The claim was founded on a bill for £20, for payment of which arrestment had been used by Walker in the hands of Montgomery, and concluded for the sum of £5 sterling. The cause having been called on the 25th, was continued, and on the 1st September following, the magistrates pronounced a judgment, whereby certain rents claimed by the pursuer Agnes Mabon, as belonging to her in virtue of her father's settlement, exclusive of the *jus mariti* of her husband, David Mabon, were decided to belong to the husband, she not having been called as a party, nor heard for her interest.

Thereafter, Agnes and David Mabon raised an action in the Court of Session, against Walker and Montgomery, to reduce the magistrates' decree, on the ground, *inter alia*, of want of jurisdiction.

In defence against this reason of reduction it was maintained, that as David Mabon had not objected to the jurisdiction of the inferior court, or to the formality of the proceedings, he was personally barred from pursuing the reduction, and at all events that the magistrates had jurisdiction, and the proceedings were competent.

The Lord Ordinary pronounced an interlocutor in favour of the defendants, both on the point of jurisdiction and on the merits, adding, in regard to the jurisdiction, the subjoined observations in his note.\*

No. 10.

Nov. 16. 1833  
Mabon v.  
Walker.

Agnes and David Mabon having reclaimed, the Court appointed the proceedings in the cause to be intimated to the Lord Advocate and the Magistrates of Glasgow. The magistrates made appearance and were cited in the process, and the Court thereafter ordered minutes of debate, "allowing the magistrates to give in a minute in support of the jurisdiction of the court referred to, if they shall see cause."

Minutes of debate were accordingly lodged, in which it was pleaded for the pursuers—

1. That the magistrates were not entitled, after the passing of the Act of Sederunt in 1825, to constitute or continue any court except under the provisions of that act; 2. That, even although they might have continued their small-debt court for the decision of claims under 40s., it was plainly incompetent for them, after the Act of Sederunt was passed, to extend its jurisdiction to cases amounting to £5, and to try cases above 40s., under regulations different from those prescribed by the act.

The magistrates, on the other hand, maintained, *inter alia*, that this was a question not so much of jurisdiction as of procedure, and it was a fundamental element in the constitution of the court in question, as of all others, that the court should have a power of regulation as to the forms and mode of procedure to be observed in the causes which came before it; that while the original regulations subsisted unchallenged, and the parties coming before the court acquiesced in the procedure under them, it was incompetent to subject a decree pronounced in conformity to these regulations to challenge, for the first time, in the shape of reduction; and consequently, as the magistrates confessedly had jurisdiction in cases amounting in value to £5, there was no principle for maintaining that they were to be prevented from applying to such cases the summary procedure they had been, before and since the passing of the Act of Sederunt, in the unchallenged use of applying to cases of 40s. value.

The cause was this day put out for advising.

\* "The decree brought under reduction must be judged of according as the case stood at the time it was pronounced. Now, even if the pursuer had then raised his objections in point of form, the Lord Ordinary is not satisfied that they would have been well founded. But there is nothing on the face of the proceedings to show that these objections were brought forward, except in the present process; and it cannot be maintained that their having been so can be made the subject of a general proof. The very useful tribunal called the Burgh Small-Debt Court of Glasgow, is not a statutory small-debt court, strictly so called, and the full-written pleadings may be rejected from it: there is no reason for holding that no notice would be taken, in judgments repelling them, of such objections as those to jurisdiction, indistinctness of charge; and the very sentence in question, which does notice to the statement and pleas of parties, excludes the idea."



No. 10.

Nov. 16, 1836.  
 Bayne v.  
 Steele's Repre-  
 sentatives.

**LORD JUSTICE-CLERK.**—I retain the strong doubts I formerly had, as to the magistrates' jurisdiction being well founded. Supposing we were to view the case as having been decided by the magistrates as justices of peace in their small-debt court, I am at a loss to know what right they had to extend their jurisdiction to cases of £5 value. They might as well extend it to cases of £500. Again, if we view the cause as having come before their magistrates' court, how could they proceed according to a form of process inconsistent with that prescribed by the Act of Sederunt? I think we cannot sustain their jurisdiction in either capacity.

**LORD MEADOWBANK** concurred.

**LORD GLENLEE.**—It is difficult to find any vestige of a title in the magistrates to extend their jurisdiction, as they have done, especially after the passing of the statute 6 Geo. IV., c. 120. I have great difficulty in thinking they could have such a right, unless by usage and the acquiescence of the lieges for a long time.

**LORD MEDWYN.**—I agree with Lord Glenlee, that without usage and acquiescence, the magistrates could have no such right. But it is merely as judges in their burgh court or court of conscience that they claim the jurisdiction in question. I do not think that the Act of Sederunt as to the burgh courts was intended to regulate such a court as this. So far as regards the court as originally established in 1672, I see no objection to the magistrates' jurisdiction, but I entertain doubts as to their power of raising the value to cases of £5. If sanctioned by usage, I should admit their right to do so. This is the ground on which I hesitate.

**THE COURT** altered the interlocutor and decerned in terms of the libel, finding expenses due by Walker and Montgomery, and also by the magistrates, since the date of the order for minutes.

**CHARLES FISHER, S.S.C.**—**WILLIAM MUIR, S.S.C.**—**CAMPBELL and MACDOWAL, S.S.C.**—**Agents.**

No. 11.

**MRS MARGARET BAYNE, Pursuer.**—*A. McNeill.*  
**STEELE'S REPRESENTATIVES, Defenders.**—*McNeill.*

*Agent and Client.*—In an action for payment of an account for conducting a process before the Court of Session,—circumstances in which held that outlays only were to be charged, and not professional services.

Nov. 16, 1836.

**D DIVISION.**  
**Lord Jeffrey.**  
**T.**

**THE** late Andrew Steele, W.S. was in the habit of employing Bayne, a writer in Edinburgh, to conduct before the Court of Session actions in which his clients were concerned, and also processes in which he was personally interested. Of the latter description was a process in which Steele was engaged with Messrs Oliver and Boyd, in regard to which, as illustrative of the understanding on which Bayne charged in his accounts with Steele, the following expressions were used by Steele in three several letters addressed to Bayne in the years 1829, 1830, and 1831. “No cause that ever I had or knew of appeared to me so much without foundation, as that of the objections of Oliver and Boyd; and, therefore, I have confident hope, that both you and I will be ultimately fully paid for our trouble.” And again; “I have not the least doubt of success in this

process. I cannot conceive the possibility of not proving my house to be my own, and that you and I will recover our outlays and for trouble." And again; "The two processes about Mathews' subjects in Dalkeith you may charge fully for all agent fee and every thing else; but in the process about the Cowgate-Port property, I expect you will only charge the outlay as formerly as in full, till the issue of it, which I hope will not be doubtful." In answer to this last, Bayne, on 17th October 1831, wrote as follows:—"I settle you with this the additional accounts which you want, viz. Oliver and Boyd's, Martin's and Mathews'.

No. 11  
Nov. 16, 1  
Bayne v.  
Steele's Re-  
presentatives.

"I never intended to make any professional charges in these matters, and feel obliged to you for what you have already paid me in the last. Yours respectfully," &c.

The process with Oliver and Boyd was tried by jury, and a verdict returned in their favour. The Court granted a new trial, and thereafter the case was settled on a footing advantageous to Steele.

The sums disbursed by Bayne in this process were entered in his books, as were also the particular items for services and trouble; the charges for these items were not filled up. In his accounts rendered to Steele in 1830 and 1831, while the charges for trouble were left blank, the charges for outlay were filled up.

Mr Bayne having died in 1832, and Mr Steele in the following year, the widow and executrix of the former brought an action against the representatives of Steele for payment of certain business accounts, one of these being for conducting the process against Oliver and Boyd; which accounts were alleged to have been owing by Steele to Bayne at the time of his death, and in them charges were made both for professional trouble and outlay. While the other accounts pursued for were not disputed, it was pleaded in defence against the claim in regard to Oliver and Boyd's process, that Bayne was not entitled to claim, and the defenders were not liable for more than the outlay; that the expressions in the correspondence between the parties and the mode in which the charges for trouble and for outlay were entered in Bayne's books and accounts, were sufficient evidence of an understanding or agreement that Bayne was to conduct the process in question without making any charge against Steele except for outlay; and that this was a usual understanding among professional men in regard to cases in which they were personally concerned, the charges for services and trouble being made good against the opposite party, if the cause came to a successful termination.

In answer to this defence, Mrs Bayne contended that the evidence was insufficient to support the view of the defenders; that the understanding as to payment of outlays merely, only applied to the period antecedent to the issue of the cause, and not to the final settlement; but it was intended as a matter of favour to Steele not to claim from him the full charges, till it should be seen whether they could not be recovered in whole or in part by the party.



No. 11. The Lord Ordinary decerned in terms of the conclusions of the libel, and added the note subjoined.

Nov. 16, 1836.  
 Bayne v.  
 Steele's Repre-  
 sentatives.

\* " It is not easy to gather from the correspondence and dealings of the parties, what was the precise nature of the bargain between them as to these processes, which the late Mr Bayne conducted for Mr Steele as a party. Three points, no doubt, seem clear enough. 1st, That in those cases, outlays only were to be charged (and occasionally paid) during the dependence, and prior to the issue of the cause. 2d, That if it issued in a decree in Mr Steele's favour, with an award of expenses against his adversary, the whole professional charges were to be made good to Mr Bayne: and 3d, That if it issued in a decree against Mr Steele, with (or probably even without) an award of expenses against him, Mr Bayne was to get no more than his actual outlay. But there is a fourth case (and the Lord Ordinary thinks it is in substance the case which occurs here), as to which it is not so easy to ascertain the true import of the agreement; and that is the case, where the ultimate decree was in Mr Steele's favour on the merits, but where he was not found entitled to his expenses. This is a middle case between the two last, and as it does not appear that any such had occurred and been settled during the joint lives of the parties, it cannot be said to be absolutely certain how they would have dealt with it. In dubio, however, the Lord Ordinary would proceed upon the principle, that professional services, rendered with ultimate benefit and success to the other party, should be fairly remunerated. The maxim is, that the labourer is worthy of his hire: and that it is not to be presumed that a man who lives by his profession, exercises it in any case gratuitously. If he is right, therefore, in holding that the case mentioned above as the third, is the only one in which it is clear that this claim for remuneration was renounced, it must be held as not renounced in that described as the fourth. And truly this seems no less equitable in principle, than presumable in point of fact. If, after a long and laborious litigation, an agent recovers a decree for his client for £10,000, though, from favourable circumstances in the defender's case, no expenses are given, it would seem to be most unfair not to allow him any remuneration for his great and successful exertions, merely because it might appear to have been arranged between him and the client, that, if unsuccessful, they were not to be remunerated. In short, where there is not a clear and explicit provision to the contrary, the Lord Ordinary would hold, that the condition upon which the agent's remuneration depended, was that of success, generally, in the litigation, rather than that of the client's obtaining decret for expenses, and being enabled to recover them from his opponent.

" The only real dispute is, as to Mr Bayne's professional charges for the litigation between Mr Steele and Boyd and Oliver: and the Lord Ordinary has said, that he thinks this equivalent to a case terminating in a decree in Mr Steele's favour, on the merits, but not finding him entitled to expenses; and the defenders did not seem to deny that it was so. The case was compromised, by the opposite party agreeing to purchase, at a fair price, the house which they had been contending they were entitled to have for nothing; and to let the litigation drop, each party paying his own expenses. The pursuer complains that this was arranged without consulting Mr Bayne's representatives; and says, that they might have refused to sanction it, and carried on the suit at their own hazard. The Lord Ordinary sees no reason to question that the arrangement was a wise and prudent one for all concerned; and has not the most distant idea, that either Mr Bayne or his representatives would have guaranteed Mr Steele against the risk of loss, and gone on with the action at their own peril. But, on the grounds already stated, he is of opinion, that it was an arrangement which did not deprive him of his right to remuneration. He cannot possibly construe the letter of 17th October 1831 (cited at page 4 of the Defences) into an absolute renunciation of all claims for such remuneration, as to the processes there mentioned, in whatever decree they might terminate. The defenders, indeed, do not pretend that it would have precluded such a claim, if they had been decided in Steele's favour, with expenses against the opposite party:

Steele's Representatives reclaimed.

The Court were at first divided, and ordered minutes of debate, and the cause was this day again put out for advising.

No. 11

Nov. 16, 11  
Fergusson  
Smith.

**LORD JUSTICE-CLERK.**—I have now come to think that the interlocutor should be altered. It is clear that in regard to this as well as other personal cases in which Bayne was employed by Steele, there was an understanding that only outlay was to be paid, and that, for remuneration for professional trouble, Bayne was to take his chance of success in those cases. Otherwise, to what effect could there have been an understanding or agreement? The whole correspondence is in conformity with this view.

The other judges having concurred,

THE COURT altered, and found expenses due since the order for minutes.

DUNDAS and JAMIESON, W.S.—SCOTT, RYMER and SCOTT.—Agents.

JOHN FERGUSSON, Pursuer.—*Greenshields*.  
JOHN SMITH and OTHERS, Defenders.—*Hunter*.

No. 12

**Annuity—Bankrupt—Composition.**—1. The value of an annuity dependent on lives, when estimated for the purpose of drawing a composition from an obligant whose estates had been sequestrated, to be calculated as at the date of the sequestration, and not as at the date of settlement. 2. The Northampton tables adopted as the rule of calculation. 3. Right to composition not excluded by no claim having been made till after the discharge. 4. Creditor not bound to deduct value of an heritable security contained in the bond of annuity over the estate of another co-obligant, which, with the composition and all other payments, still left the annuity unsatisfied.

THE pursuer Fergusson, in March 1826, obtained from the defender Nov. 16, 16  
Smith, and seven other parties, in consideration of the sum of £1980, a 2d Division  
joint bond of annuity for £198 yearly during the lives of three females, Ld. Monro  
or the longest liver of them, with a disposition in security by one of F.  
the obligants, Charles Thom (for whose behoof the advance was made),  
of certain heritable property belonging to him. In January, 1827, the  
estates of Smith were sequestrated under the bankrupt statute. No  
claim was made on the estate by Fergusson in respect of the bond of  
annuity, and in June, 1827, Smith was discharged on a composition of  
1s. in the pound. In the course of 1828 offers were made for settling by  
reference the amount for which Fergusson was entitled to claim, but  
these not having resulted in a settlement, he, in 1832, raised an action  
against Smith, and his cautioners in the bond for his composition, for

But if the words admit of this exception, they must admit of any other, which rests  
on the same equitable construction: and the principle which should govern that  
was already sufficiently explained."

No. 12

Nov. 16, 1835.  
Fergusson v.  
Smith.

payment of the composition effecting to the value of the annuity as at the date of the sequestration, estimated by him at £4293, 4s. 3d. It was not alleged that the value of the heritable security, or any sum which Fergusson had received from the estates of others of the obligants, would, with the dividend sought, satisfy the annuity; but Smith and his cautioners pleaded in defence—

1. The pursuer having lodged no claim in the sequestration cannot demand the composition agreed to on the faith of no such claim being to be made.

2. The value of the annuity should be calculated, not as at the date of the sequestration, but as at the period of settlement.

3. The pursuer is bound to deduct the value of the heritable security, and of the sums recovered from the estates of other obligants; and,

4. The calculation on which the value of the annuity, as concluded for, has been estimated, and which proceeds on the Northampton tables, is not accurate, as has been established by more recent investigations, and the value therefore ought to be ascertained according to the more accurate data for determining the duration of lives now ascertained.

The Lord Ordinary (20th November, 1835) remitted to Mr Cleghorn, accountant, to ascertain and report the value of the annuity as at the date of the sequestration, and also as at the date of his report. Mr Cleghorn accordingly returned a report calculating as follows the value of the annuity according to the Northampton, and also according to the Carlisle tables, at the three several rates of interest of three, four, and five per cent respectively, as at the date of the sequestration, as at the date of the report, on the supposition of all the lives being subsisting, and as at the same period, taking into view the fact that one of them had fallen in the course of the year 1835.

“ I. Value of the annuity of £198, on 20th January, 1827, the date of the sequestration libelled.

“ RATE OF INTEREST.

	3 per cent.			4 per cent.			5 per cent.		
“ By the Carlisle tables,	£5558	5	1	£4522	14	4	£3758	0	10
“ By the Northampton tables,	5260	13	3	4313	4	8	3637	9	2
“ Differences,	£297	11	10	£209	9	8	£120	11	8

“ II. Value of the same annuity on 11th January, 1836, the date of this report, assuming that all the three nominees were living.

“ RATE OF INTEREST.

	3 per cent.			4 per cent.			5 per cent.		
“ By Carlisle tables,	£5306	4	1	£4355	8	1	£3676	17	2
“ By Northampton tables,	4950	11	11	4140	3	7	3531	6	7
“ Differences,	£355	12	2	£215	4	6	£145	10	7

"III. Value of the same annuity at the said date, payable during the life of the survivor of the two nominees now living. No. 11

Nov. 16, 1  
Ferguson  
Smith.

"RATE OF INTEREST.

	3 per cent.	4 per cent.	5 per cent.
"By Carlisle tables,	£4980 5 11	£4148 6 0	£3523 16 1
"By Northampton tables,	4586 11 6	3834 13 4	3299 9 5
"Differences,	£443 14 5	£313 12 8	£224 6 8

"It will be for the Lord Ordinary to decide which of these values at each of the two periods shall be considered best adapted to the circumstances of this case. The reporter may be allowed to add, that, taking four per cent as the rate of interest, he would be inclined to hold the fair value as at the date of the sequestration, and also as at the date of this report, to be the mean of the two before stated, or, at the first period, £4417, 19s. 6d., and at the second period, either £4247, 15s. 10d., or £3991, 9s. 8d., according as effect is not to be given, or as it is to be given, to the death of one of the nominees."

On considering this report, the Lord Ordinary (12th May, 1836) pronounced the following interlocutor, adding the subjoined note:—

\* "The first point in the interlocutor is clear, and was substantially conceded by the defenders in the first debate, though it seems to have been the real ground on which they resisted a settlement out of Court.

"The Lord Ordinary thinks it also very clear that the annuity must be valued for a ranking, on the same footing as if a claim had been made at first, that is, that, from the date of the sequestration, on the one hand, the accruing annuities cease to run against the estate of the bankrupt, and, on the other, the entire value of the annuity must be estimated as it stood, on the facts of the case at that date. As long as it cannot be stated that the annuities are, or will be paid in full, this seems to be the only rule which the law can adopt. The failure of one of the lives on which the annuity depends, during this process, about eight years after the sequestration, cannot affect the legal principle of judgment. But, in truth, the difference in the result would not be very great, though the valuation were to be taken at the date of the report, because in that case the whole arrears of the annuity must be added to the sum brought out on the estimate of two lives only. But this just shows the inadmissibility of such a principle. It would be a ranking for a different debt from that which existed at the date of the sequestration.

"The Lord Ordinary further thinks it clear, that, in this ranking on the bankrupt estate of one of the joint obligants, the pursuer is not bound to deduct either the value of the securities which he holds from other obligants, or the payments he has received from their estates. Till he gets full payment on the full value, he is entitled to rank on each estate for his full debt, and the ranking here being for only one shilling in the pound, it is evident that it can go but a very little way towards effecting that result. The intromissions of the pursuer seem to be sufficiently explained for all the purposes of this cause, so as to render farther enquiry unnecessary.

"Which is in accordance with the mode of estimating the value of the annuity, the account-  
an estimate, both according to the Carlisle tables and according

**No. 12.**

Nov. 16. 1836.  
 Ferguson v.  
 Smith.

**“ Finds that the pursuer is not barred from claiming the composition on his debt, in consequence of his not having entered a claim during the subsistence of the process of sequestration, and repels the defence stated on that ground : Finds that the pursuer is entitled to be ranked on the estate of the defender Smith, and to draw a corresponding composition on his debt from him and his cautioners, according to a just value of the annuity under his bond, as it stood at the date of the sequestration : Finds, that in such ranking he is not bound to deduct the value of any**

to the Northampton tables, and has recommended that a medium between them should be taken. Entertaining the greatest respect for this opinion, the Lord Ordinary, on full consideration, is inclined to think that there is no sound principle for striking such a medium, or for allowing the pursuer, in such a question, to claim upon a higher estimate of human life than that given by the Northampton tables. He comes to this conclusion for these reasons:—1. Though the Carlisle tables have been of late years adopted by very respectable societies, and may be held by many persons of high skill, perhaps justly, to be sufficiently accurate and safe for the purposes of insurance, the Northampton tables have been sanctioned by much longer and larger experience, and are still, he believes, acted on more extensively than any other tables. 2. By the act of Parliament, 36 Geo. III. c. 52, imposing the legacy duty, the Northampton tables are expressly recognised as the rule for estimating annuities, and, in fact, made part of the statute, the tables annexed to it being the same. In determining such a question judicially, the Lord Ordinary thinks that such a statutory recognition affords a safe guide. 3. The case must be treated as if the pursuer had claimed in the sequestration, in competition with other creditors, and the Lord Ordinary sees no ground on which, in such a competition, he could be allowed to strain the estimate to a speculative value of life, beyond that which is the most commonly and authoritatively received. The bargain was a severe enough one any way, for it will be seen that the valuation upon the three lives makes it, in fact, nearly, if not entirely, equal to a perpetuity. 4. If there were ground for going beyond the Northampton tables, the Lord Ordinary does not see that the matter could stop at the Carlisle tables. For the principle of the superior value of female lives has been already recognised in different quarters; and he believes that there are tables made on it embracing combined lives; at any rate, this would be only a matter of calculation, though intricate. 5. If he thought himself bound to adopt a higher estimate of life, he should think it very difficult in a court of law to limit the rate of discount to four per cent, or to avoid the legal rate of five per cent, and this, it will be observed, would make a much greater difference in reducing the valuation than the difference of tables would produce in raising it. Lastly, the pursuer himself, in his summons, asked only a composition on £4293, 4s. 8d., evidently calculated by the Northampton tables; and though, under the general words which follow, any mistake in the reckoning to a small extent may be legitimately corrected, the Lord Ordinary should doubt the justice, if not the competency, without very strong reasons, of materially extending the rule of calculation.

“ The Lord Ordinary thinks that, taking the Northampton tables, he may justly adopt the rate of four per cent discount, as recommended by the accountant, 1st, Because it is also the rule of the statute 36 Geo. III. c. 52; 2d, Because the ordinarily current rate of interest between 1827 and 1833 did never, he believes, if it were not in a single year, exceed that rate; and, 3d, Because it is consistent with justice at the present moment.

“ He thinks that the defenders rendered the action and the record necessary by pleas which have been repelled, and ought, therefore, to be so far liable in expenses. But the discussion afterwards appears to have been fair, and to a great extent necessary.”

securities held by him over the estates of other obligants in the said bond of annuity, seeing that it is not alleged, that, by so ranking, he will obtain more than the full amount of his debt in the annuity so valued, or even near to that amount: Finds that the value of the annuity, as reported by the accountant, according to the rules of the Northampton tables, and the estimate of discount, at the rate of four cent per annum, is, with reference to the most authoritative practice, and the conclusions of the summons in this action, the just valuation on which the pursuer is entitled to be so ranked: Approves thereof, and finds that the pursuer is entitled to be ranked, and to draw composition accordingly at the rate of one shilling in the pound on the sum of £4313, 4s. 8d.: Finds that he is not bound to make any deduction of the sums received by him from the estates of other obligants, since the date of the sequestration, in respect that it is not alleged that he has received full payment of the annuities, or that he will receive it by means of the ranking hereby allowed: Finds the pursuer entitled to the expense of raising the action, and bringing it into Court, and of making up the record, and remits the account, when lodged, to the auditor to be taxed, and finds no other expenses due to either party; and appoints the cause to be enrolled, in order that decree may be given for the sum of composition due, in terms of the above findings.”

No. 12.

Nov, 16, 1836  
Fergusson v.  
Smith.

His Lordship thereafter (20th May) further pronounced as follows:—  
“The Lord Ordinary, in terms of the findings in the interlocutor of 12th current, decerns against the defenders, jointly and severally, for the sum of £215, 13s. sterling, being a composition of 1s. per pound upon the sum of £4313, 4s. 8d. sterling, the value of the annuity libelled, as at the date of John Smith’s sequestration, with the legal interest of said composition from and since the 16th day of December, 1827, and in time coming till payment, in terms of the conclusions of the libel, and decerns: Of new, finds the pursuer entitled to the expenses of raising the action and bringing it into Court, and of making up the record, and remits the account, when lodged, to the auditor to tax and to report, and finds no other expenses due to either party.”

Smith, &c. reclaimed, confining themselves at the advising to the question, whether the value of the annuity should be taken as at the date of the sequestration or at that of the settlement, and to the matter of expenses.

**THE COURT** adhered, with additional expenses.

**PATRICK and CRAWFORD, W.S.—ORR and MARTIN, W.S.—Agents.**



No. 13.

Nov. 17, 1836.  
Hume v.  
Middlemas.

Milligan v.  
M'Lachlan's  
Trustees.

2D DIVISION.  
Ld. Moncreiff.  
F.

JOHN HUME, Pursuer.—*D. F. Hope—Marshall.*R. H. MIDDLEMAS (William Hume's Trustee), Defender.—*Keay—**G. G. Bell.*

Et e Contra.

*Trust—Ostensible Ownership.*—These were counter-actions, depending upon evidence, in which the Lord Ordinary pronounced an interlocutor in favour of John Hume, and the Court adhered. The principal question was, whether certain shares of the stock of a banking company belonged to John Hume or were held by him in trust for his brother, the late William Hume of Westbarns. His Lordship found it instructed by the evidence in process that the shares which were “subscribed and entered in the name of John Hume,” were in reality the property of William, and “that, although in respect of the public, and of the other partners of the company, the shares were never effectually transferred into the person of William Hume, in consequence of which John continued to be the ostensible holder thereof, and legally answerable to the public and the partners as such, yet in any question between John and William, or his representatives, it must be held that William was the actual partner or holder of the shares, entitled to all the profits thereof, and liable to relieve John of all the demands or losses to which he might be liable in respect of others as the holder of the said shares.”

THOMAS JOHNSTONE, S.S.C.—GIBSON and DONALDSON, W.S.—Agents.

No. 14.

MRS JANE MILLIGAN and SPOUSE, Pursuers.—*M'Neill—A. M'Neill.*M'LACHLAN'S TRUSTEES, Defenders.—*D. F. Hope—Maitland.*

*Process—Jury Trial—Tales—Expenses.*—A cause was set down for trial by a special jury, but a sufficient number of special jurors failed to attend on the day appointed, there being common jurors, however, in attendance; the defenders, who had applied for the special jury, insisted that the trial should be delayed, while the pursuers asked a tales in terms of the 55 Geo. III. c. 42, § 28—held, 1. That the Court had no power to grant a tales. 2. That the pursuers were not entitled to expenses.

Nov. 17, 1836.

SEQUEL of the case mentioned ante, XIV. 1127, which see.

2D DIVISION.  
Jury Cause.  
R.

When this case, which was set down for trial in July last, was delayed on account of the non-attendance of a sufficient number of special jurors, the Court reserved the question of expenses.

The pursuers now moved for expenses, on the ground that the trial ought to have been proceeded with on the day appointed, and that they were entitled to have had a tales in terms of the 28th section of the 55

Geo. III. c. 42, which applied both to special and common jurors;<sup>1</sup> that on the view of this section not being applicable to special jurors, it would be necessary to adopt the improbable supposition that no provision had been made by the legislature for the contingency of special jurors not attending, when the very circumstance of the non-attendance of jurors was under their consideration. No. 14.  
Nov. 17, 1836.  
Milligan v.  
M'Lachlan's  
Trustees.

The defenders opposed the motion, and contended that the provision in question did not apply to special jurors, and that, the case having been set down to be tried by a special jury, the Court had no jurisdiction to try it by a jury not made up in the way provided by the statute for special juries. But if the matter stood thus, it was not the part of either the counsel or the agent of the defenders, who had applied for the special jury, to consent that the cause should be tried by a common jury or differently from the mode with reference to which the order for trial was given, and therefore the Court, having no power under the statute, and the defenders being perfectly entitled to stand upon their right to have a special jury, they ought not to be liable in expenses.

**LORD MEADOWBANK.**—In providing for the formation of special juries, the statute enacts that “the jury for trying the issue shall consist of such twelve of the said twenty as shall first appear.”<sup>2</sup> Now can the jury be made up of jurors of a description not contemplated by the statute? I should hold it incompetent for the Court to select a juror from the bystanders without the special consent of parties.

**LORD JUSTICE-CLERK.**—I am of the same opinion, and think no expenses should be allowed in this case. The clause providing for a tales may perhaps be intended to apply both to common and special jurors, but it is so obscurely worded that I concur in thinking that we must refuse effect to it in regard to special juries. I was led to order the trial to be delayed, considering that the Court had assigned a special jury for the trial of the cause, and that the party who had applied for the special jury demanded the delay.

**LORDS GLENLEE and MEDWYN** having concurred,

**THE COURT** refused the motion for expenses, and found the pursuers liable in the expenses of this discussion, subject to modification.

**CHARLES FISHER, S.S.C.—JOHN CULLEN, W.S.—Agents.**

<sup>1</sup> Hepburn v. Cowan, July 14, 1817 (1 Murray, 261, Lord Chief Commissioner's Opinion).

<sup>2</sup> 55 Geo. III. c. 42, § 27.



No. 15.

JOHN THOMSON (Cashier of Royal Bank), Paisier.

JOHN THOMAS STEWART LYELL, Claimant.—*Rutherford—Pyper.*

JAMES GREIG and CHARLES MORTON, Claimants.—

*Sol-Gen. Cunningham—Russell.*MISS CATHERINE CHRISTIE, Claimant.—*D. F. Hope—Buchanan.*

MISS CATHARINE LOCKHART JAMIESON, and OTHERS, Claimants.—

*More—Keay.*

*Testament—Clause—Presumed Intention.*—A lady, advanced in life, and possessed of considerable estate, executed a deed narrating that she had acquired by purchase the whole liferent right of certain bank stock which her father, by his settlement, had destined to be enjoyed equally by her and a brother, now bankrupt, and by the survivor of them: and she conveyed the said liferent right to her brother, as an alimentary provision, in the event of her death without having assigned the same in prejudice of that conveyance: in the following month, she executed a general settlement of her whole estate, “dispensing with the generality hereof, and declaring the same to be as valid and effectual as if every sum and subject belonging to me had been herein specially made over:” this settlement was in favour of her brother’s children, and it appointed him sole trustee and executor: she died in a few months afterwards: Held (in a question between her brother’s children, after his decease, and certain alimentary creditors of his) that the special alimentary provision in his favour was not meant to be revoked by the general settlement in favour of his children.

*Fee and Liferent.*—Where the liferenter of certain bank stock died before the period at which a dividend became payable—Held that his creditors could not attach the dividend by their diligence, though its amount had been declared, and the term of payment fixed by the bank directors, in the ordinary course of the bank management, prior to the liferenter’s decease.

*Process—Record.*—Circumstances in which the Court refused to allow a record to be opened up, and a plea in law to be added, which had been incidentally adverted to by one of the judges at an advising in the Inner-House.

Nov. 18, 1836.

1st Division.  
A. Fullerton.

ROBERT JAMIESON, W.S., by settlement in 1796, conveyed to his spouse, in case of her survivance, “for her liferent use allenary, and, after her decease, to Margaret and Robert Jamieson, his children, if then alive, equally, and survivors of them for the term of their natural lives, and survivor of them, and for their liferent use allenary, and, after their decease, to the children to be lawfully procreated of their bodies, per capita, equally among them,” “all and hail £4166, 13s. 4d. of the

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\* The conduct of the juryman noticed ante. XIV. 1134, as having had a bottle of whisky with him in the room in which the jury were enclosed to deliberate on their verdict in the case of *Shirreff v. Shirreff’s trustees*, was this day enquired into. It appeared that he had been rather infirm in health, and had merely taken with him about 1½ glasses of whisky, in a small bottle, to be used medicinally for enabling him to sustain the fatigue of a protracted trial. In these circumstances, the LORD PRESIDENT shortly pointed out the great mischief which might ensue if jurymen were permitted to use spirituous liquors during their enclosure, and intimated that, in this case, the juryman ought to have stated his infirmity to the Court, who would have dispensed with his attendance at the trial. He was then discharged from the bar

capital stock of the Royal Bank." Robert Jamieson died in 1808 and his wife shortly afterwards. His son, Robert Jamieson (2), and his sister, now Mrs Kinnear, had the stock transferred in the bank books into their names, as liferenters, in terms of the settlement. In 1814 Robert Jamieson (2), being in embarrassed circumstances, executed a general disposition in favour of William Scott Moncreiff, accountant, as trustee for his creditors: and by a supplementary conveyance he afterwards specially assigned his right in the bank stock. In June, 1822, the trustee brought to public sale Jamieson's whole liferent right in the stock, both in the half which he already enjoyed, and in the half to which he had an eventual right, on surviving his sister, Mrs Kinnear, who was a widow and had no children. Mrs Kinnear bought the whole right at a price of £1550, and, by her directions, Jamieson and his trustee, in July, 1822, executed a conveyance of it, which narrated the terms of the settlement of her father, Robert Jamieson (1), as to this bank stock, and the subsequent general and special supplementary conveyance by her brother, Robert Jamieson (2), to the trustee, and then conveyed Robert Jamieson's (2) whole right and interest, present or eventual, in the said stock, "to and in favour of the said Mrs Kinnear, and her assignees, and failing her by death, without having assigned or conveyed the premises, then to the said Robert Jamieson writer to the signet, during all the days of his life, from and after the death of the said Mrs Margaret Jamieson or Kinnear, in case of her death, without having executed any such assignation or conveyance; but always with and under the declarations and provisions hereinafter inserted, so far as regards the above destination in favour of the said Robert Jamieson." The deed also conveyed the whole dividends "due, or to become due, and payable from the said capital stock, during all the days of the said Robert Jamieson's life." Jamieson was empowered, "failing Mrs Kinnear by death, without having executed any assignation or conveyance of the premises," to have the liferent right transferred in his favour in the bank books. It was then "expressly provided and declared, that the said destination of the said liferent, and eventual liferent right of the said capital stock of the said Royal Bank, hereby conceived in favour of the said Robert Jamieson, in the event of his surviving the said Mrs Kinnear, his sister, without her having executed any conveyance thereof to the prejudice of such destination, shall be merely for his liferent use only, and strictly of an alimentary nature; and, accordingly, it is hereby expressly provided and declared, that it shall not be in the power of the said Robert Jamieson himself to sell, dispose of, burden, or affect with debt, his said liferent right and interest in the said Royal Bank stock hereby conveyed, neither shall his said liferent interest be in any manner arrestable or otherwise attachable by his creditors, or in any other way subjected to or liable for his debts, deeds, or engagements, and all deeds of conveyance,

No. 15.

Nov. 16, 183

Thomson v.

Lyell.

No. 15. or for affecting or burdening the said liferent right which may be executed by the said Robert Jamieson, as well as all arrestments or other diligence to be raised and executed by his creditors, in prejudice of the above declaration, shall be, and are hereby declared to be void and null, to all intents and purposes, in the same manner as if such deeds, engagements, or diligence had never existed; and it is also declared that the simple receipt of the said Robert Jamieson himself, for the dividends of the said bank stock which may become due and payable to him from and after the death of the said Mrs Margaret Jamieson, or Kinnear, during all the days of his life, in virtue of the preceding destination, shall be a good and valid voucher to the said bank, without being in any manner subjected to or affected by the deeds, debts, and engagements of the said Robert Jamieson, or the arrestments or other diligence of his creditors, with and under which express condition and provision the above destination is hereby conceived in favour of the said Robert Jamieson, and shall be accepted of by him, and not otherways."

Nov. 18, 1836.  
Thomson v.  
Lyell

In this deed, the reason why a supplementary special conveyance in favour of the trustee had been resorted to by Robert Jamieson (2) was thus stated, after referring to the general conveyance: "but which conveyance of his said moveable estate, having been expressed in general terms, might not be sufficient to enable his said trustees to uplift the dividends due, and to become due, on said bank stock, and to sell and dispose of the said Robert Jamieson's liferent of the same: Therefore the said Robert Jamieson, in supplement of the foresaid general conveyance, contained in the trust-deed before mentioned, thereby assigned," &c. "all and whole his liferent right," &c.

In August following, Mrs Kinnear, who possessed considerable estate, besides the liferent of the bank stock, executed a trust-disposition and settlement, conveying to her brother, "but in trust, for behoof of the persons after-mentioned, all and sundry goods, gear, debts, and sums of money, heritable as well as moveable, presently belonging, or resting and owing to me by any person or persons, by bond, bill, decret, account, or otherways, together with all household furniture, and other moveables, of whatever kind or denomination, which shall belong to me at the time of my decease, with the whole rights and evidents which relate to the same, dispensing with the generality hereof, and declaring the same to be as valid and effectual as if every sum and subject belonging to me had been herein specially made over; but that in trust always, and for behoof of Catherine Lockhart, Jane, Robert, Margaret, Alexander, Christian Speid, and William Jamieson, children of the said Robert Jamieson, my nieces and nephews, and survivors of them per capita, equally among them, on their attaining the age of majority respectively." Jamieson was also named sole executor and universal legatory, but, in trust, for his children. The deed was written by a clerk in Jamieson's office, but the following holograph note was added on

the back of the deed by Mrs Kinnear in reference to a name-child of No. 15.  
 hers: "Declaring, however, the bills granted by Mr John Manderston, Nov. 18, 1836.  
 for sums of money, marked upon the back, to be paid to Margaret Jamieson Thomson v.  
 son Catanach, or her mother, are not to be affected by this deed, but are Lyell.  
 to be paid by him, or to the parties, and in the manner which I have  
 directed."

Mrs Kinnear died in the end of 1822, or beginning of 1823. Robert Jamieson (2) survived, and had the stock transferred into his own name in the bank books as liferenter in virtue of the deed executed by Scott Moncreiff. He uplifted the dividends on his own receipt. He had a family, but the ages of the members of the family did not appear on the record. None of them attempted to uplift any of the dividends during their father's life. He died on 7th December, 1832, at which time the Royal Bank (under a claim of retention which was afterwards extrajudicially arranged) were holders of the half yearly dividend on the stock standing in his name as liferenter, amounting to £229, 3s. 4d., which fell due on 7th July, 1831; and the dividend, of the same amount, which fell due on 5th January, 1832. A dividend of the same amount had also, previous to his death, been declared in the ordinary course of the bank management, to be due and payable on 5th January, 1833. Jamieson's children did not represent him. In these circumstances, a competition arose for these dividends, on the one hand, between the children and certain creditors, some of whom claimed for alimentary and pious debts; on the other, between the creditors themselves. The first question, which the children raised against all the creditors, was, whether the general settlement by their aunt, Mrs Kinnear, had not revoked the previous special provision in favour of their father, so that the whole dividends on the bank stock were conveyed to them, from the date of Mrs Kinnear's death, and could not be attached by any of the creditors of their father. A multiplicity of pleadings was raised, in name of the cashier of the Royal Bank, in which Miss Catherine Lockhart Jamieson, and the other children, pleaded, (1.) The conveyance by William Scott Moncreiff was the same as if it had been executed directly by Mrs Kinnear, being done of her own mere motion, and under her absolute control. It only conveyed conditionally, the liferent of the bank stock to Jamieson on her death, "without having assigned or conveyed the premises." But in a month afterwards she executed a general settlement, embracing her whole estate of every denomination, "dispensing with the generality hereof, and declaring the same to be as valid and effectual as if every sum and subject belonging to me had been herein specially made over." If the previous deed had not existed, this settlement must have been held to include the liferent of the bank stock, and every thing else of Mrs Kinnear's estate, but the specially excepted sum in the bills to Margaret Jamieson Catanach. But, it must equally be held to include the stock, and carry it to the notwithstanding the previous deed, because that deed was only

No. 15. to take effect if no conveyance or assignation of the bank stock was afterwards executed. The previous destination to their father was therefore evacuated by the subsequent settlement in their own favour. And their right ought not to be prejudiced, although he had got the stock transferred to his own name in the bank books, as he acted for them. (2.) The last dividend was not payable till 5th January, 1833, and as their father died in December preceding, it had never vested in him. The mere resolution of the bank directors, declaring the amount of the dividend, and the term when payable, had not the effect of vesting a right to such dividend, or at least making it available to creditors, where the debtor's right ceased prior to the term of payment.

Nov. 18, 1836.  
Thomson v.  
Lyell.

The creditors answered,—(1.) It was entirely a question of intention whether Mrs Kinnear's general settlement in favour of her brother's children, which was executed in August 1822, revoked the special conveyance for her brother's aliment, which she had made so recently as the preceding month. No change of circumstances had occurred in that short interval; and, in particular, the continuance of her regard for her brother was clearly evinced by her making him sole trustee and executor for behoof of his children, under that same general settlement which, they now contended, was meant to render him wholly destitute and dependent on them. This construction of the settlement was contrary to every presumption and every rational supposition; and the real evidence of the case, produced the conviction that Mrs Kinnear, in her general settlement, merely meant to dispose of her other estate, which was considerable, and had no reference to the previous special provision. In these circumstances, there was a series of precedents for holding that the special provision remained unrevoked.

The reference to the provision for Mrs Kinnear's name-child, Margaret Jamieson Catanach, had no effect in this question, because the provision on that child stood in very different circumstances from that in favour of her brother. Such a minute circumstance was more than counterbalanced by the opposite specialty, that, when Jamieson conveyed this same stock to the trustee for his creditors, a general conveyance had not been thought to reach it, and a special supplementary conveyance had been executed. The same view had probably been in his mind when the general settlement was executed by Mrs Kinnear, and the stock had been held not to be reached thereby, even if it could be supposed that the attention of the parties had been specially called to it at all. (2.) The dividend at the bank having been declared, in the ordinary course of procedure, the right to that dividend had vested, and the subject was therefore assignable or attachable.

The Lord Ordinary found, “ that the special destination of the life-rent of the Royal Bank stock in favour of the late Robert Jamieson, contained in the assignation of that life-rent taken by the late Mrs Kinnear, his sister, and declared in that deed to be alimentary in the person of

Robert Jamieson, was not revoked by the general settlement executed a few weeks afterwards by the said Mrs Kinnear; and, therefore, in the competition between the creditors of the late Robert Jamieson and Miss Catherine Lockhart Jamieson, and his other children, repelled the claims of the said children, and decerned; and found them liable in expenses." No. 15.  
Nov. 18, 183  
Thomson v.  
Lyell.

The children reclaimed.

**LORD BALGRAY.**—I think the Lord Ordinary has rightly disposed of the point now under review. I consider the deed by Mr Scott Moncreiff in precisely the same light as if it had been executed directly by Mrs Kinnear. She bought the subject and directed the seller how to convey it; and I have known entails executed by the seller of an estate, in terms of the directions given by the purchaser, which were, of course, the same in effect as if executed directly by the purchaser himself, after making up his titles. Viewing that as the deed of Mrs Kinnear, therefore, and admitting that there is an express power of alteration (which power, in the circumstances, would have been implied even though not expressed), I still think that the subsequent general settlement did not revoke the previous special provision. On looking to the terms of that provision, I see it is very anxiously declared to be an alimentary fund bestowed by the testatrix on her brother, which is to remain destined to him if she dies "without having executed any assignation or conveyance of the premises." This was the nature of the provision, and the diligence of creditors was carefully excluded. Now, when I see this lady, in July, so solicitously providing an alimentary fund for her brother's maintenance, how can I suppose that, in the very next month, and with no change of circumstances in the interval, she, by merely executing a general settlement in favour of her brother's children, which makes no reference to the previous alimentary provision to her brother, intended to deprive him of that provision, and bestow it on his children, along with the rest of her estate, which was considerable, leaving her brother totally destitute. I do not think that this was her intention—I cannot think so; and as this is a case to be determined according to the true intention of Mrs Kinnear in making her last settlement, I hold that she did not thereby revoke the alimentary provision on her brother. And I come to this conclusion with the less hesitation, when I observe that Mrs Kinnear makes her brother her sole trustee and executor in her general settlement. And it appears to me that the cases referred to by the creditors are much in point, and prove it to be well established in our law that a general settlement will not derogate from a previous special provision, where it satisfactorily appears that it was not the intention of the testator so to revoke it.

**LORD MACKENZIE.**—I admit that it is a principle in our law, that, in cases of strong and conclusive circumstances, a general settlement will not evacuate a previous special disposition; and the cases referred to as precedents were cases of that nature. But, in all those cases, the previous donation, mortis causa, contained no reservation, in gremio, as to the power of evacuating it by a subsequent conveyance. Such a power might no doubt, exist inherently from the nature of the deed, whether expressed or not; but in looking to the intention with which such a deed was made, I think it material to notice, that the destination to Robert Jamieson was, of a qualified nature, and contemplated from the first the possibility of evacuation by a posterior conveyance. Indeed the condition is re-



No. 15.

Nov. 15, 1836.  
Thomson v.  
Lyell

peated more than once, that the destination shall remain only if the grantor, Mrs Kinnear, died without executing "any assignation or conveyance of the premises;" or afterwards "any conveyance thereof to the prejudice of such destination." Considering that this is the nature of the first deed, the question comes to be whether the general settlement fairly included the same subject destined to Jamieson by the first deed, and revoked the destination in his favour, by assigning the subject away to others. No doubt has been stirred whether the words employed in the deed were sufficient to reach the bank stock, if they were intended to reach it; and perhaps there is no room for such a doubt. But the question which remains behind, is attended with much difficulty. In the whole circumstances, however, and in accordance with the doctrine of our law to which I have just adverted, I incline to adhere to the judgment of the Lord Ordinary. The circumstances of this case are very strong indeed. Mrs Kinnear evidently acquired the right to the bank stock for the very purpose of making an alimentary provision on her bankrupt brother, and from the first she took the conveyance of the stock in favour of her brother, failing herself, without otherwise destining it. Now, considering the settled and anxious purpose of making this an alimentary provision on him, and excluding all his creditors, I do not think that her execution of a general settlement, within a few weeks afterwards, which makes no reference to this special provision, and which confers no other provision on her brother, and which, at the same time evinces continued regard for him, by making him sole trust-dispensee and executor for his children, who are the parties favoured by that settlement, can be held to have revoked, or been intended to revoke, the previous alimentary provision, so anxiously settled on him. On the whole, I incline to adhere to the Lord Ordinary's judgment on this point, though I think it not unattended with difficulty.

LORD GILLIES.—I think it a case attended with very great doubts. But it is purely a question of intention, and on considering all the circumstances, and the strong real evidence of the facts of the case, I incline to hold that the general settlement was not intended to recall the previous special assignation by the testator in favour of her brother.

LORD PRESIDENT.—I am also for adhering. Every thing depends on the circumstances, and on the intention of the parties, so that there is scarcely any one of this class of cases which can be quoted as a precedent to another. But looking to the facts here, and to the anxious terms of the destination of the alimentary provision to the brother of the testatrix, I incline to think that it would have required a special assignation of the subject to other parties, to do away the effect of that provision; and that a mere general settlement ought not to be allowed that effect. In such cases as this, parties are sometimes apt to confound the question of power with the question of intention, which are very different things. The power of the testatrix was undoubted; but I think it was not her intention to revoke, and accordingly that, by a fair construction of her last will, we cannot hold her to have revoked the previous provision.

The Court then proceeded to dispose of the question as to the right to the third dividend.

LORD GILLIES.—In regard to the third dividend, I am clearly of opinion that

the creditors of Robert Jamieson cannot reach it. He died some time before it became payable. It was true that prior to his death, the bank directors had fixed the amount of the dividend, and declared the period of its payment; but that was not enough if he died before it became payable. There is much analogy between this case and the right of a party to a term's rent falling due, under a written lease, to which he has a liferent right. If he dies, for example, between terms, the rent of the next term after his death cannot be taken by his creditors, and never became his, because he did not survive the period of payment; yet both the amount of it, and the period of its being payable, were as definitively fixed and ascertained, as the dividend could be by any declaration of the bank directors. Notwithstanding any declaration of a dividend, the bank might have met with such losses before the term of payment, as might have rendered it necessary to alter the resolution on the subject; or it might even have become bankrupt altogether.

**LORD PRESIDENT.**—I am of the same opinion. If the mere declaration of a dividend, as payable at a future period, was to suffice to entitle a party's creditors to attach it, though he died before it became payable, it is difficult to see what limit could be set to such a rule. If the declaration will reach forward to future dividends, not payable for a month after, so it might reach forward to the dividends of an ensuing year or years, if it only declared the amount and fixed the period of payment of them.

**LORD MACKENZIE** concurred.

**LORD BALGRAY** dissented.\*

**LORD MACKENZIE.**—This prevents the creditors from reaching the last of the three dividends accruing on this fund. But I am a little doubtful, considering the absolute exclusion of the right of all creditors, or their diligence, by Mrs Kinnear, whether the creditors (except those for alimentary and pious debts) can compete at all.

*Pyper for Creditors.* The children of Robert Jamieson do not represent their father, so that, as to any arrears of this alimentary fund, so far as it fell due to him in his lifetime, there is nobody to oppose them. The questions arising, therefore, fall necessarily to be discussed among the creditors themselves.

**LORD MACKENZIE.**—Perhaps it may be doubtful, even in these circumstances, whether such arrears should not go to the children, who have been all along undoubtedly in right of the fee of the fund, out of which these arrears grew; and whether such a destination of these arrears may not be truly according to the will of the testator and reached by it. Or perhaps they might be held to be just an unappropriated portion of the testator Mrs Kinnear's estate.

*Keay for the Children.*—I move the Court to reserve these pleas for discussion before the Lord Ordinary.

*Rutherford for the Creditors.*—No such plea has been put on record, or can be entertained under this record.

**LORD MACKENZIE.**—I believe these pleas should not be sent back to the Lord Ordinary. It would be contrary to the use and intention of our system of closed records to do so.

**THE COURT** then pronounced this interlocutor:—"Adhere to the interlo-

\* See note, next page.



No. 15.

v. 18, 1836.

JAMES V.

et al.

cutor reclaimed against, in so far as respects the two first dividends ; but alter the same in so far as respects the third dividend on the Royal Bank stock, payable on 5th January, 1833, and find that the said third dividend belongs to the children of the late Robert Jamieson, and prefer them to the \* same accordingly ; and recal the said interlocutor in so far as it finds the children of the said Robert Jamieson liable in expenses."

DUNN and WILSON, W.S.—J. RICHARDSON, W.S.—GREIG and MORTON, W.S.—FERRIE and JAMIESON, W.S.—Agents.

\* Nothing was stated on the record respecting the rules or practice of the Royal Bank, in striking and paying dividends. The raiser (cashier of the Royal Bank) stated in his condescendence of the fund in medio, that the third of the dividends in question " was neither due nor payable on account of the stock, before Mr Jamieson's death." And it was averred by the creditors, in general terms, that that dividend " had been made and declared during the lifetime of Mr Jamieson, and before the 22d November, 1832, though payment was postponed." The children of Jamieson " denied " this statement : and the case was understood to be argued, in the Inner-House, on the general statement, as made in the prefixed report, that the amount of dividend, and the period of its payment, had been declared, in the ordinary course of the bank management. The reporters have been favoured by LORD BALGRAY, since the judgment of the Court, with the following note of his Lordship's opinion respecting the right to that dividend. " I entertain considerable doubts as to the view taken by Lord Gillies, in regard to the third dividend, and I am of opinion that the Act of Parliament ought to be first consulted. In banking establishments, the declaration and payment of dividends are regulated and specially pointed out, either by the Act of Parliament which creates the bank, or by the charter, or by the contract of co-partnery. The Scottish Act of Parliament, 5th Wm. III. 1695, erecting the Bank of Scotland, declares, ' That no dividend shall be made, save out of the interest or produce arising out of the joint stock, and by the consent of the adventurers, in a general meeting.' By constant practice in that establishment, and it is believed in all other similar establishments, the dividends have been half-yearly, mentioned to be ending at precise dates. And the directors who have the management, after the lapse of such half-yearly period, make a minute, recommending to the next general meeting of the proprietors that a dividend at so much per cent should be made. Then the subsequent general meeting express their consent by a regular minute, ' that a dividend be made out of the interest or product arising out of the joint stock for the half-year ending on a precise day, at a certain rate of interest on the capital stock ; ' and then there is a recommendation to the court of directors to fix the day of payment, and the same is advertised. Under these circumstances, if the act erecting the Royal Bank be conceived in similar terms, it is evident that the existence and constitution of the dividend commences with the Court of Directors, and is rendered complete by the resolution and declaration of the general meeting of proprietors. The dividend is declared for a period that is passed ; consequently, if the liferenters be alive after the declaration of the general meeting, he must have right to receive such dividend when it shall be payable. And if he dies before the dividend becomes payable, it must pass to his executor and not to the heir. On the same principle that any debt constituted but not payable till a future day, passes to the creditor's representatives, if the creditor die before that day, the dividend being constituted during the existence of the liferenter's right, is a debt due to the liferenter, although it is not payable till a future day. It therefore appears to me, that the Act of Parliament and practice of the bank should be more carefully looked into and examined."

JOHN THOMAS LYELL, Pursuer.—*Rutherford—Russell.*  
MISS CATHARINE CHRISTIE, Defender.—*D. F. Hope—Buchanan.*

No. 16.

*Passive Titles—Executor—Creditor—General Charge.*—Where the next of kin of a deceased resided partly within the kingdom and partly without, a creditor of the deceased raised letters of general charge, and a summons of constitution, which were signeted and executed on the same day, against those of the next of kin who were without the kingdom; after the lapse of 20 days, the charge and the summons were both executed on the same day against those within the kingdom; the summons was not called in Court until after the induciæ of the charge and of the summons had expired against all the next of kin.—Held that this form of procedure was regular, and objection repelled that the summons had been executed against part of the next of kin, before the charge had been given to the rest.

In the competition of creditors mentioned in the preceding report, Miss Catharine Christie, sister-in-law of the deceased Robert Jamieson, W.S., produced a claim as executrix-creditor, confirmed for £1403, 10s. and other sums. Her confirmation proceeded upon a decree dative following on a decree of constitution, dated Jan. 21, 1834. Part of the children of Jamieson were domiciled in England, and part, including the eldest son, in Scotland. The letters of general charge, and also the summons of constitution at Miss Christie's instance, were signeted on 13th November 1833. On 14th November, both were executed against those of the family who were domiciled in England. On 4th December following, being 20 days afterwards, the general charge and the summons of constitution were executed against those of the family who resided in Scotland. The summons was not called in Court until after the expiry of the charge, and of the induciæ of the summons as against all the defenders.

Lyell raised a reduction of the confirmation, and of the decree of constitution, on various grounds, one of which was that it was irregular to have executed the summons of constitution against any of the next of kin, before the general charge was executed against all of them. Though it had been held<sup>1</sup> that the execution of the general charge and the execution of the summons might proceed simul et semel, it still was essential that the general charge, as against all the defenders, the next of kin, should at least be concomitant with the execution of the summons of constitution against any of them.

The defender answered that by Macqueen's case it was fixed that the execution of the general charge and of the summons of constitution might proceed simul et semel; and had all the children been within the kingdom, it might have been irregular to execute the summons against any, until the general charge was given to all: but where part of the children lived in England, and the summons required a longer induciæ, it was regular to proceed by giving the charge, and executing the summons, unico contextu, against those out of the kingdom; and afterwards, giving the

<sup>1</sup> Macqueen, July 9, 1829 (ante VII. 882).

No. 16. charge and executing the summons, unico contextu, against those within the kingdom; provided that the induciæ of the whole were fully expired before the summons was called in Court, which was the case in this instance.

Nov. 18, 1836.  
Lyell v.  
Christie.

The Lord Ordinary repelled this, among other reasons of reduction, and Lyell reclaimed.

LORD PRESIDENT.—I think that there was no irregularity in the form here adopted. Against all the children who resided in England the charge was given, and the summons was executed on the same day. At a subsequent period, the charge and the summons were both again executed on the same day against those of the family who resided in Scotland. There were thus two regular executions, in which not one of the next of kin had the summons executed against him, before the general charge was also given to him. They were concurrently executed in both instances, first against the next of kin without Scotland, and afterwards against those of the next of kin within it. But it is fixed that they may be executed simul et semel. Both the charge and the induciæ of the summons had fully expired as to all the next of kin, before the summons was called in Court. I therefore consider the procedure to be unobjectionable, and, in regard to this reason of reduction, I concur with the Lord Ordinary in repelling it.

LORD BALGRAY concurred.

LORD GILLIES also concurred, but was understood to do so with some difficulty.

LORD MACKENZIE.—I cannot concur with the Court in repelling this reason of reduction, which appears to me to be well founded. It is true that there has been a relaxation from more ancient forms so far, that both the charge may be given, and the summons may be executed unico contextu. But it has never yet been held that a summons can be executed without a charge against all the defenders being at least concomitant with it. The summons cannot be executed without a charge, or before any charge. Now if that be so, I am at a loss to understand how a charge against one part of the next of kin, which is not good against the rest, is better for legalizing a summons of constitution against any of the next of kin, than the total want of a charge altogether would be. By the style of the summons it bears, and necessarily bears, that the next of kin have been charged; and though I am aware that such charge may be concurrent with the execution of the summons, still it cannot be later than this. I therefore consider that the summons, having been raised against part of the next of kin, some weeks before the charge was given to the rest, was unwarrantable, and that the decree of constitution was irregularly obtained.

LORD PRESIDENT.—I should take the same view if, either, all the next of kin had been within Scotland, or all of them out of Scotland. But where part were within, and part without the kingdom, I think the case is different, and the procedure was regularly had.

THE COURT pronounced this interlocutor:—"Adhere to the interlocutor reclaimed against, in so far as it repels the reasons of reduction grounded on the objection to Miss Christie's decree of constitution as having proceeded on a general charge and summons irregularly executed; and before answer, quoad ultra," ordained certain farther discussion to take place.

ANDREW ROBERTSON, Pursuer.—*A. Wood.*  
DAVID OGILVIE, Defender.—*H. J. Robertson.*

No. 1

Nov. 18, 1  
Robertson  
Ogilvie.

THIS was an action of relief, turning upon specialties, against the cautioner of a messenger for payment of the contents of a bill on which the messenger had given an erroneous charge, and of expenses subsequently incurred. The Lord Ordinary decided in favour of the pursuer, and

Jaffray v.  
Carrick.

2d Division  
Lord Jeff  
T.

THE COURT adhered.

GEORGE MONRO, S.S.C.—JAMES BURNES, S.S.C.—Agents.

WILLIAM JAFFRAY, Advocate.—*Monteith.*  
MISS JEAN CARRICK, Respondent.—*M'Neill—A. M'Neill.*

No. 11

*Landlord and Tenant—Hypothec.*—Circumstances in which held that certain furniture brought into a dwelling-house by the tenant, who was tortiously withholding it against the true proprietor, and pending legal proceedings to recover it, was not subject to the landlord's hypothec, though no intimation was made to him by the owner of the furniture pending the claim.

In the year 1824, the respondent, Jean Carrick, purchased certain articles of furniture at a sale of her father's effects. She subsequently resided in family with her brother, Thomas Carrick, removing this furniture to the different houses successively occupied by him. About the beginning of 1833 Miss Carrick ceased to reside with her brother, who, on her leaving his house, refused to deliver up the furniture. On the 5th of February she presented a petition to the sheriff of Stirlingshire, praying that he would ordain Carrick to deliver up to her the furniture in question as her property. This petition led to a contested process in the Sheriff Court, the result of which was a finding by the sheriff, on the 29th November, that the furniture was the property of Miss Carrick, and a decerniture for its delivery in terms of the prayer of the petition.

Nov. 18, 18  
2d Division  
Ld. Moncr  
T.

While this litigation was pending, the furniture had been removed by Carrick from the premises where he and his sister had last resided toge-

\* November 18, 1836.—The case of Johnston v. Dundas's Trustees was this day called, when it appeared that only one counsel (Mr Rutherford), who was engaged in the First Division, had been instructed to support the reclaiming note, the counsel who signed the note not having been instructed. The Court intimated that, in cases coming from the Outer-House to be reviewed by their Lordships, two counsel ought to be instructed on each side, and that the counsel, whose name appeared at a reclaiming note, ought to be instructed and prepared to support the

No. 18. **Nov. 18, 1836.**  
**Jaffray v. Carrick.**

ther, to a house belonging to the advocator Jaffray, to the occupation of which he entered by lease at Whitsunday 1833. Miss Carrick gave no intimation to Jaffray either then or afterwards that the furniture was her property, or that she was taking steps to recover it. On the 9th of December, Jaffray sequestrated for the rent the effects brought into his house by Carrick, and on the 18th December, on the narrative that Miss Carrick was about to remove the sequestrated furniture, presented a petition to the sheriff, praying to have her interdicted and discharged from carrying away all or any part thereof till payment should be made of the Martinmas rent and security found for that to become due. Interim interdict having been granted, Miss Carrick lodged answers, in which she set forth the Sheriff Court process in which she had been found to be proprietor of the furniture in dispute, and pleaded, *inter alia*, that, as it had been illegally detained and carried into Jaffray's premises without her approbation or consent, it was not subject to the landlord's hypothec. The sheriff pronounced this interlocutor:—"Finds it instructed by the process between the defender and the compeerer (Thomas Carrick), produced, that the furniture in question is the defender's property: Finds it not averred by the pursuer, that the furniture claimed by the defender was carried into his house with the defender's consent or approbation, and that the process produced elides any presumption of collusion which might otherwise arise from the near relationship of the parties: Finds it instructed that the furniture in question was not lent to the compeerer for hire, therefore recalls the interim interdict, and assoilzies the defender from the conclusions of the complaint, and decerns: Finds her entitled to expenses of plea."

Jaffray brought an advocacy, and pleaded, *inter alia*, that there was no sufficient evidence of the furniture being Miss Carrick's property—that it must be held to have been deposited with the tenant, and allowed to remain with him, in which case, though not lent for hire, it fell under the hypothec, the landlord's right extending over all *invecta et illata*, and he being entitled to say that it was on the faith of the ostensible ownership of the furniture that he originally gave credit to the tenant;<sup>1</sup> that the relationship of Miss Carrick and the tenant raised a presumption of collusion; that in the present case she was bound to have intimated to the landlord the fact that the furniture belonged to her, and was barred *personali exceptione* from interfering with his right of hypothec.

Miss Carrick answered, that the furniture was proved to be her property by the sheriff's decree in the process with her brother, which process also showed that there was no collusion between the parties; that

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<sup>1</sup> Ersk. ii. 6, 64; Bell, ii. 31; Hunter on Landlord and Tenant, p. 684, 687; Wilson v. Spankie, Dec. 17, 1813 (F.C.); Pothier, Contrat de Louage, p. 136; Code Civil, § 2102.

she was not required to intimate to the landlord that the furniture was hers, and was not presumed to know any thing about him; that even in the general case furniture lent without hire was not subject to the landlord's hypothec,<sup>1</sup> but in the present instance the furniture was detained from the true owner, and carried without her consent into the premises of the landlord, and was therefore entirely without the rule of the authorities referred to by the advocate, and, on the original principles applicable to this question, not subject, to the hypothec.<sup>2</sup>

No. 11  
Nov. 18, 1  
Jaffray v.  
Carrick.

The Lord Ordinary repelled the reasons of advocacy, and remitted simpliciter, adding to his interlocutor the following note.\*

<sup>1</sup> Bell, ii. 31; Cowan v. Perry, Jan. 31, 1804, in Bell, *supra*.

<sup>2</sup> Cod. 4, 29, 5; Voet, 20, 2, 5; Pothier, 2, 277, § 241, 243.

\* "The Lord Ordinary does not think it necessary for the decision of this cause, to go minutely into the decisions on the question whether goods lent to a tenant not on hire fall under the landlord's hypothec or not. He is inclined to think, that the rule, as laid down by Mr Bell, 2, p. 31, on the authority of the case of Cowan v. Perry, 31st January, 1804, is right; that, after all the explanations of that case which were given in the debate, it did distinctly involve the point, and that it is not really contradicted by Wilson v. Spankie, December 17, 1813, or any later case. But it appears to the Lord Ordinary, that the appeal made to the original principles of the subject does, when rightly applied to the facts of this case, very clearly resolve it, independent of that particular distinction. There can be no question, that, abstractedly and on general principles, the rule of law is, that a man cannot pledge property which is not his own: *Res aliena pignori dari non potest*. All the cases in which either express pledge or tacit hypothec is admitted, are exceptions from that rule, and proceed on a presumption of the consent of the real owner, by the possession voluntarily given, and the title of such possession as implying such consent. Hence, in the civil law, there is this rule in the Codex on the S. C. Velleianum, '*si sine voluntate tua, res tua a marito tuo pignori data sunt, non tenentur*.' Cod. 4, 29, 5; where the exceptions of a consent given, or say thing done to deceive the creditor, are also stated. Both Voet, 20, 2, 5, and Pothier, 2, 277, § 241, as quoted in the debate, place the case of hypothec on *invecta et illata*, precisely on this footing, expressly requiring as the condition which creates the exception, that the goods placed in the premises, not being the tenant's property, are '*domini consensu in prædium conductum ita inducta, ut perpetuo ibi sint, seu in usum conductoris habeantur*.'—'lorsque c'est de leur consentement, ou express ou tacite, qu'ils garnissent et occupent la maison;' and, though the latter author explains that the presumption of consent will not be effectually taken off, so as to bar the landlord's claim as upon fraud, by a latent agreement between the owner and the tenant that the goods shall not be subject to the hypothec, if, with the owner's consent, they are placed in the premises to remain permanently, he goes on in § 243, to lay it down clearly and expressly, that it is essential to the application of the hypothec, that it is with the consent of the owner that the goods are introduced into the house, '*il faut que ce soit par la volonté du propriétaire des dits meubles qu'ils soient été introduits dans la maison*.'

"These are the principles on which the rule and the exception stand in our law. According to them it is settled, that furniture lent for hire is subject to the hypothec, on the presumption of consent by the voluntary placing of the furniture for permanent use on the premises. It has been thought that furniture merely lent gratuitously, and, of course, at the will of the lender, does not come within the same presumption; and, therefore, that in that case, the consent to the impignoration is not given, and the exception to the general rule not established, notwithstanding that the moveable subjects are introduced with the owner's consent. But this is not fully settled, and whether it stands on a solid distinction or not,



## No. 18. Jaffray reclaimed.

Nov. 18, 1836.

Jaffray v.  
Carrick.

**LORD GLENLEE.**—I think the interlocutor right, and that we have nothing to do with the law as to furniture lent for or without hire. Here the respondent claimed certain articles of furniture, which she had originally purchased, on the

the fact which it is essential for the landlord to establish, in order to raise the presumption of consent at all or in either case, is, that they were introduced into the house with the owner's consent.

“What, then, is the present case upon the facts? On the 5th February, 1833, the respondent, not then residing with her brother, presented a petition to the sheriff, praying that he would decern and ordain Thomas Carrick to deliver up to her certain furniture specially described in an inventory, and which she averred to be her property. At that time the furniture was not in the premises of the advocator, but in another house at a very considerable distance, where it had been in use while the respondent herself lived there. Thomas Carrick's entry to the advocator's house was not till Whitsunday, 1833, three months thereafter. The petition led to a process in the Sheriff Court, in which it is quite clear that the respondent and her brother were at open war, so that there could be no collusion in the matter, besides, that the action was raised before the advocator could have any interest. The result of the process was, that on the 1st November, 1833, the sheriff found it proved that the furniture was the property of the respondent, and decerned for delivery, in terms of the prayer of the petition. By that time the furniture was in the advocator's house, but no sequestration was applied for till some time after the date of the decree.

“In this state of the case, the question is, whether the advocator has any legal basis on which to establish the exception from the general rule of law, that the property of a third party cannot be pledged or hypothecated. The decree of the sheriff must be taken as establishing that the goods are the property of the respondent, unless the advocator had offered, in some competent form, to prove that it did not belong to her either for herself, or in trust for others. And, taking it to be the respondent's property, it is for the advocator to show, either as matter of fact, or by some admissible presumption of law, that she consented to their being introduced into his house. As matter of fact, this is impossible, because three months before the brother's entry to the advocator's house, while confessedly the furniture was in a different place, she had judicially demanded decree for delivery of it to herself. But the Lord Ordinary apprehends that there can be no presumption of law in this matter. The consent to the introduction of the goods, which the authorities speak of as essential to ground the presumption of consent to the hypothecation, must be an actual consent; whereas here it was in the face of a judicial demand of delivery, that they were moved into the advocator's premises. The advocator says, that the goods are ostensibly in the possession of Thomas, and that he had no notice of the respondent's right or of the respondent's process. But this assumes that she was bound to give any such notice. She might know nothing of the intention to remove this furniture. A possession held by Thomas in one house, from the accident of the parties having previously lived together, could not warrant any party to infer a consent to his hypothecating them to another party and in a different house. Yet it lies with the advocator, who says that a consent was given, to show that it was so; and whether the litigiousness by the process might of itself create an impediment to the constitution of such a hypothec or not, it at least brings the case to this, that the advocator can never show that either by actual consent, or by any presumed consent of the respondent, the furniture was removed into his premises.

“The Lord Ordinary, therefore, thinks that on this ground the case is clear in favour of the respondent. The sheriff has found the fact instructed that the furniture was not lent for hire. But his judgment stands firm on the other ground, comprised in the two first findings of the interlocutor.”

plea that they were not lent but taken away tortiously, and she was successful in vindicating them. It seems unreasonable to suppose that she was bound in initio litis to warn the whole world against trusting her brother. She raised the process in February before the term of his entry to the advocator's premises; and how she was to know that her brother was to take the advocator's house, I cannot see. Intimation subsequent to that was unnecessary, and the advocator admits in his pleadings that at the date of the sequestration, he knew she was claiming the furniture. I see no evidence that the furniture was left with the respondent's brother, when she separated from him, by her consent, but the contrary; and I am therefore for adhering.

No. 18.

Nov. 18, 1836  
Jaffray v.  
Carrick.

LORD MEADOWBANK.—I am of the same opinion. This furniture was the property of the respondent, and tortiously withheld from her. Supposing her brother, instead of detaining the furniture in his possession, had broken into her house and stolen or spoliated it, was she to be precluded from reclaiming her property, though no notice had been given to the landlord? To say so would be the wildest proposition ever advanced. If the advocator relied solely on the property appearing in the possession of the tenant, was he not bound to ascertain if the furniture really was Thomas Carrick's property? The principle on which the effects of a third party are made liable to the landlord's hypothec is, that they have come into the tenant's possession with the express or implied consent of the owner; but how implied consent is to be made out from express dissent it would be difficult to discover.

LORD MEDWYN.—I take a somewhat different view. As to the case that was put of the property being stolen, there a *labes realis* attaches, which always entitles the owner to vindicate. My difficulty is, that the respondent, having got decree in the process with her brother in November, gave no intimation to the landlord, who did not sequester till the 9th of December. It is the principle of the law of hypothec that the *invecta et illata* are hypothecated to the landlord, and whoever leaves furniture to be made use of must know that it is liable for the rent. When the respondent brought the process to recover her furniture, she ought to have put Mr Jaffray on his guard, and intimated that she did not consent to the furniture being removed to his premises. In such a case, the circumstance, "*nec admonuit locatorem*," is regarded as essential by Voet.\*

LORD JUSTICE-CLERK.—It is not necessary for us to decide any general point. I go on the specialties of the case, which are here clearly made out. The respondent commenced proceedings to vindicate her property in February; the tenant's entry took place at Whitsunday following. It is said, why did she not interpellate when the furniture was removing into the advocator's house; but I see no neces-

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\* The whole passage from Voet referred to by his Lordship and by the Lord Ordinary is as follows:—

"Non aliter tamen *invecta et illata pignoris taciti jure* tenentur, quam si *conditoris* propria sint, aut aliena quidem, sed domini consensu in *prædium conditoris* ita inducta, ut perpetuo ibi sint, seu in usum conductoris habeantur, *quasi locati*, sedilia, instrumenta artis quam conductor in domo exercet; quasi hoc *dominus* tacite consenserit in hanc tacitam rerum suarum obligationem, saltem *in prædium*, deficientibus propriis conductoris; nec possit videri extra fraudem *locatorem* hoc agi per conductorem, dissimulavit, nec admonuit locatorem."



No. 18.

Nov. 19, 1836.  
Chandos v.  
Breadalbane.

sity for such a proceeding. Besides, by claiming her property in the Sheriff Court, she gave sufficient warning. Having given no consent to its detention by her brother and subsequent removal, there was nothing to prevent her vindicating it. Take the case of spulzied property. While the owner is taking steps to recover, would a landlord be entitled to make the subjects liable for rent?

THE COURT, in so far varying the Lord Ordinary's interlocutor, "advocated the cause, and, in the particular circumstances of this case, repelled the claim of the landlord, recalled the interdict, and assoilzied the defender, with expenses."

WM. MUIR, S.S.C.—R. and A. KENNEDY, W.S.—Agents.

No. 19. MARQUIS and MARCHIONESS OF CHANDOS, Petitioners.—*Lord Advocate Murray—Sol.-Gen. Cuninghame—Ivory.*

MARQUIS OF BREADALBANE, Respondent.—*Rutherford—Baillie.*

BREADALBANE TRUSTEES, Respondents.—*D. F. Hope—Outram.*

*Process—Interim Decree.*—In a cause before the Court of Session, a lady, the wife of an Englishman, was found entitled to legitim, her right thereto not having been expressly excluded in her marriage-contract, which was framed in England; the decision of the Court having been affirmed on appeal, and an interlocutor pronounced applying the judgment of the House of Lords, the lady and her husband applied for decree for an interim payment; this application was opposed by the party who had resisted her claim of legitim, on the ground of the dependence of certain proceedings in the Court of Chancery, instituted with a view to "reform" the contract, and have a clause inserted excluding the legitim;—The Court granted interim decree.

Nov. 19, 1836.

2D DIVISION.  
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THE judgment in this case (ante, XIV. p. 313) having been affirmed on appeal (August 16 and 19, 1836), the Court, on the application of the Marquis and Marchioness of Chandos (November 12) applied the judgments of the House of Lords, and decerned and ordained the trustees of the late Marquis to make over to the petitioners "one-third part of the free moveable estate of the deceased," to which they had been found entitled in name of legitim.

Thereafter, Lord and Lady Chandos presented a petition, setting forth, that the amount of the moveable succession, as condescended on in the multiplepoinding, was £325,666, 17s. 10d.; that the Dowager Marchioness of Breadalbane had already received, in respect of her jus relictæ, an interim decree for £100,000; that the trustees were willing to have made a similar payment to the petitioners, but had been interpellated from doing so by the Marquis of Breadalbane, on the ground of the dependence of certain proceedings in the Court of Chancery, instituted by his Lordship with the view of "reforming" the existing marriage-contract between the petitioners; that, with reference to these proceedings, while the judgment of this Court was under appeal, his Lordship had

petitioned the House of Lords to put off the hearing “until judgment should be pronounced in the suit before the Court of Chancery,” stating, in his petition, that he had been “advised, that if the judgment of the said Court of Session shall be affirmed by your Lordships, the same will be conclusive against your petitioner, although the said provisions in the said settlement should be declared to have been in full satisfaction of the right of the said Marchioness of Chandos to legitim, and although the said settlement should be decreed to be amended and reformed in manner aforesaid;” that the House of Lords had refused this application, and proceeded to hear and dispose of the appeal; and that the dependence of the Chancery proceedings was no ground whatever for preventing the judgment of the House of Lords from receiving present effect. They therefore prayed to be found entitled to an interim payment to the extent of £100,000.

No. 19.

Nov. 19, 1836.

Chandos v.

Breadalbane.

The Marquis of Breadalbane put in answers to this petition, in which he contended, that the amount of the finding of the Court in regard to his claim of legitim was, that he must collate his interest in the entailed estate before he could make an effectual claim thereto, and that time ought to be allowed him for consideration, and a period assigned, within which he may be enabled to declare his option to collate or not; that having recently discovered important documents not under consideration of the Court of Session, showing that the marriage-contract in question was disconform to the intention of the parties, he had filed a bill in the Court of Chancery, praying that Court to correct or reform the contract, by having a clause inserted excluding Lady Chandos's claim of legitim, and to grant an injunction against Lord and Lady Chandos receiving, and the trustees paying over to them, any part of the funds in dispute; that he was in daily expectation of such injunction being granted, and the Court ought to stay their proceedings until the injunction should be allowed or refused.

The trustees likewise lodged answers, stating, that they were willing to consent to an interim decree to the extent of £70,000, provided the Court should put them in safety to do so.

LORD JUSTICE-CLERK.—Looking to the very deliberate manner in which this question has been decided, to the nature of Lady Chandos's claim, and the way in which it was opposed by Lord Breadalbane, and also to the way in which he enforced his own claim, and looking to his Lordship's petition to the House of Lords to delay the hearing of his own appeal, and the statement then made by him, I am of opinion that the delay which is now asked ought not to be granted. If a case was deliberately considered, and the interests of parties carefully weighed, it was in the present instance. It is too much for the Marquis now to require time to deliberate whether he will or will not collate. He has had time to do so. No doubt, even at this hour, he is entitled, on the principle of justice, to come forward and say, I am ready to collate; but that cannot

No. 19.

Nov. 19, 1836.  
 Chandos v.  
 Breadalbane.

warrant this demand for the application of the judgment being delayed. The other ground alleged for delay is, the dependence of certain proceedings in Chancery relative to Lord and Lady Chandos's marriage-contract. But this is no new discovery, as the same ground was urged before the House of Lords. An able argument was maintained on the interpretation of that contract, and we were of opinion that Lady Chandos was entitled to her legitim, it not being formally excluded. The argument for Lord Breadalbane was pressed in the House of Lords, but their Lordships affirmed our judgment. In reference to this proposal of Lord Breadalbane, I would ask, who is so competent to judge of the effect to be allowed to these proceedings in the Court of Chancery as the House of Lords, to whom the petition founding on them was presented? After hearing that petition, they disposed of the appeal, affirming our judgment. On the whole, I am decidedly of opinion that nothing has been stated to make us delay judgment on this application for an interim decree, and I think it should be for £70,000.

LORD GLENLEE.—I do not see how, consistently with our duty, we could do otherwise than has been proposed. The judgment of this Court has been affirmed; and we do not require any consent from the trustees, as they must obey. As to granting Lord Breadalbane time to consider if he will collate or not, I never heard of such a proposal.

LORD MEADOWBANK.—It is unnecessary for the rest of the Court to do more than express their concurrence in the opinions given by the Chair and Lord Glenlee. I think we should act most irregularly were we not to grant the interim decree.

LORD MEDWYN.—I entirely concur. According to the terms of our judgment, I have no doubt that Lord Breadalbane may now offer to collate, but he is not entitled to require an order from the Court of Session for him to say whether he will or will not collate. As to the proceedings in the Court of Chancery, we know nothing of them or their effects. They have been compared to a process of reduction on the ground of *res noviter veniens*. I doubt much whether this would be a sufficient cause for our allowing delay; and it would be matter of grave consideration how far we are not bound to carry through directly the judgment of the House of Lords. If the proceedings in Chancery should be such as to affect that judgment, the trustees are well advised, and will judge how far they are bound by them; but there is no collision of jurisdictions, as we have merely to follow out the judgment of the House of Lords, and have no concern with the proceedings of any other Court.

THE COURT accordingly granted interim decree for £70,000, to be paid by the trustees to the petitioners.\*

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—W. B. CAMPBELL, W.S.—DAVIDSON and SYME, W.S.—Agents.

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\* Some days after the date of this advising, an injunction was granted by the Court of Chancery against Lord and Lady Chandos receiving any part of the funds in dispute.

NEIL CAMPBELL MACLAREN, Suspender.—*A. McNeill*.  
ALEXANDER SYMERS, Respondent.—*D. P. Hope—Paterson*.

No. 20.

Nov. 19, 1836.  
Maclaren v.

*Process—Suspension.*—Bill of suspension refused as informal, there being no Symers' conclusion for suspension of the charge.

In June, 1836, the respondent, Symers, took out a small-debt summons for £8, 15s. in the Sheriff Court of Glasgow against the suspender, Maclaren. The principal summons bore to be for "the sum of £8, 15s., per account contracted prior to 9th September last." The citation-copy omitted to mention the sum being due "per account," but, in the will, the messenger was required "to deliver to the defender a copy of any account pursued for." A copy of the account pursued for was served along with the complaint; and it was so stated in the execution by the officer.

Nov. 19, 1836.  
2<sup>d</sup> Division.  
Bill-Chamber.  
Lds. Meadow-  
bank and  
Jeffrey.

The Sheriff having decerned for the sum claimed, Maclaren presented a bill of suspension, on the ground of the provisions of 10 Geo. IV. c. 55, having been contravened, in so far as no mention of the sum in question being due "per account" was made in the body of the claim served on the defender.<sup>1</sup> The suspender, on presenting the bill, did not produce the citation therein referred to as defective.

Answers having been given in, the Lord Ordinary (Jeffrey) pronounced the following interlocutor, refusing the bill, and added the subjoined note:—"In respect that the principal summons (which is not sought to be reduced or improved) distinctly specifies the debt to be due by an account rendered, that the execution thereon bears that a copy of such account was served on the suspender, that it is admitted that such a copy was actually served along with the citation, and that the suspender has not produced the citation so served on him, to instruct his averment that

<sup>1</sup> Brown v. Richmond, Feb. 16, 1833, ante, XI. 407; and Wallace v. Hume, July 3, 1835, ante, XIII. 1034.

"If the copy of citation makes no mention of the account, the case would be within the rule of that of Wallace. But while this is withheld, no credit whatever is due to the mere averment of the suspender, in opposition to the original summons and execution thereon, produced. The objection founded on the want of specification as to the bill, which forms one item in the account, is a great deal too critical. First, It is quite competent and usual to describe generally as due per account, though one item in the account may be a bill, or the balance of a bill; and, second, If the debt had been only described in the summons as due per bill, this would have been quite sufficient, provided a bill was produced and served, and noticed as served in the execution and citation. That it was not a bill due originally to the pursuer, but one to which he had afterwards acquired right, could be of no consequence as to the form or sufficiency of the procedure, ~~and~~ it might suggest upon the merits."

No. 20. the copy of the account was not mentioned in such citation, refuses the bill, and finds the suspender liable in expenses."

Nov. 19, 1836.

Maclaren v.  
Symers.

The suspender thereafter presented a note to the Lord Ordinary, setting forth, that the citation-copy of the claim had been improperly withheld by the respondent, and craving his Lordship to rescind the interlocutor, or, at all events, prohibit the clerk from issuing any certificate of the refusal of the bill, for such time as would enable him to bring the interlocutor under review.

His Lordship (24th September) "refused, as incompetent, the prayer of this note, to cancel a recorded interlocutor; but prohibited the clerk from issuing a certificate of refusal for eight days from this date," issuing at the same time the note subjoined.\*

Maclaren then presented a second bill of suspension, which, after the narrative and argument, concluded thus:—

"For these and other reasons to be proponed at discussing hereof, the complainer has no doubt that your Lordships will have no difficulty in granting him letters of suspension in the premises, without caution or consignation, as was done in the cases before referred to.

"Herefore the complainer beseeches your Lordships to recal the interlocutor refusing the first bill of suspension, and to grant him letters of suspension in the premises without caution or consignation.

"According to Justice, &c."

Symers, in his answers, contended, inter alia, that the bill was irregular and inoperative, as containing no conclusion that the charge should be suspended.<sup>1</sup>

\* "The Lord Ordinary must not be understood as entirely acquiescing in the suspender's view of the effect of the omission in the copy of citation, the case differing from that of Wallace in this material circumstance, that not only is there a copy of the account actually served, but that in the will of the summons recited in that citation, there is an express order to serve or deliver such a copy. The Lord Ordinary understands that there was no such recital in Wallace's case; but still it now appears to come so near it that he thinks the suspender fully entitled to the means of presenting a second bill, and only regrets that a proceeding which now appears to be imputable to the other party should have made such a step necessary."

<sup>1</sup> Browlee v. Donald, Jan. 24, 1829. This was an Outer-House case, in which Lord Corehouse, Ordinary, sustained a similar objection to letters of suspension, and added to his interlocutor the following note:—"Every bill of suspension, like every summons, should form a libel containing premises, and a conclusion regularly deduced from them. In a bill of suspension the conclusion is that the letters of charge should be suspended, and then follows a prayer to the Court that warrant may be granted for expediting letters of suspension. If the bill is passed, the letters are expedite, engrossing the bill; but instead of the prayer of

The Lord Ordinary (Meadowbank) refused the bill, with expenses. No. 20.

Maclaren reclaimed, and, on the point of the informality of the bill, contended, that its style was conform to the present practice of drawing bills of suspension, and that an objection similar to the present had been repelled in the case of letters of advocacy.<sup>1</sup>

Nov. 19, 1836.  
Maclaren v.  
Symers.

Symers answered, that the present bill was not according to the form in the style-book; and that the case referred to showed the necessity of a conclusion for suspension, their Lordships having in that case merely found that the defect in the letters was in some measure supplied by the will bearing a warrant for advocacy.

LORD JUSTICE-CLERK.—I do not think, in this case, we should be warranted in departing from the style-book. I am not satisfied that this bill has been prepared in the proper form, and I am for refusing the note.

LORD MEDWYN.—I agree. There is no reason for departing from the regular style. Here there is no conclusion for suspension; and if we want what we should have in these proceedings, we have what we should not have had—a reclaiming note to the Lord Ordinary on the Bills to recal his interlocutor.

LORD GLENLEE.—I concur; but the distinction is very thin between the form in the style-book and that of the present bill.

THE COURT accordingly refused the note.

C. F. DAVIDSON, W.S.—JOHN CULLEN, W.S.—Agents.

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the bill, there is substituted the will or command to the messenger to cite the charger, that he may see the charge suspended. In the present case there is no conclusion in the bill of suspension that the charge should be suspended. There is only a prayer for letters of suspension, which prayer was granted. In like manner the expedite letters contain no conclusion for suspension, and that defect is not supplied by the command to the messenger to cite the charger to the action. It is a defect also which cannot be remedied as in the case of an ordinary summons."

<sup>1</sup> Grant v. Shepherd, June 16, 1836, ante, XIV. 975.



No. 21.

JAMES CHARLES MACRAE, Pursuer.—*Sandford*.

Nov. 22, 1836.  
Macrae v.  
Macrae.

MRS MARIA LE MAISTRE MACRAE OF HYNDMAN, and HUSBAND, and  
OTHERS, Defenders.—*H. J. Robertson*.

*Outlawry — Horning — Entail — Jurisdiction — Trust.* — Criminal letters, containing a charge of murder, were raised against a party who was infest, in fee simple, in a land estate; before citation, he executed a disposition of the estate, *ex facie absolute*, in favour of a friend who was truly a trustee for his behoof, and who was immediately infest; the party fled, and was afterwards “decerned and adjudged to be an outlaw and fugitive from his majesty’s laws,” and ordained to be put to the horn (all in common form), by sentence of the Court of Justiciary, “for his contempt and disobedience in not appearing this day and place, in the hour of cause, to have underlyen the law for the crime of murder, as mentioned in the said criminal letters;” this sentence was followed by denunciation at the horn, as a rebel, which was duly recorded: the party lived abroad for many years, and died unrelaxed: in the interval, by a formal deed, he directed his trustee to execute a strict entail in favour of his (the party’s) only son, whom failing, his only daughter; and he farther directed his estate to be burdened with a provision of £5000, in favour of the daughter; the trustee executed the requisite deeds, and passed infestment on them in the party’s life, and, after his death, applied to the Court in his own name, and obtained a warrant to record the entail, which was done: the son of the outlaw raised a reduction of the whole of these deeds, especially the entail and the application to the Court to record it:—Held, by the whole Court unanimously, that the deeds were unchallengeable at his instance, and that the entail was duly recorded; a majority of nine judges\* being of opinion, (1.) That “the consequences of a denunciation on a horning are not different from those of fugitation in the criminal Court, or in any respect less severe, with the exception of the distinctions introduced by express statute, or, in one or two instances, rendered necessary, either from the different forms of procedure in the civil and the criminal courts, or from obvious views of expediency and justice:” (2.) That the fee of the heritage remained in the outlaw: and, (3.) That “the outlaw retained every power of disposing of his property which could be exercised without prejudice to the rights of those who might have an interest in his single or liferent escheat:”—and the remaining four† judges, holding, on the one hand, that though the fee of the heritage remained in the outlaw, yet, as he was “civilly dead,” and “had lost the law of the land,” and “could claim no privilege or benefit under it,” he was not in a capacity to perform the *acta legitima* implied in making a deed of entail, and therefore any such deed, executed by him after outlawry, would be unavailing; but, holding (along with several of the other Judges), on the other hand, that in respect of the *ex facie absolute* disposition and infestment, prior to outlawry, the subsequent deed of entail by the *ex facie absolute* disponee was valid, at least against this pursuer, being unchallengeable, so far as regarded the form of the title, and it not being a relevant reason of reduction that the deed was conformable to the wishes of the outlaw.

Question raised, and opposite opinions expressed, whether, if the outlaw had possessed no power of disposing the fee of his heritage, the entail could have been effectually made by a party who was truly his trustee, and acted under directions received from him during his outlawry.

*Homologation.*—Circumstances in which the plea was repelled that a deed of entail had been homologated by the heir-at-law.

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\* Lords Justice-Clerk, Balgray, Gillies, Meadowbank, Mackenzie, Medwyn, Corehouse, Fullerton, and Jeffrey.

† Lords President, Glenlee, Moncreiff, and Cockburn.

On 13th April 1790, the late James Macrae of Holmains mortally wounded Sir George Ramsay of Banff in a duel. On 8th May, Macrae, who had fled to France, executed an ex facie absolute disposition of his estate of Holmains, to Lord Glencairn, and Alexander Young, W.S., and the survivor, and their heirs and assignees. Infestment passed under the precept in this deed, on 15th May, and was afterwards duly recorded. This conveyance was truly in trust for behoof of Macrae.

No. 21  
Nov. 22, 18  
Macrae v.  
Macrae.  
1st DIVISION  
Ld. Moncrieff  
D.

Criminal letters, containing a charge of murder, were raised against Macrae, at the instance both of the public and private prosecutors, and the will of the letters directed messengers-at-arms, in common form, to charge him to appear, "to underlie the law for the crime above mentioned, and that, under the pains contained in the acts of Parliament, and that ye charge him, if within Scotland, &c., to come and find the said caution and surety acted in manner foresaid, &c., under the pain of rebellion and putting of him to the horn; wherein if he fail, the said respective terms being bygone and the said surety not found, nor no intimation made by him to you, of the finding thereof, that incontinent thereafter, ye denounce him our rebel, and put him to the horn, escheat and inbring all his moveable goods and gear to our use, for his contempt and disobedience, and that ye, within fifteen days thereafter, cause register these our letters, with the executions thereof, in our books of adjournal, conform to act of Parliament."

On 26th May, Macrae was cited, under these letters, to appear and stand trial before the Court of Justiciary, on 26th July. On that day he failed to appear, and the Court, on the motion of the public prosecutor, "decerned and adjudged him to be an outlaw and fugitive from his Majesty's laws, and ordained him to be put to his Majesty's horn, and all his moveable goods and gear to be escheat and inbrought to his Majesty's use, for his contempt and disobedience in not appearing this day and place, in the hour of cause, to have underlyen the law for the crime of murder, as mentioned in the said criminal letters raised against him thereunto." Letters of denunciation were raised on the following day charging messengers "to denounce him our rebel, and put him to the horn, escheat and inbring all his moveable goods and gear to our use, for his being an outlaw and a fugitive from our laws for the crime foresaid." These letters were executed and recorded on July 28th and 29th.

In April 1793, after the death of Lord Glencairn, the surviving disponee Alexander Young, W.S., executed a disposition of Holmains, in favour of Messrs Duncombe, Pettiwood, and Le Maistre, and of the survivor of them, and their assignees. Infestment followed on this conveyance. In June following, these gentlemen executed a deed, declaring that the conveyance was granted to them "in trust only, for the use and behoof of the said James Macrae, Esquire, his heirs and disponees, and for the support and maintenance of his family, &c." And they bound themselves "to denude of this trust whenever so required by the said



No. 21. James Macrae and his heirs or disponees, and to dispose the lands, &c. to the said James Macrae himself, or any other person having right from him to the same."

Nov. 22, 1836.  
Macrae v.  
Macrae.

Macrae was married prior to the deed, and on 2d January, 1791, a son was born in London of the marriage, named James Charles Macrae. In 1800 a daughter was born, named Maria Le Maistre Macrae. In May 1807, Macrae executed a deed, narrating the disposition by Young to Duncombe and others; their declaration of trust, and certain subsequent testamentary dispositions, after which the deed proceeded,—"and therefore, for the more effectually accomplishing the purpose of the said deeds, and for other onerous and good causes and considerations me hereunto moving, I am desirous that the said lands, and others before specified shall be settled and disposed of in manner after mentioned, and do, by these presents, not only desire, but also authorize, direct; and appoint the said Charles Duncombe, Roger Pettiward, and John Gustavus Le Maistre, Esqs., and the survivors and survivor of them, not only to alter and revoke the destination of the said lands and estate, but also, with all convenient speed, to execute and deliver a regular disposition and deed of entail, agreeable to the laws of Scotland with regard to entails, and containing all usual and necessary clauses for giving and disposing in strict entail the said lands and estate of Holmains, and others, with pertinents thereof, all as more fully and particularly described in the disposition first herein before mentioned, to and in favour of the said James Macrae, my only son, and the heirs whomsoever of his body; whom failing, the said Maria Le Maistre Macrae, my only daughter, and the heirs whomsoever of her body; whom failing, my nearest heirs whatsoever." The deed directed the trustees to pay £700 per annum out of the rents of Holmains, to Macrae himself, during his lifetime, and to apply the residue of the rents for behoof of his children. It appointed Mrs Macrae, whom failing, other parties, to be tutors and curators to the children; and it ratified a deed by which the trustees, in 1805, had burdened a portion of Holmains, with a provision of £5000 to his daughter, declaring it to be in full of all that she could claim through his decease.

In 1809 the trustees executed a strict entail of Holmains, in terms of these directions, and in the same year James Charles Macrae was infeft by them under the precept contained in their deed of entail. In 1812 he came of age. In 1820, his father, Macrae senior, died abroad, without having ever obtained letters of relaxation. About six months after this event, the trustees, Duncombe and others, produced the deed of entail before the Court of Session, and petitioned, in their own names, to have it recorded in the register of tailzies. No opposition was made, and the Court granted warrant to record it, which was accordingly done. James Charles Macrae entered into possession of the estate, and afterwards adopted various steps on the supposition that the entail was unchallengeable, such as obtaining, in 1824, an Act of Parliament to sell a portion of it, and

pay debts affecting the estate; following up this with certain judicial procedure for ascertaining the amount of debt, and valuing the portion of the estate which should be sold; disposing his interest in the estate, in 1821, to a trustee for creditors, in such terms as to guard against the risk of committing any irritancy, if the entail should be effectual, but acknowledging the entail only in so far as it should be found binding on him; and giving statutory notice, in 1829, under 10 Geo. III. c. 51, to his sister (who was now married to Mr John Hyndman, advocate) when about to make improvement-expenditure on the estate.

In 1831 he raised a reduction of all the deeds executed by his father or his trustees, and especially the entail of 1809, and his father's mandate, or deed of 1807, which authorized and directed the entail. The main ground of reduction was, that his father, being an outlaw and fugitive, by sentence of the Court of Justiciary, and never relaxed, was personally incapacitated from executing, directly or indirectly, any deed affecting his heritable estate. The action concluded for declarator of the pursuer's right to complete his titles to Holmains, in fee-simple, as heir of line of his father; or, at least, if the first disposition by his father, on 8th May, 1790, was good to the effect of supporting the subsequent trust-conveyance to Duncombe and others, that these trustees should be decreed to denude, and to execute a conveyance of Holmains to him in fee-simple.

Mrs Maria Macrae or Hyndman and husband lodged defences, pleading, 1st, Homologation<sup>1</sup>; 2d, That the entail was within the powers of the late James Macrae; and, 3d, That, at all events, it was unchallengeable unless the *ex facie* absolute disposition, on 8th May, 1790, divesting Macrae, could be cut down, which however was unchallengeable, as it was prior to citation under the criminal letters.

The Lord Ordinary ordered Cases, and thereafter "made *avizandum* with the cause to the Court."

<sup>1</sup> *Pursuer's Authorities on this point*—Gardner, Dec. 3, 1830 (*ante*, IX. 138); Ogilvie, Jan. 26, 1694 (5652); Black, June 29, 1825 (*ante*, IV. 124; or 125 New Ed.); 3 Ersk. 3, 47 and 48; L. Reay, Jan. 7, 1825 (1 W. and S. 306); Dickson, March 18, 1815.

*Defender's Authorities*—Mackenzie, Dec. 4, 1767 (5665).

\* "NOTE.—It would be proper to report this case to the Court on account of its peculiarity and admitted novelty. But the Lord Ordinary, though he has carefully considered the argument, both in a very full hearing and in the revised cases, thinks it proper to report the cause, without at present expressing any opinion; because it will be seen, that he was the counsel who was privately consulted by the pursuer in 1820, and that something in the argument turns on the nature and effect of that consultation. The only observation he has to make is, that, when it is ascertained that the sentence of the Justiciary was followed by denunciation of the deceased as an outlaw, duly recorded, if the case of the defenders were to depend entirely on the proposition in law, anxiously and confidently maintained by them in this case, that such an outlaw is under no other or different disability from the consequences of legal acts, than that which attaches to a person denoun-

No. 21.

Nov. 22, 1836.  
[Macrae v.  
Macrae.]

The Court intimated an Opinion, that, in the special circumstances, no homologation of the entail had taken place; but, in regard to the effect of the sentence of outlawry, and the recorded denunciation, their Lordships were divided in opinion, and a hearing in presence was ordered.

Before the cause was finally disposed of, a supplementary reduction was raised, chiefly to strike at the petition by Duncombe and others to record the entail in the register of tailzies; the warrant granted by the Court to record it; and the registration of it.

The record in this action was laid before the Court along with the original cause, but the actions were not conjoined.

*Pleaded by the Pursuer—*

1. By the sentence of the Court of Justiciary the late James Macrae had been adjudged an outlaw and fugitive from his Majesty's laws. This sentence alone deprived him of all protection of the law, and of every right or privilege under the law.<sup>1</sup> Such a person is declared by institutional writers to be *civilter mortuus*;<sup>2</sup> or, as others express it, *amittit legem terræ*.<sup>3</sup> He could neither sue nor defend in any court of justice; having no *persona standi in judicio*. Such a party was incapacitated from executing any deed affecting his heritable estate,<sup>4</sup> because every such deed must derive all its force from the law, and he and his deeds were equally cut off from all countenance or support by the law. And it was not only in point of legal principle, but also in point of public policy, that the courts of law refused to recognise the person or the deed of an outlaw. Where a party, charged with murder, kept himself at large, and refused to stand a trial, it was the policy of the law, for the better preservation of the peaceful lieges, to disable him utterly of all

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ced on letters of horning for a civil debt, he should think that it involved a question of very great importance. He is not at present prepared to assent to the doctrine. But the case may not, and probably does not, depend on that point."

<sup>1</sup> 1567, c. 33; 1612, c. 3.

<sup>2</sup> 2 St. 4, 61; 4 St. 47, 10; 3 St. 3, 26; 2 Ersk. 5, 60 and 66; 2 Bankt. 4, 37; Instit. lib. 1, t. 10; Heinec. ad Inst. lib. 1, t. 16, 225.

<sup>3</sup> 2 Hume, 280 and 265; Alison's Pract. of Crim. Law. 350; Lindsay, Jan. 23, 1627 (8354); Inglis, July 26, 1627 (8356); Cochran, Dec. 6, 1638 (8358); Lochinvar, Mar. 24, 1632 (8358); L. Conheath, Dec. 1631 (8357).

<sup>4</sup> Hog, Mar. 1614 (13537); Crombie, Dec. 1749 (10162); Cheyne, &c. July 4, 1828 (ante, VI. 1061); Reg. Maj. (Ed. 1774, 130, 152, and 392), Parl. 2, May 1372, c. 4; Jac. VI. Parl. 2, c. 50; Quon. Attach. c. 18; Countess of Dundee, Feb. 24, 1669 (15123); Ja. V. Parl. 4, c. 31; Hen. III. an. 9, c. 22; Edw. II. an. 17, c. 16; Balf. Pract. 515, v. "Of Slauchter," c. 13; Ibid. 483, v. Recognition, c. 3, art. 3; Ibid. 557, v. Horning; Ibid. "Of Brieves," 429, c. 48; Ja. VI. Parl. 3, c. 49; Elchies' Notes on Stair, 194; 1535, c. 32; Mackenzie's Obser.; Ja. V. Parl. 4, c. 32; Dirlet. Doubts, 146, v. Rebellion; Spottiswoode's Practica, 148, v. Horning; Balf. Prac. 294; 2 Hume, 263; 1579, c. 75; 1592, c. 145 and c. 147.

power to exercise any of the rights of property which were competent to the lieges alone. No. 21

2. As Macrae was also put to the horn, and denounced a rebel, and remained unrelaxed for year and day, his liferent escheat fell.<sup>1</sup> But though the continued contempt of the rebel, in not appearing, tended to strengthen the plea that courts of law could not recognise his deed, it was not a necessary element in founding that plea, which, on the contrary, resulted necessarily from his sentence of outlawry and fugitation.

Nov. 22, 18  
Macrae v.  
Macrae.

3. An alien, though no fault was imputable to him, yet merely because he was not liable in the allegiance of a subject, could neither hold heritage himself, nor execute a deed disposing of heritage; and, a fortiori, an outlaw and rebel, fugitive from the laws to which he owed allegiance, could not be permitted to execute a deed affecting heritage. The fee indeed remained in him, but his power over it was gone. By his liferent escheat, the feu became void, and his immediate superior drew the profits during his natural life; after which his heir, who would have taken up the estate, had he actually died at the moment when he was thrust beyond the pale of the law, could take up the estate, without being affected by any deed executed in the interval by the outlaw.

4. It was extremely doubtful if denunciation at the horn, for a civil case, such as non-payment of debt, was ever placed on the same footing with denunciation at the horn, following on a sentence of outlawry and fugitation, in a criminal court. But at least there had been a marked distinction between the two cases,<sup>2</sup> for many generations, owing to the increasing civilisation of the country, aided by the circumstance, that civil denunciation proceeds upon a mere fiction of rebellion, and never could have been allowed, in a commercial country, to produce the effect of actual outlawry or the loss of a *persona standi judicio*. Although therefore a party, denounced for civil rebellion, retained a *jus disponendi* as to his heritable estate, this afforded no analogy for inferring that the same *jus disponendi* remained to the outlaw, who was denounced a rebel by a criminal court.

5. The whole series of deeds under reduction being mere trust-deeds for behoof of the outlaw, were equally liable to reduction as if they had been directly executed by the outlaw himself.<sup>3</sup> Or if the deed of 8th

<sup>1</sup> 4 St. 9, 1; 2 St. 4, 61; 2 Ersk. 5, 66; Hope's Minor Pract. 268.

<sup>2</sup> 2 Ersk. 3, 16.

<sup>3</sup> 2 Ersk. 1, 22; Lockhart, Feb. 19, 1819 (F.C.); Donaldson, March 11, 1786 (6942); Speirs, Dec. 14, 1790 (8808); Campbell, Jan. 14, 1801 (Dict. v. Adjudication, App. P. I. No. 11); Duke of Roxburghe, May 25, 1820, 2 Hugh, 619; Macmillan, March 4 1831 (ante, IX. 551); Boswell, Dec. 14, 1825 (ante, IV. 314, or 317 New Ed.); Dick, July 4, 1828 (ante, VI. 1065); Angus, June 6, 1836 (ante, IV. 279, or New Ed. 283).

No. 21. May, 1790, in favour of Alexander Young, W.S., was not reducible, being prior to citation to the criminal court, it was confessedly a trust for behoof of Macrae and his heirs; and the pursuer was the party entitled to call on Duncombe and others, the trust disponees of Young, to denude in his favour, by a conveyance in fee-simple.

iv. 22, 1836.

Macrae v.  
Macrae.

6. But in any event the application to record the entail, and the warrant to record it in the register of tailzies, ought to be reduced, not only because the parties who presented it were mere mandataries and trustees of an outlaw, who were not entitled to appear in judicio, any more than their constituent; but also because their mandate fell by the death of Macrae, which had occurred about six months previously.

*Pleaded by Defenders—*

1. The late James Macrae had never been convicted of any crime. He had been accused, and charged to appear; and, for disobedience to that command, he had been denounced an outlaw and a rebel. But this offence was precisely analogous to that which is committed, in civil cases, when a party is denounced at the horn as a rebel for not obeying a command on the King's letters, such as to pay a debt or perform a deed. In all these cases alike, the offence is one and the same, being disobedience, or rebellion against a charge contained in the King's letters: and in all, the rebel must be presumed innocent of every other offence or crime. Such was the rule of the law of Scotland, which never dealt with a fugitive, as with a convicted criminal,<sup>1</sup> but merely punished his contempt for not appearing. From the earliest times therefore, until now, with the exception of certain limited statutory modifications,<sup>2</sup> the legal consequences of civil rebellion had always been as severe as those of outlawry and rebellion under the sentence of a criminal court.<sup>3</sup> This was strongly evinced by the necessity of specially enacting, by 1612, c. 3, that if a party, at the horn, for a civil cause, was murdered, his condition of outlawry should not be pleadable as a defence for the murderer.

2. The penal consequences of rebellion or outlawry were not to be extended by implication. And although, in the case of continued contempt, the liferent escheat fell, of any rebel who remained unrelaxed<sup>4</sup> for year and day, that did not take the fee out of the rebel, which, on

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<sup>1</sup> Yeaman, July 20, 1662, and Jan. 21, 1663 (4773 and 15843); also 1 Bro. Supp. 484; Hague, Nov. 30, 1671; 2 St. Dec. 15; 1 St. Dec. 451; Stuart's Ans. 64; Hamiltons, Dec. 20, 1709; 2 Fount. 543; 3 Bankt. 3, 46; 3 Bankt. 3, 36.

<sup>2</sup> 1612, c. 3, mentioned above; and 20 Geo. II. c. 50, which abolished escheat, as a consequence of denunciation at the horn for debt.

<sup>3</sup> Holburn, Feb. 1687 (4774); Ormiston, May 25, 1542 (2265); 2 Ersk. 5, 59; Blackst. Comm. b. 3, c. 19, and b. 4, c. 24; Mackenzie's Obser. Ja. V. Parl. 4, c. 32; 4 St. 47, 11, and 52, 23; 3 Pitcairn's Crim. Trials, 122, and 1, 367, 382, 384, 887, 389, 406, 407.

<sup>4</sup> 1535, c. 32.

the contrary, was taken up by his heir, by service, after his death.<sup>1</sup> This service proceeded in the usual way, except that a dispensation was obtained as to that head of the brieve, regarding the ancestor's dying at the faith and peace of the King. The rebel was also left at full power to affect the fee, by every deed which did not prejudice the Crown, and its donatar to the single escheat, or the immediate superior of the rebel, who was the party interested in the liferent escheat: and it was *ius tertii* to any other party, to challenge any of the rebel's deeds whatever.<sup>2</sup> And the law of England was similar to ours in those cases where they did not hold outlawry to be equivalent to an actual conviction of the crime charged against the outlaw.<sup>3</sup>

No. 21  
Nov. 22, 1  
Macrae v.  
Macrae.

3. A deed of settlement and entail was certainly within the power of any party though denounced a rebel for a civil cause; and it was equally so, when he was denounced by a criminal court. There were numerous precedents for this.<sup>4</sup>

4. But, separately, Macrae had divested himself, by an *ex facie* absolute disposition, as early as 8th May, 1790, followed by infestment on 18th May, all which was prior to his citation under the criminal letters, and therefore unchallengeable. The subsequent conveyances, ending with the entail of 1809, were not executed by him, but by the liege-privies who stood feudally vested in the fee of the estate. These deeds were not reducible merely because they were conformable to the wishes of Macrae. Had they been opposite to his directions, he might have been disabled by personal incapacity from complaining; but his heir had no title to reduce them because they were such as he had desired.

5. The petition to record the entail was regularly presented by Duncombe and others as acting for the heirs-substitute, any one of whom might have applied in his own name. And their authority to make the application was not contained in any simple mandate which fell by the death of the mandant, but in a deed which necessarily subsisted after his death, and was so intended to subsist.

<sup>1</sup> Balf. Pract. 557, c. 21; Leslie, Feb. 1596 (3635); Balf. Pract. 231, c. 35, and 458, § 13; Scot. July 18, 1722 (3673); Lindsay, Jan. 20, 1602 (4662); Telfer, June 29, 1661 (5631); 2 St. 4, 62 and 66; 2 Ersk. 5, 66; 1571, c. 36; 1571, c. 39; 1592, c. 147; Lindsay, Jan. 14, 1635 (8373); Cunningham, March 21, 1623 (3636 and 8372); Edmiston, Feb. 10, 1624 (8372); Clerk, Dec. 10, 1629 (1 Bro. Supp. 298); Pinkell, 1639 (8374); Mossman, Feb. 10, 1635 (8365); 2 Ersk. 5, 76; Cleland, Dec. 2, 1687 (3 Bro. Supp. 656); Jackson, Jan. 28, 1676 (8362).

<sup>2</sup> 2 St. 4, 61; 3 St. 3, 15 and 26; 4 St. 47, 11; 2 Ersk. 5, 60; Young, July 10, 1706 (10160).

<sup>3</sup> 3 Blackst. Comm. c. 19; 4 ib. c. 24; Andr. Gaill de Pace Publica, L. 1 c. 5 and 6; Bacon's Abridgment (7th Ed.) Vol. IV. p. 57, 58, and 62.

<sup>4</sup> See authorities under note (1).

No. 21. The cause was first advised, by their Lordships of the First Division,  
 Nov. 22, 1836. on 4th February, 1834, when the following Opinions were delivered :—  
 Macrae v.  
 Macrae.

LORD BALGRAY.—This is a case of much difficulty, And first, in regard to the question whether there is any important difference between being put to the horn for a civil cause, or in consequence of a sentence of fugitation and outlawry in a criminal court; it appears to me that Stair, Erskine, and above all Mackenzie, lay it down that rebellion was regarded in the same light in civil and criminal causes. And I proceed upon the footing that they still are so, with the exception of certain specific modifications introduced by comparatively modern statutes. And it is clear that a sentence of fugitation does not proceed on the assumption that the fugitive is guilty of the crime charged against him, or that he is dealt with in any respect as if convicted thereof. It is a sentence following exclusively on the disobedience and contempt of the fugitive, in failing to obey the citation, and appear in Court to abide by the award of the laws, after a trial. The fugitive is therefore entitled to the legal presumption to which any other party is entitled till convicted, that he is an innocent man. In these circumstances I conceive that there are certain consequences following on outlawry, and denunciation at the horn, which are of a well-defined and limited character, and have long been known to the law. The denounced rebel has no *persona standi in judicio*. His single escheat instantly falls, and the King may seize on his moveables. If the denunciation continues for year and day, the rebel's liferent escheat falls, and the rents and profits of any crown lands which he may have, fall to the crown, while those of any of his other lands, fall to the respective immediate superiors thereof. But except the Crown or its donatary, and the immediate superior of the rebel, I think no other party has an interest in the consequences of the denunciation. In particular, the fee of his lands remains in the rebel, and is not forfeited by rebellion. *Rebellionis pœna non est feudi amissio*. On considering these well-known and established results, which are of a marked and definite character, I think it an attempt, attended with much difficulty, to carry the consequences of rebellion farther, and to hold that the *jus disponendi* of the rebel is destroyed. Even if a man was tried and convicted of a capital crime, and sentenced to death, is it maintained that he has no power of disposing his heritage? In the present case, there is nothing but a sentence of fugitation, followed by denunciation at the horn, and I cannot think that this is to have the effect of taking away the *jus disponendi*, which indeed would be assimilating it to the consequences following on an actual conviction of high-treason, which is a very different case from this. And yet I think the pursuer's argument would place the mere fugitive, and the convicted traitor, on the same footing, as to the *jus disponendi*, to which I cannot assent.

LORD PRESIDENT.—I concur with Lord Balgray in thinking that the fee is not actually taken out of the rebel by denunciation at the horn, but it is quite a separate question whether he, being an outlaw, has a power of executing any deed which shall be valid in law, so as to affect his heritable estate. If he could execute such a deed it would always have been in his power, after his single escheat fell, to defeat the liferent escheat altogether by disposing away his heritage before he had been year and day at the horn. But I doubt much whether he had such a power of disposing. It is not enough to say that the fee continues in a party after his *outlawry*. The fee may be in him, and yet he may be affected with a personal



incapacity, which entirely prevents him from altering the destination which the law would give to that fee, in the event of his death without executing any disposition of it. If he died intestate, his heir-at-law would take it up, and I incline, at present, to the opinion that the outlaw cannot execute any disposition which shall be allowed to disinherit his heir, or in any degree to impair, the right which the law, by its own course, would confer after his death, on his heir. I am not prepared to assent to the doctrine that the consequences of a sentence of outlawry, by a criminal court, are the same with those of denunciation at the horn, in a civil cause. The outlaw, according to Baron Hume, forfeits his person in law, amittit legem suam; he cannot appear in court in any cause; he is decerned and adjudged an outlaw and fugitive from the laws, and ordained to be put to the horn and denounced a rebel. And even supposing that the denunciation at the horn never followed on the outlawry, still the sentence of outlawry would remain, and the person of the outlaw would be civilly dead, and could not be recognised in a court of law. And that leads me to observe the specialty which occurs in this case, that there was an application made to the court to have the entail recorded. This was made by the trustees of the outlaw, acting under the deed by which he authorized and directed them to make the entail. But as the Court could not have entertained a petition in the outlaw's own name, I doubt whether they could entertain it on the part of persons who clearly were his trustees and mandataries. I incline to think it should be dealt with, in any event, as an unrecorded entail.

No. 21

Nov. 22, 18

Macrae v.

Macrae.

LORD CRAIGIE was for repelling the reasons of reduction; and was understood to concur in the views of Lord Balgray. His Lordship also observed that the question, whether the entail had been effectually recorded, was only of importance in a question with creditors, and not in this question inter-heredes.

LORD GILLIES.—I incline to concur with your Lordship, but, as the question involves an application of principles of some novelty and importance, I think it should be farther discussed before any decision is pronounced. I consider it to be attended with much difficulty, to decide as to the alleged difference between rebellion for a civil cause, and rebellion following on a sentence of outlawry. In both cases alike the law originally was, that the single escheat fell, in consequence of rebellion; and that if the rebel remained at the horn for a year and day, the immediate superior of any lands belonging to him, might enter to them and reap their annual fruits and profits, as he was left without a vassal. But even the right of a donator to the liferent escheat was not completed until he obtained a decree of declarator. In looking to this state of the law, I feel that there is considerable difficulty in holding that it is not *jus tertii* to any other party, except the Crown or the immediate superior, to object to any deed by the rebel, disposing of his estate. At the same time, even although nothing but the moveables, and the profits of the heritable estate during a rebel's life, fell under the single and liferent escheat, consequent on rebellion, it is quite another question whether he, being an outlaw, can make a deed, good in law, to dispose the fee of his heritable estate. The fee is undoubtedly in him, but that does not solve the difficulty. The fee of the estate may be unquestionably in an infant of a month old, but such infant can execute no disposition to affect it. And I rather incline, at present, to hold that an outlaw cannot effectually dispose the fee of his heritable estate. In regard to the petition for recording the entail, it could not have been effectually presented by the outlaw, *pro persona standi*, and his mandatary or trustee is no better than himself.

*in consequence of this would be, to deal with the deed as an unrecorded*



No. 21. entail, and in this question, inter heredes, it is immaterial whether it be recorded or not.

Nov. 22, 1836.

Macrae v.  
Macrae.

The Court ordered Supplementary Cases, which were advised on July 9th, 1834, at which time Lord Mackenzie sat as a Judge of the First Division, in consequence of the death of Lord Craigie.

LORDS PRESIDENT, BALGRAY, and GILLIES, adhered to their opinions already delivered.

LORD MACKENZIE.—It appears to me that, after sentence of fugitation and outlawry, followed by denunciation at the horn, the personal disqualification attaching to the rebel, was not total, but was of a definite and limited character. I do not think that a charge of horning, following on a sentence of fugitation and outlawry in a criminal court, is attended with more severe consequences, than a charge of horning in a civil cause. In the latter case, it is true that some special and limited modifications have been introduced by statute; but, laying aside these, I cannot allow higher effects to follow on the sentence of fugitation, than on the denunciation at the horn. In truth it is because the party is an outlaw and fugitive that he is put to the horn, and declared a rebel for his contempt, and no consequences of greater severity than this are to follow on the outlawry. The pronouncing sentence of outlawry, was just the mode adopted of proceeding to declare him a rebel at the horn; and it seems to me that declaring a man a rebel, is just as incapacitating an act, as declaring him an outlaw. As I consider that the disqualifications resulting from being put to the horn, do not deprive a party of the fee of his heritage, or of the power of disposing of it, I incline to repel the reasons of reduction.

As the Court were equally divided in opinion, a hearing in presence, by one counsel on each side, was ordered; after which the whole cause, along with additional cases, was laid before the Judges of the Second Division, and the permanent Lord Ordinary, under this interlocutor:—  
“Remit to the Lords of the Second Division, and permanent Lords Ordinary, and request their Lordships’ opinions, either severally or collectively, on the question, ‘Whether the deed of entail executed by Mr Duncombe and others, by mandate of 6th May 1807 from the late Mr Macrae, then under sentence of outlawry and fugitation by the High Court of Justiciary, for failing to appear to answer to an indictment for murder, be liable to reduction at the instance of his son the pursuer, his heir-at-law?’”

The following Opinions were returned:—

LORD MEDWYN.—Before considering the question as to the effect of a sentence of outlawry and fugitation by the High Court of Justiciary, for failing to appear to answer to an indictment for murder, it may be useful to advert to what has been established in other countries as the consequences of a similar proceeding.

It seems to be the natural result of those principles which bind society together, *that submission to the law demands from the law the reciprocal duty of protec-*

tion; whereas disobedience to the law, and rejection of its authority, relieves from this obligation, and leaves the outlaw beyond the pale, and consequently the protection, of the law. "Mercy was never extended to the outlaw:" he was said to bear "a wolf's head;" and, like the wild beast to whom he was compared, he was slain whenever he approached the haunts of human kind. He was also emphatically termed, "The friendless man"—one who had forfeited his country, who had lost the countenance of his kinsman, and the protection of his King. He had broken the compact which united him to society. Every hand might be raised to strike him; none to revenge his fall.<sup>1</sup> This was the state of the law at one time in Norway,<sup>2</sup> in Denmark and Jutland,<sup>3</sup> in Saxony,<sup>4</sup> in The Empire,<sup>5</sup> in most of the States of Italy,<sup>6</sup> and probably in other countries. It is of more importance to us to observe, that it was so also among the Anglo-Saxons; and, according to Craig,<sup>7</sup> "Illud tamen de pace domini regis fracta, licet ex Anglo-Saxonum regum statutis descenderet, tenacissime Conquæstor retinuit." It was by a law of Edward the Confessor, which was adopted among the Norman laws, and confirmed after the Conquest, that where an offender does not appear, "utlagat eum Rex verbo oris sui. Si vero postea repertus fuerit et retineri possit vivus, regi reddatur, vel caput ejus si se defenderit, lupinum enim gerit caput. Et hæc est lex communis et generalis de omnibus utlagatis."<sup>8</sup>

No. 2  
Nov. 22, 1  
Macrae v.  
Macrae.

This addition is made because the law itself is applicable to an offence against the church, *De fractione pacis ecclesie*, when it is followed up by restoring to the civil power. For these severe consequences were the result of civil offences, as well as ecclesiastical, but of course in those cases only where the party had been guilty of felony. "An outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf by any one that should meet him, because, having renounced all law, he was to be dealt with as in a state of nature."<sup>9</sup>

It arises from this, that, in England, in prosecutions for offences against the person, such as murder, or assault, or rape, the indictment still bears that the violence has been committed, as even in the latter case it is said to be, "on and upon one A. J., spinster, in the peace of God, and of our said lord the king,"<sup>10</sup> as being the only persons whose safety from injury, the law was bound to protect, or to avenge its infraction.

The law continued in this state till the beginning of the reign of Edward III., when "it was resolved by the Judges, for avoiding of inhumanity and effusion of Christian blood, that it should not be lawful for any man but the sheriff only (having lawful warrant therefor) to put to death any man outlawed, though it were for felony."<sup>11</sup>

<sup>1</sup> Palgrave on the English Commonwealth, p. 210.

<sup>2</sup> Palgrave, vol. ii. Proofs and Illustrations.

<sup>3</sup> Matthæus, lib. xlviii. t. v. c. 7.

<sup>4</sup> Muller, Promptuarium Juris, v. Bannum.

<sup>5</sup> Gaill de Pace, Publ. lib. ii. c. 5, § 12 and 16.

<sup>6</sup> Jul. Clarus. Sentent. p. 192, § 52.

<sup>7</sup> Li. d. 7, § 10.

<sup>8</sup> Wilkins, p. 198.

<sup>9</sup> Blackstone, iv. p. 320.

<sup>10</sup> Chitty's Criminal Law, vol. ii. p. 726.

<sup>11</sup> Coke upon Littleton, vol. i. p. 128.

No. 21.  
Nov. 22, 1836.  
Iacrae v.  
Iacrae.

The original severity of the law, however, still remained in one case; the case of judgment being given against a defendant upon a *præmunire facias*: "he was put out of the King's protection, and might have been slain by any man, without any danger of law. But Queen Elizabeth and her Parliament,<sup>1</sup> liking not the extreme and inhuman rigour of the law in that point, did provide that it should not be lawful for any person to slay any one, in any manner, attainted in or upon a *præmunire*."<sup>2</sup>

But though an outlaw is now thus far protected, yet, if he has been indicted for a capital offence, and does not appear, and is outlawed, this "amounts to a conviction of the crime, as much as if he had been actually found guilty by the verdict of a jury. And if he be subsequently taken and committed to prison, the justices of gaol-delivery may award any execution against him."

"In misdemeanours inferior to felony, the consequences, though not so penal, are highly serious, and generally more severe than would be inflicted for the crime of which the outlaw stands accused or convicted: but it does not indeed operate as a conviction of the offence, for the party may be afterwards tried and convicted; but it operates as a conviction for the contempt in not answering. It subjects the party to forfeiture of goods and chattels, the loss of profits of real estates, and restraint of liberty. In consequence, it does not materially differ from those which ensue on civil process."<sup>3</sup>

It was after the barbarous doctrine was rejected that an outlaw was beyond the protection of the law, that the process of outlawry was by the law of England applied, in the case of misdemeanours as well as in civil actions, as the punishment generally applicable "for a contempt in avoiding the execution of the process of the King's Court. In civil actions, however, it is rather in the nature of a process to compel the defendant to submit to the jurisdiction of the Court. If outlawed upon *mesne*-process, he may, on putting in and perfecting bail, or entering on appearance, reverse the outlawry, as of course: if upon final process, he may reverse the outlawry upon payment of the debt and costs."<sup>4</sup>

If he does not, he is liable, as in cases of contempt in misdemeanours, to forfeiture of goods and chattels, the loss of profits of real estates, and restraint of liberty. "Besides the forfeiture, the outlaw is incapable of suing in any action for redress of any injury, and of sitting on a jury to try any issue; but he may be allowed to give evidence as a witness, though not to try as a juror; and he may make a will, and appoint executors, by whom the outlawry may be reversed, if the proceedings are defective; and he may sit in the House of Commons as a member."<sup>5</sup>

Such appear to be the rules of the law of England as to outlawry, and they have been adverted to, in the first instance, as affording a not uninteresting or unuseful introduction to the consideration of the principles and practice of our own law on this subject, and illustrative of the different views which have been adopted, in some respects, by the laws of the two countries, as well as of the points in which they agree. In discussing this matter, great industry and antiquarian knowledge have been exerted by the counsel; but the subject is not exhausted.

<sup>1</sup> 5 Eliz. c. 1.

<sup>2</sup> Coke, vol. i. p. 130.

<sup>3</sup> Petersdorff v. Outlawry, p. 49.

<sup>4</sup> Petersdorff, p. 22.

<sup>5</sup> Petersdorff, p. 49.

In both countries, the origin of the doctrine, as might be expected, is to be found in cases of felony where the accused declines to appear and abide his trial; the consequence of which was, that with us he was declared a rebel. Originally, the person accused required to be four times summoned, and it was only on his failure to appear at the fourth court that he was declared fugitive.<sup>1</sup> This tedious process came in time to be abridged, and "it was enacted, that, in processes before the Justiciar, the second summons, instead of the fourth, shall be peremptory; so that if the person summoned appear not on the second summons, he shall be put to the horn, as was in use formerly on the fourth summons."<sup>2</sup> Then the diet of compearance is made peremptory by 1584, c. 140, and not with continuation of days.

No. 21.

Nov. 22, 1836

Ori-Macrae v.

Macrae.

It never was a rule of our law, as it was in England, that the non-appearance of the accused was to be held such a proof of his guilt, that it was to supersede the necessity of a trial for the offence, if he should afterwards be found within the kingdom. The consequences of a sentence of outlawry, or putting to the horn, were "as a punishment of his contumacy and rebellion" (so it is construed) "in disobeying the will of the King's letters, which order him to appear and underlie the law. In contemning this injunction, he is held to have cast off his allegiance as a subject, and to have entered into a state of rebellion to the law and the sovereign of the land."<sup>3</sup>

At the same time, it seems at one period of our law to have been held, that being at the horn for the crime, and remaining long unrelaxed, was sufficient evidence of guilt, where no defence was set up; so that the production of the letters of horning is often the only evidence laid before the assize; as, for instance, this is the course adopted in the case of William Cunninghame (15th December, 1601), and of George Trumbill (23d August, 1603).<sup>4</sup>

The object of outlawry is to compel the accused to appear, or to drive him out of the country, by putting him out of the protection of the law.<sup>5</sup> This form was even adopted by the Court of Session, and that so late as 1741, in a complaint against Alexander Newlands for subornation of perjury. He had absconded, and, as no criminal trial could proceed against him in absence, the question occurred, under what certification the Court could ordain him to appear. On a search of precedents, the Court, on the narrative that he had been searched for and not found, granted warrant to ordain him to appear under pain of rebellion and being put to the horn; wherein if he failed, that they would denounce him his Majesty's rebel, and put him to the horn, and escheat and inbring his moveable goods, for his Majesty's use, for his contempt and disobedience.<sup>6</sup> This case is reported both by Kilkerran and Kames.<sup>7</sup>

When a criminal was fugitive or at large, the usual course came to be to cite him, upon criminal letters, to come and find caution to appear to underlie the law; and failing his doing so, the messenger is authorized to declare him a rebel, and put him to the horn. The effect of this was to authorize his apprehension, so as to place him at the bar on the day of trial. The form by indictment was the

<sup>1</sup> R. M. b. i. c. 7; Skene de Verb. Sign. v. Iter.

<sup>2</sup> Stat. Rob. iii. c. 31, 1535, c. 33.

<sup>3</sup> Hume, ii. p. 270.

<sup>4</sup> Fother's Trials, vol. ii. p. 366; *ibid.* p. 424.

<sup>5</sup> *ibid.* vol. ii. p. 270.

<sup>6</sup> Also in Acts of Sederunt, June 4, 1741.

No. 21.

privilege of the Lord Advocate, and used where the criminal was already in custody.

lov. 22, 1836.

Macrae v.  
Macrae.

In the case of criminal letters, if the party accused did not appear, the Court declared him an outlaw and fugitive, and his moveable goods to be escheat.

Even where a criminal charge was not specifically ascertained against any person but being suspected of being guilty, he had been required by the Secret Council to appear "and answer to sic things as sould be laid to his charge;" if disobeyed this charge, letters were then granted, with the advice of the Secret Council, charging the party to appear on a certain day, "under pain of rebellion and putting of him to the horne; and gif he failzie therein, the said day being past, to denounce him rebel, and put him to the horn and escheat." As an ample of this, reference may be made to the proceedings against James, Earl Murray (1st August, 1565), who is accordingly denounced rebel on the 6th not obeying this charge;<sup>1</sup> as well as to the proceedings against the Earl of Morton, Lord Lindsay, and their accomplices in the murder of Rizzio (8th June 1566).<sup>2</sup> The proceedings as there given from the Privy Council Records, highly instructive.

This form of procedure was put an end to by 1585, c. 13, in ordinary cases abolishing "letters to compear super inquirendis, or to enter their persons in wair or to do anie deed under the pains of treason or rebellion; and in case of failure denunce without calling or cogniton tane of before."

Horning was applied in all cases of disobedience to the King's letters. By statute 1584, c. 140, it was provided, that the prosecutors who were obliged to find caution to follow out their accusation, should further find caution not to enter the Court with more than the number prescribed in the act 1555, c. 1, and the accused in like manner, in finding caution to appear, is also to find caution not to have a greater number of friends than law admits, which were four for the pursuer, and the defender to have six, to come into Court along with him, if they appear with a greater number, "their soverties sall be unlawed, as gif they had not compeired, and they sall be adjudged fugitive fra the law, and put to the horne, and their escheit inbrocht;" and, in like manner, those exceeding the prescribed number are to be denounced as rebels "for their contemption," and registration in the books of adjournal is sufficient.

We never admitted of any criminal prosecution before the Justiciar against an absent party, except to a limited extent, for certain species of treason, by 1585, c. 69. But in trials for treason before the Parliament, as a Court of judicature, the case was different. If the party accused failed to appear, sentence was pronounced at the fourth Court against the accused, as if he had been present and defended himself, and convicted notwithstanding his absence. I may refer to the proceedings against the last Popish Archbishop of St Andrews, and other accessories of Queen Mary, after her escape from the Castle of Lochleven.<sup>3</sup> They did not appear, but sentence is given, that they have committed treason, that they have forfeited their lands and moveable goods to the King, that their dignities, names, and memories are for ever to be extinct, and "they to underlye the pane of treason and just punishment destinatt of the law of the realme for the causes foresaid."

<sup>1</sup> Keith's History, p. 309, 310.<sup>2</sup> Keith's History, App. p. 130.<sup>3</sup> Acts of Parliament, v. iii. p. 47-54.

It is a historical fact, that the Archbishop, having afterwards been taken prisoner in the Castle of Dunbarton, was hanged at Stirling on 1st April, 1570, in consequence of the above sentence, without any new trial;<sup>1</sup> strictly according to law, but almost a solitary example of its being enforced, and probably arising out of the strong political and religious feelings, which then persecuted the unfortunate prelate.

No. 21.

Nov. 22, 183  
Macrae v.  
Macrae.

The same course was followed in the case of Lord Maxwell.<sup>2</sup> He was summoned before Parliament, and condemned in absence, for treason.<sup>3</sup> He was at that time abroad. The proceedings are instructive. The summons is first found relevant by the Lords of the articles. It is then brought before Parliament, and again found relevant. The evidence is then produced and minutely set down, and then found is pronounced. Having returned to this country, he was apprehended in Edinburgh, and executed at Edinburgh on 18th May, 1613,<sup>4</sup> by warrant from the Privy Council, under the former sentence.

Outlawry was not employed with us as a means of compelling a defender to appear in a civil process.<sup>5</sup> Originally, this was by attaching his moveables till he found caution to appear and answer in judgment;<sup>6</sup> and this whether he withdrew from the jurisdiction of the judge or not. He was then to be summoned three times, and failing his appearance he was outlawed for the expenses of the defender; if he was absent at the fourth summons, his moveables or land, if the plea regarded it, were put into the pursuer's hands.<sup>7</sup>

But letters of horning, and of course outlawry, came to be employed in civil processes, the history of which has not been well traced in our law. Perhaps the earliest notice of it is to be found in an act in the middle of the 15th century, devised by our churchmen, to give greater effect to their decrees. They had by this time obtained a considerable extent of jurisdiction in civil causes, but their only form of either enforcing the appearance of the defender, or compelling implement of their decree, was by excommunication, 1426, c. 86. This sentence was at an early period enforced by caption, issued by the Bishop himself, the law of Robert III. c. 6, be authentic; but this was now to be issued by the King. But by 1449, c. 12, it was provided, that if the defenders "were fugitive, and had lands and gudes, they should be arrested and prysed as for other debts; and if they have no lands or gudes, they shall be put to the King's horne." The act is to endure till the next Parliament.

By another act of the same Parliament, 1449, c. 30, also a temporary act, the form is set down for compelling a defender to compare before the King and Council for any cause; if he fails to appear at the three first diets of compareance, he is condemned in a certain sum of expenses to the pursuer, and an unlaw to the King. If he continue absent, the pursuer was to be put in possession of his lands, if it was a pursuit for them, or his moveables, till these fines and unlaws were paid, and then he might be heard; and "gif he has no lands goods, then sall he be outlawed and put to the King's horne."

In this form, even in the case of one without lands or goods, ever was in force

<sup>1</sup> Spotswood's Hist. p. 252.

<sup>2</sup> 25th June, 1609.

<sup>3</sup> 1st Bull. p. 301; sects. 1 and 2.

<sup>4</sup> Balf. p. 311, c. 36; Reg. Maj. l. i. c. 7.

<sup>5</sup> Thomson's Acts, vol. iv. p. 417.

<sup>6</sup> Pitcairn, vol. iii. p. 33.

<sup>7</sup> Q. Att. c. 1; Mod. Ten. Cur. c. 2.



**No. 21.** to compel appearance, this could only have been for a short period ; for about this time we adopted the form of process from the Roman law of giving decret in absence. This was at least as early as the end of the 14th century. Probably the oldest judicial record in this country which has been preserved, is to be found in the Burgh Court-Books of Aberdeen ; and there are instances there as early as 7th July and 9th September, 1399, where the defender, not appearing at the fourth diet, the pursuer leads his proof, and the Court decides upon it in absence. The same course is followed on 10th October and 13th October, 1478, in civil processes before Parliament.<sup>1</sup> It was now unnecessary to continue any form for compelling appearance in a civil action ; at the same time when appearance was necessary, this was the only compulsitor. Thus, a reference having been made to the oath of the opposite party, he failed to appear. He is again summoned to appear to depone under pain of rebellion and putting to the horn, and after he has deponed, he is to enter his person in ward in Blackness Castle, for the contempt of the King's authority, under pain of rebellion and putting to the horn.<sup>2</sup>

Nov. 22, 1836.  
Macrae v.  
Macrae.

Witnesses in a cause having failed to appear, are warned to ward their persons in Blackness Castle, and to compear on the day to which the cause is continued, under the pain of rebellion.<sup>3</sup>

Persons of inquest being on oath, and originally witnesses of the fact they were to find by their verdict, when tried and convicted of error, were held worthy of punishment, as in a case of perjury, and therefore they could not appear by procurators, but were bound to appear personally ; if they failed to compear, they were ordained again to be summoned under pain of rebellion.<sup>4</sup>

As yet we do not find horning or letters of four forms used to compel implement of decree given against a defender in a civil process. The first trace of this in our law is 1535, c. 9, where a defender had been ordained by the Spiritual Court *ad factum præstandum*, and process of cursing had issued on this decree, and he lay under the process for forty days, for " non-doing or fulfilling of any act or dede ; in that case, the persons, their creditors, sall haue letters in the first, second, third, and fourth forms, according to the ordinares letters of cursing, and this act always to be na prejudice to them that likes to take captions." Hitherto the diligence against a defender was by poinding of his moveables or apprising his land, or by an act of warding within burgh, or caption on a decree of a Spiritual Court. The application of horning to enforce a decree *ad factum præstandum*, with all its consequences if contemned, was a reasonable extension of this originally criminal process, as obedience must always have been within the power of the party, and disobedience implied a contempt of the royal authority.

A farther and most important step was made by 1551, c. 7, whereby, if a person remained a year under a sentence of cursing, or communicates when he is excommunicated, his moveables are escheated, " providing always, that they at whose instance they are denounced cursed for sums of money, for fulfilling any deed, sall be first satisfied and paid of all sums or other things that they may craue, by virtue of the said letters of cursing, of the said escheit goods." Thus, horning came to enforce decrees of the Church Courts, not *ad factum præstandum* only, but for

<sup>1</sup> See Acta Dom. Conc. of these dates.

<sup>3</sup> Acta Aud. July 3, 1476, p. 41.

<sup>2</sup> Acta Aud. May 16, 1474, p. 33.

<sup>4</sup> Acta Aud. July 20, 1476, p. 56.

payment of a debt after the proper ecclesiastical compulsitor had been despised for a certain term ; and it was under the equitable proviso, that the forfeiture on account of the contempt of the royal authority should be qualified with the burden of paying the debt, which it will be found did not at first, nor for some time, follow as the effect of hornings on decrees of the Civil Courts. This was one of those improvements for which the common law of most countries was indebted to the churchmen, and their study of the equitable rules of the civil and canon laws. At this time, as is well known, the Church Courts throughout Europe generally, and most certainly in this country, had acquired a jurisdiction in every civil case which could be brought under *mala fides*, or made a case of conscience, or where the contract was fortified by an oath ; so that much of what was purely civil process, was disposed of in these Courts, for which this effectual mode of enforcement had been provided, which secured payment to the creditor on whose diligence the outlawry had proceeded. It thus appears how important and valuable an addition was here made to our law, for the recovery of debts and fulfilment of pecuniary obligations.

No. 2  
Nov. 22, 1  
Macrae v,  
Macrae.

By 1555, c. 55, churchmen are no longer to be liable to horning for the aids granted to the Crown by Parliament. It appears that it had been customary to levy these by this form of diligence, by what law, or when introduced, I do not know.

After the Reformation, the act 1572, c. 53, was passed, which required the Lords of Council to direct letters in all the four forms charging the excommunicate persons, remaining so for forty days, to satisfy the sentence or decret pronouncd against them, under the pain of rebellion.

It is generally said, that an important change took place in the execution following on decrees, by an act of sederunt,<sup>1</sup> passed by the Court of Session, " the King's Majesty sittand in judgment,"<sup>2</sup> on the narrative, that execution was often frustrated by simulate and false alienations of their lands and gudes by defenders ; and therefore it enacted, " that letters, as weil of horning as poynding, the ane nocht prejudicial to the other, sall be directed at the will and pleasure of the partie obtainer of the decret, quhidder the same be given upon liquidate summes, or that the execution thair of utherwayes consist in facto." This act of Sederunt was ratified two years afterwards by Parliament.<sup>3</sup>

If the charge to obey the decree was disobeyed, even if the decree was to make payment of a sum, which the party had no means of doing, he was declared a rebel, which is the only certification in the letters of horning, and he was liable to all the consequences of that situation.

But it seems pretty clear from 1579, c. 75, which authorized the register of hornings, and required their registration by the sheriffs, within their sherifffdoms, within fifteen days of denunciation, that hornings were executed at that time for sums of money, and on failure to pay, the party was put to the horn, and his wheat fell ; and it was by this act first provided, that, in process following on a decree of the Civil Court, the creditor was to be paid his debt out of the goods sequestered, with the officer's expenses, the contempt of the royal authority having been previously alone regarded. It was not till 1592, c. 145, that this obligation

<sup>1</sup> Kames' Law Tracts, p. 360 ; Ross, v. i. p. 273.

March 23, 1582.

<sup>3</sup> 1584, c. 139.



**No. 21.** to satisfy the creditor was imposed upon the donator of the escheat, or the intro-mitter with the escheat goods.

v. 22, 1836.  
icrae v.  
icrae.

By a series of statutes, from 1593, c. 181, to 1612, c. 7, the Court of Session was directed to issue letters of horning in the present form upon a single charge, on decrees of inferior judges; and by an Act of Sederunt, 23d November, 1613, letters of horning on their own decrees were also to be given on a single charge.

In this discussion as to horning in civil process, I have been led away somewhat from the proper object of enquiry—the effect of declaring one an outlaw, and putting him to the horn. When it is recollected that, in criminal causes, the nature of the crime makes no difference on the outlawry, and the offender being fugitive, is not held, as in England, an acknowledgment of guilt; but the Court more properly considers only the disobedience of the citation and contempt of the royal authority, and that the consequence is the same, whether he is cited for murder or for the most petty delinquency, the offence in all being the same; we would naturally expect, that, when the same form came to be applied to disobedience of a charge upon letters-executorial in the King's name, that the contempt being the same, the consequences should be the same also. The warrant contains the same certification in civil as well as criminal process: in the latter, as in criminal letters, it ordains the messenger “that, incontinent thereafter, ye denounce him our rebel, and put him to the horn, escheat and inbring all his moveable goods and gear to our use for his contempt and disobedience;” and the letters of horning on a charge to pay or perform, grant warrant to charge “under pain of rebellion and putting of them to the horn, wherein, if they failzie, that, incontinent thereafter, ye denounce them our rebels and put them to the horn, and escheat and inbring all their moveable goods and gear to our use, for their contempt.” It cannot make the slightest difference that, in the above instances, the party charged is at once declared a rebel on disobedience, by the messenger, on the warrant and authority of the letters; and that, as in the case of a trial by indictment, this sentence is more solemnly pronounced by the Court before which he was summoned to appear. In both the authority is the same; it is the royal authority directed in the one case to messengers, as sheriffs in that part, authorizing them to discharge this branch of judicial duty in a certain event; and in the other, it is the exercise of the same authority inherent in the Court, and conferred at its institution, and for which, accordingly, there neither is, nor is required to be, in the libel any special warrant.

Accordingly, when Sir George Mackenzie observes, in treating of the effects of outlawry for a crime, that a person at the horn is said *non habere personam standi in judicio*, he distinctly adds, “nor puts our law any distinction between civil and criminal cases;”<sup>1</sup> and he, in effect, lays down the same law in another of his works, in his Observations on 12th Parl. Jas. VI. c. 147, p. 273, anent the Escheat of Rebels:—“Though the Act of Parliament specifies only crimes, yet I conceive that all rebellion is comprehended under the word crimes; for in all cases, even for civil rebellion, not only may the thesaurer seal till caution be found, but even the Lords of Session will, upon a bill, allow the sealing of the rebel's goods at the donator's instance, till caution be found;” and it will be observed, that when

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<sup>1</sup> Crim. P. II. t. 19, § 5.

Spottiswood, Stair, Bankton, and Erskine discuss the effects of horning on the status or property of the party, it is in their Institutes of our civil law, and when they arise out of civil cases; and they never hint at any different effects from what would occur in a criminal case, from which this form of process was unquestionably adopted. In the following case the two are expressly assimilated, and this doctrine is assented to by the judgment of the Court. "Though sentences of forfeiture upon probation of the crime are drawn back to the date of committing thereof, yet the declaring a person fugitive infers only contempt in not compearing, conform to the will of the letters, upon which nothing falls but the single escheat and the liferent, if the rebel continue year and day unreleased, as in the case of denunciation upon horning."<sup>1</sup> Stair mentions, as the only exception from the usual effects of hornings; "hornings directed against witnesses or havers of writs, to be produced ad probandum;"<sup>2</sup> disobedience there is not to infer rebellion; and the horning is to be followed out by caption.

No. 2  
Nov. 22, 1  
Macrae v.  
Macrae:

When outlawry was in England adopted in civil process to enforce appearance in Court, or to compel obedience to the orders of Court, it has been already noticed that this was subsequent to the time of Edward III., when some of the harsher features, incident originally to the situation of an outlaw upon a criminal proceeding, had been softened, and it never was made use of as a means of enforcing a judgment. With us, however, it was different; no change had taken place upon the effects of outlawry, when it was adopted as a means to enforce payment or performance; hence the difference as to its effects in the two countries. No doubt there was something very harsh that the same effects should follow on being fugitive on account of a criminal offence inferior only to treason, and disobedience of a charge to pay, not "out of contempt to the King's authority and command, but because they are either not able to perform, or supinely negligent, and ignorant of the denunciation and registration;"<sup>3</sup> and this hardship became the more glaring, according as this mode of enforcing implement came to be extended and applied to other cases than those in which it was originally adopted.

Accordingly, it appears, that, in the Parliament 1567, among the other matters referred to the Lords of the Articles, one was to consider, "that horning is made one comone paine, without respect of causes."<sup>4</sup> But by the marking on the margin of the record, nothing seems to have been done. It appears that the suggestion had been to distinguish between "them that wilfully passes to the horne and lyes thereat, and them that passes to the horne for liquidat sumes, and them that passes at the horne and enters in the girth."<sup>5</sup>

By 1579, c. 13, which first appointed denounced hornings to be registered, each sheriff is to make out a catalogue of such rebels, and affix it on the Market Cross and Tolbooth, before each of the three head Courts: and he is to send a copy of this catalogue, "with a brief note of the causes for whilk they are denounced, to the treasurer." But this does not imply that any distinction was made between the effects of rebellion in a criminal or civil case, for its object is declared, that the party complainer may be paid "of his just debt with the officiar's expenses of the readiest and first end of the escheat."

<sup>1</sup> Holburn, Feb. 168, M. p. 4774.

<sup>2</sup> B. 4, t. 47, § 9.

<sup>3</sup> Stair, B. 4, t. 47, § 9.

<sup>4</sup> Thomson's Acts, vol. iii. p. 44.

<sup>5</sup> 1567, c. 25, vol. iii. p. 30.

No. 21.

Nov. 22, 1836.  
Macrae v.  
Macrae.

The same matter was again brought before the Parliament which met in 1581,<sup>1</sup> for the act 9th of that year, referring to the former commission to the Lords of the Articles, again remits this matter in the very same terms, and in the same three heads as before.

These remits, as well as some other considerations, make me hesitate in adopting the usual opinion as to the object and effect of the Act of Sederunt 1582, already adverted to, that it first authorized the use of letters of four forms to enforce decrees for debt; and I am rather inclined to hold, that the alteration introduced was the very important one, that execution was to be competent both against the person and the goods, the one without prejudice to the other. When a debtor was denounced rebel and put to the horn, and he entered his person in ward, conform to the said letters, no diligence could be done against his goods or lands; and it was only decided in 1558, that warrant will be given to poind the moveables and apprise the heritage, provided the debtor in such a case be first put to liberty.<sup>2</sup> But, be this as it may.

It appears that nothing had followed upon the proceedings already noticed in 1581. Nay, the act 1592, c. 146, for the punishment of receipters of traytors and rebels, distinctly places intercommuners with the one or the other class on the same footing, and their punishment is to suffer "the same paine for quhilk they are forfaulted or put to the horne:"<sup>3</sup> And further, the act 1598 shews that no distinction was yet made as to any class of rebels, and that "the hail horners within the kingdom" were treated in the same manner; the sheriffs were not even now to send a note of the causes for which they were denounced, but the same consequences followed on their rebellion in whatever cause.

Accordingly we find it equally a point of dittay to reset and supply a rebel, at the horn for a civil cause as for a criminal act. Thus, on the 12th March, 1605, Ringan Armstrong and Will Armstrong<sup>4</sup> are tried, among other causes, for this offence, and the act referred to is plainly the act 1540, c. 97, because the penalty is stated in the indictment to be death and the confiscation of moveables; and the persons said to have been resetted were rebels, and at the horn for not making redress and payment in terms of a decree given by the Warden of the West Marches in a court of redress at Dumfries, 29th December, 1587.

The act 1612, c. 3, unquestionably made the first distinction in our law between those at the horn for contempt in a civil and those in a criminal process and when by this law it was enacted, that it should be no defence to the accused that the person slain by him, or mutilated, was at the horn for a civil cause, and when this distinction was thus made between this situation and the homicide of one at the horn for disobeying a citation to underlie the law for a crime, we may surely lay it down, independently of the evidence from the proceedings in Parliament above referred to, that hitherto at least there was no difference as to any of the consequences between the two.

But to consider more particularly the consequences of outlawry, 1st, As it affects the status; and, 2d, The property of the party outlawed.

I. As to the status of the party denounced as a rebel or outlaw, he "hath not

<sup>1</sup> Vol. iii, p. 214.

<sup>2</sup> Pen. Nov. 1558, Galbraith v. Edinghen. Balf. p. 392, c. 28.

<sup>3</sup> Thomson's Acts, vol. iv. p. 174.

<sup>4</sup> Pitcairn, vol. ii. p. 542.

personam standi in judicio either as pursuer or defender;"<sup>1</sup> or, as Erskine says, "he is not personable, or, in other words, he cannot appear judicially in any other court, either as pursuer or defender."<sup>2</sup> This naturally results from disobedience to the royal authority, for he cannot be entitled to claim the assistance of the courts of that sovereign whose mandate he contemptuously despises, either in prosecution of his rights, or in defence against wrong. Nay, even his person is not under the protection of the laws, so that they cannot be resorted to to punish even his murderer, for they take cognizance only of offences of those who are subject to them. Although it is said that the rebel is civiliter mortuus, that amittit legem terræ;<sup>3</sup> yet, when these expressions are defined, they import nothing more than this, that he is repelled "ab agendo et defendendo." It is never said he can do no act or deed which will bind himself or his heirs.

No. 2  
Nov. 22, 1  
Macrae v.  
Macrae.

A rebel, then, while unrelaxed, cannot pursue<sup>4</sup> or defend in any cause;<sup>5</sup> inasmuch, that the wife of a rebel who is conjunct fiar in the lands, cannot defend for her own interest, because she cannot be authorized by her husband, "quhilk he cannot do by reassoun of the horning."<sup>6</sup> Hence it was necessary for Lady Morlane, the wife of Mr Archibald Douglas, who was accused of accession to Darnley's murder, to obtain a special authority to pursue all actions by herself or others in her own name only, regarding her own property. That a person accused of a crime, fugitated, and put to the horn, is repelled, ab agendo, not on account of the crime, but of the rebellion, the contempt of the royal authority in disobeying the summons, will still farther appear from this, that "ane beand criminallie accusit and convict for theft, may nevertheles call and persew for spuilie of guidis and geir pertaining to him, 19th May, 1574, John Cristisone."<sup>7</sup>

In order to enable a person at the horn either to pursue or defend himself, it was necessary to obtain letters of relaxation, and this either in a criminal or civil process, and whether he has been put to the horn for a civil or criminal cause; so true is it, "that our law puts not any distinction on this matter between civil and criminal cases."

Thus, in the case of Patrick Dunbar, 22d June, 1599, the justice found no process at the instance of the private pursuer, he being at the horn for slaughter.<sup>8</sup> On 6th November, 1607, John Forbes is placed at the bar for slaughter. He had been at the horn for not appearing to underlye the law for this crime, and a commission had been granted to apprehend him. The advocate produces the dittay with the letters of horning. The pannel produces a letter of relaxation, and claims the right of being tried as the King's free subject, in respect of the relaxation.<sup>9</sup>

Archibald, Earl of Angus, having raised a reduction of his forfeiture, the Queen's Advocate alleged, that he could not stand in judgment to pursue, because he was put to the horn, till he shew relaxation. His prolocutor accordingly produces a relaxation.

<sup>1</sup> Stair, 3, 3, § 15.

<sup>2</sup> Ersk. 2, 5, § 60.

<sup>3</sup> Stat. 1598; Thomson, vol. iv. p. 174.

<sup>4</sup> Balf. p. 296, c. 12, July 7, 1532.

<sup>5</sup> Balf. p. 294, c. 2, Feb. 11, 1563, Crombie v. Duguid, Dec. 1749, p. 10162.

<sup>6</sup> 1531, c. 78, Thomson's Acts.

<sup>7</sup> Balf. 290, c. 2.

<sup>8</sup> Balf. p. 270, on

in, vol. ii. p. 532, March 15, 1542; Thomson's Acts, vol. ii. p. 424.

No. 21.

Nov. 22, 1836.  
Macrae v.  
Macrae.

When the process of forfeiture was instituted in Parliament, and the accused failed to appear, in order to prevent any attempt afterwards to rescind the sentence to be pronounced in absence, on the ground that being at the horn, the party was not safe to appear, it was customary for the King's Advocate to produce a relaxation, although, of course, not applied for by the accused himself.

Thus, in the proceedings against the Archbishop of St Andrew's, and various other friends of Queen Mary's, "and sicklyke the said advocat producit letters gevin under our sovrane lordis signet dewlie execut, relaxand all the foirsaidis personis above writtin fra the process of horning led upoun thame, and every ane of thame, for quhatsumever causs bygane, sua that thai might, without ony feir, compeir and defend in the said causs."<sup>1</sup>

A similar procedure takes place in the summons of treason against John Comendator of Aberbrothock, and other Hamiltons.<sup>2</sup>

The relaxations produced, it will be observed, are from the process of horning for whatsoever cause or occasion, for it was as necessary to obtain a relaxation from a horning on a civil process as in a criminal pursuit, the effects being the same in both. Stair says, "The Lords do likewise relax parties who are incarcerated and not able to find caution, to give them personam standi in judicio, to the effect that their cause may be discussed while they are in prison."<sup>3</sup> It is in this chapter, entitled "Letters Executorial of Decreets," he is treating of the "effects of horning, whereby decreets and others above mentioned (that is, decrees of registration) attain their end."<sup>4</sup>

Hence Balfour says, "Letters of horning beand execute against ony person, and he denuncet rebel, and put to the horn for not fulfilling of ane decrete given aganis him, the samin sould be suspendit to ane certain day, and the person put to the horn relaxt thairfra, he findand caution to obey and fulfil the said decrete in all punctis; 6th Feb. 1534."<sup>5</sup>

And accordingly the style is given in these words at the end of letters of suspension, "and if the said complainer be already denounced rebel, and put to our horn for the cause foresaid, that ye messengers-at-arms pass to the mercat-cross of and there, in our name and authority, relax him therefrae, receive him to our peace again, and deliver to him, or any other in his name, the wand thereof, and that ye cause registrat the said suspension and relaxation within fifteen days next after he bees relaxed, conform to the act of Parliament."<sup>6</sup>

In order to entitle a party to raise an action for annulling a horning, "he must suspend and relax himself; but the Lords resolved, if the cause of horning was so great as the pursuer was not able to find caution, that they would grant suspension and relaxation super juratoria cautione."<sup>7</sup> So firmly was this fixed, that in a declarator of the Laird of Foulis' liferent-escheat, the gift being granted on divers hornings, and some were used to support the declarator, and another produced to debar the defender a defendendo, "The Lords found that he ought to be relaxed or ever he could be heard to propone improbation, seeing horning, albeit it was

<sup>1</sup> August, 18, 1568, Thomson's Acts, vol. iii. p. 47.

<sup>2</sup> October 21, 1579, Thomson's Acts, vol. iii. p. 125.

<sup>3</sup> B. 4. t. 47, § 11.

<sup>4</sup> § 9.

<sup>5</sup> Page 393, c. 30.

<sup>6</sup> Dallas, p. 446.

<sup>7</sup> Thomson v. Ramsay, Nov. 11, 1609, Mor. p. 10151.



contained in the gift, yet it was not used by the pursuer to recover declarator thereon, but only to debar him; 14th June, 1626."<sup>1</sup> No. 2

It may be worth while to notice that it was the same in the case of a person excommunicated. By the Canon Law it is laid down, "*Reus in qualibet parte huius excommunicationem contra actorem objiciens auditur.*"<sup>2</sup> With regard to defenders, however, the rule is thus given, "*Quia postulasti a nobis, utrum excommunicatus in judicio stare possit; Respondemus quod conveniri potest; et debet per alium respondere in judicio: Ne videatur de sua malitia commodum reportare.*"<sup>3</sup> But when we adopted from the Roman law the form of a decree in absence, this distinction was unnecessary; and accordingly with us, while an excommunicated person may not pursue, "and na person is holden of the law to mak answer to him, bot gif he pleises to do otherways;"<sup>4</sup> neither can a person cursit and excommunicate, defend in any action or cause.<sup>5</sup> Nov. 22, 1  
Macrae v.  
Macrae.

On this ground an objection is taken against a summons at the instance of Ellen Lady Grahame, that she was then under the sentence of cursing: The Lords Auditors "finds the exception of avale, and therefore decernis the summons of the said Elene to be of nane effect, force, nor strenth at this tyme."<sup>6</sup>

If a person cursit and excommunicated has an objection to the caption which issued on this sentence, he may suspend without relaxation, as he is not yet declared a rebel, and he is necessarily defending himself against being so declared, 25th January, 1541.<sup>7</sup>

In England "an excommunicated person cannot sue any action, real or personal, but he may be convened and must defend,"<sup>8</sup> because there no decree is given in absence, and therefore his delinquency against the church would operate as a defence and supersedere of all civil process, if the same rule were observed as with us.

But, besides an outlaw not being entitled to come into the King's Court to claim the authority of the laws to enforce his rights or defend against wrongs, the same consequence with us followed as we have seen attended the situation of an outlaw in England, *ut gerebat caput lupinum*; and his death or mutilation was no point of dittay cognizable by our courts; and it is undoubtedly true that here, too, no difference was made, whether he was fugitive and declared a rebel for an atrocious crime, or was at the horn for not making payment or performance of a decree in a civil action. How this barbarous state of matters arose has been already noticed: While all the consequences of outlawry in felonies remained in full force, the same procedure was in Scotland adopted in civil process, and no restriction or mitigation was introduced: Whereas in England it was not till after the judges modified the consequences of outlawry in felony, that the form was applied to civil process, so that the singular and barbarous effects upon the personal safety of a party outlawed never took place there in civil process, That it did so in Scotland, is too fully shewn by unquestionable public documents.

At the debate a remarkable case was referred to from the records of our criminal

<sup>1</sup> Mor. p. 10155.

<sup>2</sup> Decret. Greg. lib. ii. t. 25, § 12.

<sup>3</sup> Balf. p. 289, c. 1; Stat. 1443, c. 7.

<sup>4</sup> May 13, and Oct. 12, 1474, Acta Audit. pp. 34, 36.

<sup>5</sup> — p. 290, c. 1.

<sup>6</sup> Lib. ii. t. 25, § 7.

<sup>7</sup> Balf. p. 294; c. 1.

<sup>8</sup> Coke, vol. i. p. 133.

No. 21. court,<sup>1</sup> where it was pleaded and recognised that the slaughter of a rebel at the horn was not a point of dittay. In a feud between the Maxwells and the Crichtons, which long disturbed the county of Dumfries, Douglas of Drumlanrig, who followed the banner of Lord Maxwell, killed Crichton of Kirkpatrick. Douglas was brought to trial by Crichton's heir for murder, and pleaded in defence that Crichton was a rebel, and at the horn at the time of his death, and therefore that he was not liable to punishment for the death of one who was out of protection of the law. This defence was sustained, 24th September, 1512.

v. 22, 1836.  
cras v.  
cras.

In consequence of this trial a Convention of the Estates, or perhaps only the Secret Council, was induced to consider the state of the law as to this matter, and passed an act which is entered in the Books of Adjournal,<sup>2</sup> to define this privilege, so that it was only to apply to the slaughter of a rebel at the time of apprehending him; and if he be apprehended and kept safe twenty-four hours after his apprehension, "it shall not be lawful to the keeper, apprehender, or any other person, to slay him, but such shall be reputed manslaughterers." This restriction of the power of putting a rebel to death, when he was safely secured in custody, proved by his remaining there for twenty-four hours, shews what previously was the law as to killing a rebel, and which, even after the passing of this act, was left broad enough to protect such a case as that which was brought against Douglas of Drumlanrig.

This act, I have no doubt, had regard only to rebels under criminal proceedings.

But the above is not the only case where such a defence was sustained. Mackenzie mentions a case where it was found, "that the killing of such as are at the horn for slaughter or other crime, is not criminal, January 1600, Guthrie v. Jardine;"<sup>3</sup> and he further holds, that to kill a person at the horn out of private revenge, would infer no punishment according to the received maxim, *bannito occiso per inimicum, occidens non reputatur homicida*.<sup>4</sup>

The same law is pleaded in another case which was also tried in 1600, "Robert Auchmowtie for the slaughter of James Vauchope in singular combat, on 19th April last."<sup>5</sup> The defence was, that James was the King's rebel, "put to the horne for non-compeirance to answer to his Majestie, and the counsall, for the tressonabel reset of a rebel," the letters of horning being executed 22d February, 1596.

The answer is, that the horning is and was null from the beginning, and was so declared by the Lords of Council and Session in May last.

Although the decree setting aside the horning is subsequent to the duel, and at the instance of James's heir, to the effect that he might be retoured to his father (which was then necessary, or a license from the King to answer to the head of the brieve that the deceased died at the peace of the King), it is probable that the father and brother of the deceased, who, with the King's advocate, are prosecutors, saw that it was necessary first to obviate the defence that would be set up on the circumstance of his being at the horn. The argument turns on whether the Court of Session had power to set aside a charge given on a decree of the Secret Council,

<sup>1</sup> Pitcairn's Trials, vol. i. p. 79.

<sup>3</sup> Works, vol. ii. p. 104.

<sup>5</sup> June 5, 1600, Pitcairn, vol. ii. p. 113.

<sup>2</sup> Pitcairn, vol. i. p. 80.

<sup>4</sup> *Ib.* p. 105.

and what is the effect of a horning, even though reducible, while it stands unre-  
 deduced? Many quotations are made from the civilians in the pleadings of the par-  
 ties to prove this position: "Quod bannitum, cujus bannum injustum aut nullum  
 est, impune licet occidere," and, among others, this from Bartolus: "Si inter-  
 sciens nullitatem sciebat, tum punitur; secus, si hoc ignorabat et quod ignorans,  
 non puniatur;" and from Joannes Andree, "Si quis bannitus fuerit propter pecu-  
 niam non solutam, et postea solverit, banno tamen non cancellato, occisus, fuerit,  
 non tenetur pena homicidii."

No. 2  
 Nov. 22, 1  
 Macrae v.  
 Macrae.

The deceased was held never to have been at the horn, as the execution by the  
 messenger wanted a statutory solemnity, and the defence was therefore repelled,  
 and the pannel put to the knowledge of an assize, convicted, and executed.

In the pleadings in this case,<sup>1</sup> the Justice is referred to a case as well known to  
 him, where the Laird of Arkinglass, being accused of the slaughter of the Laird of  
 Caddell, alleged na process, because the defunct was slain at the horn, and pro-  
 duced letters of horning at the instance of Mr James Harvie, advocate. This  
 must have been for a civil cause. The answer was, the horning had been reduced  
 as being null from the beginning, so that the decree draws back to the time of the  
 denunciation; and although this process of reduction had been raised at the in-  
 stance of the relict and bairns of the deceased, and after they had summoned  
 Arkinglass to underly the law for the slaughter, and obviously with a view to get  
 the better of this defence as to Caddell being at the horn, the justice, in respect of  
 the answer, repelled the defence proponed by the pannel on the horning, declared  
 the same null, and found farder process in the said matter.

The trial of Johnne Campbell of Arkinglass commenced 17th September, 1596;  
 see another notice of this case, p. 363.<sup>2</sup>

A remarkable proof of the subsistence of this state of the law among us occurs  
 in certain proceedings in Parliament in the year 1567, which throw considerable  
 light on this point. In consequence of the battle of Corrichie in 1562, where the  
 Earl of Huntly was defeated and lost his life, many of his followers were forfeited  
 by Parliament. When Queen Mary afterwards wished the support of that  
 powerful family, many of these forfeitures were reduced and set aside by Parlia-  
 ment. In the reduction at the instance of two of these Gordons, among the rea-  
 sons given for setting aside the decree of Parliament, which had been in absence,  
 was this one, "becaus befor the day of compeirence and the tyme of the leding  
 and deduceing of the foirsaid decrete and sentence of foirfaltour, lang of befor and  
 allwa ane gret space thairafter, the saidis persones were dewlie and orderlie de-  
 menceit rebellis and put to the horne," for not obtempering the charge to compear  
 and answer super inquirendis, "Quhairby the said persons then wer alluterlie  
 unable, and had na personages to stand in jugement for defence of their just  
 cause, thai being innocent of the crymes laid to thair charge, and thairfor durst  
 not nor myght not compeir to that effect for dainger and feir of thair lyves be  
 reason that thai being for the tyme standand at the horne, and sua it was lauchful  
 to any of the lieges of this realme, thair inymeis and unfreindis, to haif slaine  
 thaim, without ony cryme or remeid of law, to haif followit thairupon."<sup>3</sup>

In this instance the pursuers were at the horn for disobeying a charge in a

<sup>1</sup> *Edinburgh*, vol. ii. p. 120.

<sup>2</sup> *Edinburgh*, vol. i. p. 391.

<sup>3</sup> April 19, 1597, Thomson's Acts, vol. ii. p. 587.



No. 21.

ov. 22, 1836.  
acrae v.  
acrae.

criminal process ; but it is a remarkable circumstance, that in the same Parliament there is a reduction of the forfeiture of John Earl of Sutherland, which had been pronounced by Parliament also in absence ; and one of the grounds of reduction is, that the Earl was at the horn, using the very same words as expressive of the consequences, to the safety of his life, and the impunity of any of the lieges who might slay him. But the horning was at the instance of the comptroller against the Earl " for non-payment of the thridis of the bischoprick of Caithnes, and as takkisman or ferimorare thairof,"<sup>1</sup> so that he was at the horn for a civil cause ; and yet the same effects are said to attend a horning on such a debt, as for disobeying a charge to underlye the law, that it was lawful for any one, even his private enemy, to have put him to death, without liability to punishment.

These forfeitures, it is true, are reduced in absence of any person on the part of the Crown : the parties had made their peace with the Queen, and the reduction was a mere matter of form ; but it cannot be supposed, that, in a proceeding before Parliament, any statement should be made as to what was law which was not true : indeed, in such a case there was less occasion to allege what was not admitted law, than in a case to be defended.

In the case of Thomas Trumbill and others, for the slaughter of Thomas Ker and his servant,<sup>2</sup> there is a further illustration that this was still admitted law. The pannels objected that they ought not to be put to the knowledge of an assize, because Ker and his servant were rebels at the time for slaughter. The answer is, they were lawfully relaxed before the crime libelled, and this is sustained.

The pannels next object that they ought not to be tried for the murder of Ker, because at the time " he was enterit our Soverane Lordis rebell, and put to the horne, and herewith produced the said horning, usit at the instance of James Mastertoune for non-payment of seven scoir ten li. mony, and xl. li. for expenssis." The advocate does not dispute the effect given in the pannel's plea to this horning for a debt, but objects to the horning for want of registration and subscription of the sheriff-clerk ; in truth, he thus admits the law that horning has the same effect in this highest of all respects, whether it be in a criminal pursuit for slaughter or for non-payment of a debt. The relaxation is held to apply to this horning also, and the trial proceeds.

In like manner, George Trumbill, accused of several slaughters and other crimes, pleads, " as to the slauchter of Walter of Raflat, he was slaine at the horne, and produceit the horning for verifying thereof, raisit at the instance of Andro, Commendator of Jedburcht, quhair (against?) the said Walter for nocht removing fra the landis of Raflatt, dated 20th April, 1581."<sup>3</sup>

The advocate " allegit, that albeit he was at the horne, the pannel aucht nocht to usurpe the Kingis auctorite upounne him, to slay ony man at his awin hand."

This answer, however, was not sustained, and although the horning was twenty-one years before, and in a civil process, as he had never been relaxed, he was out of the protection of the law, " for the justice remittis the hail poyntes of dittay, except the slauchter of umquile Walter Trumbill of Raflatt, to ane assize."

The plea is again urged, in the case of Alexander and Nicoll Bruntfield, " that the defunct for quhais slaunchter thai are persewit, was slane at the horne for four

<sup>1</sup> Thomson's Acts, p. 581.

<sup>2</sup> Dec. 18, 1601, Pitcairn, vol. ii. p. 370.

<sup>3</sup> July 19, 1603, Pitcairn, vol. ii. p. 419.

several caussis, contenit in the four hoirningis presentlie producit be the pannell."<sup>1</sup> No. 21.  
The process is continued to 24th November, and it does not again appear in the  
record.

Nov. 22, 1836.  
Macrae v.  
Macrae.

But there is a subsequent case which proves the same, and which is the rather noticed, as it led to the enactment of 1612, c. 3, which made the first difference in our law between civil and criminal rebellion; and it is singular enough, that, just a century after the proceeding already noticed in 1512, the same family, Douglas of Drumlanrig, should give occasion to discuss this matter.

On 21st December, 1611, William Douglas, younger of Drumlanrig, is "dilaitit for invading and pursewing of William Kirkpatrick of Kirkmichael on 15th July, 1610;"<sup>2</sup> the prosecutors are the private party and the King's Advocate.

It is allegit na proces at Kirkmichael's instance, because he is rebel (horning on a civil cause is produced). The answer is he is relaxt. It was also alleged that he is at the horne for not-payment of the taxatione.

The Justice, with advice of the Assessouris, finds na proces at the instance of Kirkmichall "sa lang as he stands rebele unrelaxt."

The further proceedings in this curious case are well worthy of attention, but I refer to my authority for the details. The King's Advocate (Sir Thomas Hamilton, afterwards Lord Haddington) upon this declares that he insists for his Majesty's interest. The defence against this also is, that the person taken captive was not the King's free liege, as being rebel by a horning in 1601, and it was therefore no usurpation of the King's authority to invade and detain him prisoner; and it was further pleaded, that "Bannitus potest impune occidi, sic multo fortius capi et incarcerari;" and Baldus and Julius Clarus are cited for this rule of law. The plea of the King's Advocate, who, however, cites no authority for his position, is, that bannitus here is only he who is declared rebel for a capital crime. The panel replies, that "Banniti war alsweill rebells for crymes as for pecuniall wronges." From this it is clear that Kirkmichael was at the horn for a civil cause; indeed it is stated to have been for the taxation.

The Justice continues the case till Tuesday next.

The law clearly was not such as was favourable to the prosecutor; and from the after proceedings in the case, it appears that steps had been taken to procure the agreement of the parties, in order to avoid a decision which would not have been consistent with that improvement and civilisation which the King wished to see introduced among his native subjects.

On 24th December, the pannel appears, and offered to abide his trial, and passed from any objection to Kirkmichael pursuing because he is a rebel. The diet is deserted, as neither Kirkmichael nor my Lord Advocate appeared.

On 24th April, 1612, the cause is brought again before the Court. The Lord Advocate declares he is now to insist. The pannel produces a letter from Kirkmichael, declaring that he had gone to Drumlanrig of his own consent, and had not been detained a prisoner.

The Advocate also produced a letter from the King, directing him to insist for the cause remitted for farther consideration to the Lords of the Secret

<sup>1</sup> *Pitcairn's Trials*, vol. ii. p. 480.

<sup>2</sup> *Pitcairn's Trials*, vol. iii. p. 212.

- No. 21.** Council, on the pannel “renouncing all uther exceptionnes formerlie proponit in his defence; the King insisting in the mean tyme earnestlie that these uther exceptionnes heretofor usit in his defence, being so dangerous, and by no president warranted, may nocht hereafter be recordit in the Registers of Adjornal as lauchful or tollerable defences to be proponit in the lyk causis in any tyme cuming.” The deletion was ordered accordingly, but no deletion of the record appears.\*

Nov. 22, 1836.  
Macrae v.  
Macrae.

\* I am indebted for this important illustration of this curious subject to a learned friend (Cosmo Innes, Esq. advocate), who is so conversant with our legal antiquities; and he has further supplied me, from the Privy Council papers, with a copy of a letter of King James on this subject, which bears intrinsic proof of having come from the pen of the royal author himself. I give it here as a curious document, illustrative of the history of our statute law.

“JAMES R.

“Right trusty and right weilbeloued cosen and counsellour, and right trusty and weilbeloued counsellouris, wee greet you weill. Vnderstanding that the laird of Drumlanrick, younger latelie persewed befoir our Justice of that our kingdome, for certane crimes libelled in the summondis raised against him; and that our said Justice and his assessouris, weighing the gravitie of that actioun, and the consequence of the exceptionis proponed in defence of the pairtie persewed, with the replies by Our Advocat thereto returned, did remitt the decisionn thereof to your deliberationne, wherin your interlocutour, being by our Advocatis passing from his persute prevented, and wee finding the great danger whiche, to the interruptionn of the peace and quietnes of that our kingdome, will vndoubtedlie follow vpoun your allowing of that exceptions, whereby the defender contendis that none of our subjectis is by our lawis punishable, or to be persewed befoir our Justice for slaying, muchles for vsurping our authoritie in takeing captive and imprisoning of any partie being at our horne: your approbationn whereof must consequentlie warrant and make it lawfull to any of our subjectis to kill his envyed neightbour being at our horne for a mean matter of debt, whereof wee think noe good subject will allow, since wee by our princelie power are not hable vpon that ground to bring any man within compasse of a criminall persute. But forasmuch as our permitting this without furdur controlment thus to disert and die, will with impunitie produce as ill effectis as your approving the same might otherwayes warrant, wee have therfoir required our Advocat of new to insist in his persute, vpon whose reviving herof (howsoeuer wee doe not greatlie intend the punishment of this offendour) It is nottheles our speciall pleasure that for removeing of the evill exemple and worse consequent whiche the approbationn, or impunitie of this intollerable absurditie may otherwayes warrant or produce, yee doe in hoc individuo in contemplationn of the fact without feid or favour of the offendour declair this crime and all other crimes of the like nature to be by our laws punished to the † of the pairtie slayne although they shalbe fund to have bene at our horne, which exceptionn being impoed as a lett to impeded the procedour of our Justice, in persutis criminallie intenit against the slyers of such rebellis, can nowayes be a law to justifie the iniustice of this crime. The contempt whereof being done directly against vs, and soe as wee being the chef object of the same are equallie interessed thereby, whither the pairtie imprisoned be at our horne or not, must in that respect, argue this offence to be in qualitie far greater, then in the slaughter of a rebell, whiche may be without any contempt of vs the suddane effect of ane passionate hait. And whereas it wes in this proces furdur alledgit by the defendars advocates, that the crime of priuate slaughter at present is not capitall, and that our subiects are

† The MS. here not legible.

The proceedings in this case led to the passing of the act 1612, c. 3, which put an end to the law which was pleaded by Drumlanrig, that a rebel for a civil cause might be slain, and that the slayer was not amenable to the law as a murderer, because the person slain was out of the protection of the law. By this act it is declared, "That if any of his subjects be mutilate or slaine, being at the borne for only civil causes, the slayer being pursued, or sick as are airt or part of the said crimes of slaughter or mutilation before the Justice-General, his depute, or any other ordinar juge; no allegiance founden upon the party slain or mutilate thus being at the horn for any civil cause, shall either stay process or be ane defence to delay process, or procure impunity of the offenders guilty of the crimes foresaid."

No. 21.

Nov. 22, 1836  
Macrae v.  
Macrae.

I know of no further distinction which was made by statute till escheat was taken away as a consequence of denouncing a burning for a civil cause, by 20th Geo. II. c. 50; so that I do not adopt the opinion that, keeping out of view these two acts of Parliament, there was any difference in the consequences following the contempt of the royal authority, whether that arose from disobeying a charge to underlie the law, or to pay or perform under the decree of a civil court.

II. As to the effect of being at the horn upon the property of the rebel, and the capacity of affecting that property with his debts or deeds.

When any person was convicted of a felony, or, being accused, was fugitive from justice, the natural consequence was, that not being able to vindicate his right to the moveable property belonging to him, it fell to the King as *res nullius*; while, according to the principles of the feudal law, the superior of whom he held

as therefore to be criminallie followed, but at the Judges discretioun to be gentlie punished, whiche being an innovatioun both repugnant to the Imperiall law and to our certane knowledge contrare to the many and daylie practickis of that our *Judicioris*, will not only make that civil whiche hath always been thought criminall, but lykewyes give occasion to our subiectis at their pleasure with impunity, or at the worst with the assurance of ane gentle punishment, to oppress and imprison our other frise lieges, soe as the kingis peace, and our royall authoritie shalbe no securitie to our subiectis, and that barbaritie, which wee have soe much endeavored ourselve to repes in the Clangregour, shalbe increased in others, But because this presuming to propone ane innnovation in a question de Jure is in all advocattis intollerable: (howsoever the same be permissible to them in controveries de facto), and in respect that the danger of new lawis (whiche in all commonwealthis is iustlie to be feared) did induce the Lacedemonians to ordane the infringers thereof to propone the same with a roape about their neck wherein the author was hanged if his law tryed not expedient for the weill of their estate; It is therfor our speciall pleasure, that vpon sight hereof, yee do certify these and all other advocattis, that wee will not suffer this presumption to be any longer in them unpunished: And in case any of them shall hereafter attempt to propone the like innovatiounis yee shall not neglect to punish them therfor condignelie; wherein your omission, or remissions will not only move vs to anger against yourself, but lykewyes induce vs to intend some severer course for their correction; and thus willing you not to faile in the premissis as yee wold doe vs most acceptable service, wee bid yow fairweill. From our court at Roistounne,

"To our right trusty and right weilbeloved cosen and counsellor The Earl of Dunfermline chancellare, and to our right trustie and weilbeloved counsellor the remanent Lordis and others of our Privie Counsell in our kingdome."

No. 21. his land would enter into possession. The moveable property upon the land was, however, first to be recovered for the King. Disputes, it may easily be supposed, would often arise between these contending interests. In England such are known to have occurred, and to have formed part of the grievances, the redress of which was extorted from the King. Accordingly, among other points, this was settled by the charter of Henry III. in 1216, sect. 23, "*Nos non tenebimus terras eorum qui convicti fuerint de feloniam nisi per unum annum et unum diem, et tunc reddantur terræ dominis feudorum.*"

Nov. 22, 1836.  
Macrae v.  
Macrae.

The same rule was observed with us, and was also applied to the case of a person not abiding his trial; so that the moveables belonging to the rebel became the property of the King, and, at the expiration of year and day from the outlawry, the superior recovered the lands out of the hands of the King, to hold them during the lifetime of the rebel; the one being termed the single, and the other the liferent escheat.<sup>1</sup>

If the effect of being declared a rebel was that he could not bind himself, or enter into any contract, or do any thing in relation to his property, it might have been expected that this important consequence would have been noticed in the institutes of our law, the more so if the same disabilities applied in cases of civil as of criminal rebellion, and considering the innumerable cases to which this proceeding was applied. Yet nothing of the kind is to be found, but the contrary; so that it will appear that the rebel's acts and deeds are always valid, where they do not affect the interest of the King or the superior, and where he does not require the aid of the King's Courts to enforce them. These are the only limitations. Thus,

1. One denounced may, before expiring of year and day, set tacks for payment of the old duty.<sup>2</sup>

2. A rebel may dispone upon his moveables any time before intenting of the general declarator.<sup>3</sup>

3. A rebel, while affected by the single escheat only, may assign heritable bonds or dispone heritable property, "otherwise horning would be equivalent to an inhibition."<sup>4</sup>

4. A bond granted after denunciation sustained against the escheat, is not voluntary, but in satisfaction and implement of a prior obligation.<sup>5</sup>

5. A rebel may assign a debt owing to him, if the assignee complete his right before the gift.<sup>6</sup>

6. A rebel may warn tenants to remove, he not being year and day at the horn.<sup>7</sup>

7. An obligation to pay during the life of one who is declared a rebel, does not fall under the single escheat, as not being moveable; and when the liferent escheat only affected feudal subjects, it necessarily remained with the rebel; "therefore

<sup>1</sup> Reg. Mag. L. ii. c. 55, § 13; Balf. p. 515, c. 13.

<sup>2</sup> Earl of Tullibardin v. Dalzel, in Spottiswood, p. 98; Stair, b. ii. tit. 4. § 66.

<sup>3</sup> Spottiswood, p. 99 (Lindsay, Jan. 14, 1635); Morr. p. 8373.

<sup>4</sup> Cunningham v. Earl of Glencairn, March 21, 1623; Lord Edmiston v. Earl of Lothian, Feb. 10, 1624; Clerk, Dec. 10, 1629.

<sup>5</sup> Jackson v. Simpson, Jan. 28, 1676; Rome v. Irving, Dec. 2, 1687.

<sup>6</sup> Johnston, July 30, 1636; Spottiswood, p. 107.

<sup>7</sup> Balf. p. 458, c. 13.

sonator, nor requires the aid of the King's Courts, a rebel is not incapacitated from acting his property, or acting as a proprietor, during the first year that he is born.

2, when the rebel has remained year and day at the born, it is material to that no new procedure takes place against him, affecting or limiting his of acting; but only as then the superior's interest becomes effectual, which permanent and of a higher character than the right under the single escheat, tion and powers of acting are farther affected; but they are not changed icted, except in so far as the more permanent interest of the superior is ed.

tenzie thus states the law:—"If the vassal continues year and day rebel, is esteemed civilly dead, and consequently, not being able to serve the r, the law gives the superior the mails and duties of his feu during all the the vassal's life."<sup>4</sup> Stair says, "Liferent escheat carries the profit of all d liferents during the life of the rebel, having remained year and day at the ough thereafter he be relaxed;"<sup>5</sup> and Erskine observes, "Though it is a n expression that heritable rights fall under liferent escheat, it is only the , or the profits arising from those rights during the rebel's life, that are car-that casualty."<sup>6</sup>

is in strict accordance with the declaratory act 1535, c. 32, which declares, the mails and duties of the lands returned again to the superior." The his- this act is curious. James IV., both in his amusements and his tastes, was naive prince, and it would appear that one of the means adopted for supply-coffers were the sums paid for commuting crimes. The records of the try Court during his reign shew to what extent this system was carried; s illustrations from the privy seal record (p. 97)' add much to our informa- this subject. When remissions for crimes could be obtained on such easy there was no occasion to be fugitive from the laws; and even when that ppen, a fine was sometimes imposed instead of sentence of fugitation.<sup>8</sup>

he beginning of James V.'s reign when a more vigorous administration of

No. 21. appearing on a charge of slaughter,<sup>1</sup> we find this further decerniture: "*Et omnia bona sua mobilia et immobilia, suo usui escheatur.*"<sup>2</sup> The same 13th March 1535.<sup>3</sup>  
 Nov. 22, 1836.  
 Macrae v.  
 Macrae.

In reference to the act 1535, we may notice that in 1513, at the Justiciary Court held at Wigtonne, we find a person convicted and fined for intercommuning with Thomas M'Clellane,<sup>4</sup> a rebel, and at the horn; and also Patrick M'Clellane of Gilestone, and Andrew and John M'Clellane,<sup>5</sup> &c., denounced rebels for their not entering to underlye the law for the slaughter of Robert Mur.

Patrick had been rehabilitated in 1510, although he had received sentence of death for rief and Stouth.<sup>6</sup>

Thomas M'Clellane of Gylestone, whether the person above mentioned or not is of no moment, having been, in 1535, year and day at the horn for slaughter, the Court of Session, instituted just three years before, seems for the first time to have been called on to enforce "*the laws of the realm,*" at the instance of his superior, claiming the liferent escheat of M'Clellane as his vassal. Because they found these laws "*varient in themselves,*" they referred the interpretation to Parliament, "*gif the samine concernes simple slauchter or not, and suld have place in that mater or not.*" The question seems to have been, whether the superior's right was effectual in the ordinary crime of murder, or of murder under trust, which was formerly punished as treason. The Lords of the Articles decided, as a general rule in all cases, that "*the use in times bygane has bene, that the mails and duties of the lands of them that has been year and day at the horne, holden of uther superiours than the King's grace, year and day being bypast, returned againe to the superiours of the saidis landis, for the lyfetime of them that sustained sik process of horning year and day, as said is, except crimes of treason and lese majesty.*"

Since then, only the profits of the fee, or the mails and duties, go to the superior, the fee must remain in the rebel, only that he cannot make disposition of any thing currente rebellione in prejudice of the superior or his donator, if he happen to remain year and day rebel, no not to any of his lawful creditors."<sup>7</sup> But his powers are limited by the superior's interest alone; and also that he being a rebel, cannot seek the aid of the law, or of the superior, to enforce any deed in his favour, or any disposition by himself; but in other respects he remains proprietor. Hence,

1. Liferent escheat did not originally affect heritable subjects which were not feudal, and which did not hold of the superior, such as a liferent tack, for this was not enacted till 1617, c. 15, and the rebel continued to enjoy it.<sup>8</sup>

2. On the rebel's death, his heir must take the property out of his hæreditas jacens by service, obtaining a dispensation as to his predecessor having died at the peace of the King.<sup>9</sup>

3. His creditors may attach the fee in the person of the rebel, provided they do not affect the superior's right to the profits during his life.<sup>10</sup>

<sup>1</sup> Nov. 18, 1524.

<sup>2</sup> Pitcairn, i. p. 126.

<sup>3</sup> Ibid. i. p. 173.

<sup>4</sup> Pitcairn, p. 92.

<sup>5</sup> Ibid, p. 95.

<sup>6</sup> Ibid, p. 112.

<sup>7</sup> Spottiswood, Pract. p. 148.

<sup>8</sup> Montgomery, March 4, 1576, in Balf. p. 557: Leslie, Feb. 1598.

<sup>9</sup> Balf. p. 231. c. 35.

<sup>10</sup> Telfer v. Maxton, June 29, 1661, Morr. p. 5631.



4. A vassal may lose the taksied fee when he is at the horn, and his liferent escheat in the superior, only the liferent escheat will not be prejudiced during the vassal's life.<sup>1</sup>

No. 21.

Nov. 22, 1836.

Macrae v.  
Macrae.

5. A vassal at the horn year and day may resign on a procuratory in the hands of his superior. It is not said to be null as the act of one *civilliter mortuus*, but was excluded by the said superior's gift, the rebel having been previously base in fact on the precept.<sup>2</sup>

6. An infeftment from a rebel year and day at the horn, is sufficient to support the defence of *bona fide percepti et consumpti*.<sup>3</sup>

7. As an accessory to the right of levying the rents during the life of the rebel, the superior or his donator may remove tenants, but their title is too temporary to support an action for annulling feus, *ob non solutum canonem*, "which might be only urged by him who was capable to break the property, as the donator was not."<sup>4</sup>

8. A creditor arresting after year and day, having obtained decrees of furtherance before gift or declarator of liferent escheat, was preferred to the superior's donator because of his diligence.<sup>5</sup>

9. A comprising led against one who was year and day at the horn, and infeftment on it preferable to a subsequent gift of the liferent.<sup>6</sup>

10. A rebel denounced, and remaining year and day at the horn, may acquire lands after that period; and if he does so, and continues still at the horn, unrelaxed for year and day again after such acquisition, these will belong to the superior.<sup>7</sup>

11. A rebel granted a charter to his son, to be holden of his superior, reserving his own liferent. This charter the superior confirmed. This was not held null, but was sustained as sufficient acknowledgment of the superior by the rebel, although the charter in his own favour not having been confirmed, he was in fact not the vassal of the superior.<sup>8</sup>

After so many instances where the rebel's acts and deeds are effectual, or diligence against his lands or moveables as still his property validly executed after his denunciation, it seems quite impossible to maintain, that no act of his can be valid, because he is to be reckoned *civilliter mortuus*. Indeed, if a rebel were to contract a marriage, surely a son born to him while unrelaxed would be his heir, and would be entitled to succeed on his father's death, as the superior's interest, the only opposing interest, would then have ceased. The pursuer, at least, could not plead the contrary, as he was born on 2d January 1791, and, of course, subsequent to the outlawry of his father, which was on 26th July 1790; and it can make no difference in such a case that the rebel was previously married.

It was said that no instance had been shewn of a disposition or settlement of an estate by a rebel. Perhaps not; but is there any one decision pointed out, in

<sup>1</sup> Scott v. Creditors of Scott, July 18, 1722.

<sup>2</sup> Donator of Meldrum's liferent escheat, Jan. 23, 1624, Morr. p. 3671.

<sup>3</sup> Mair v. Abannay, July 3, 1624; Durie.

<sup>4</sup> Lord Wedderburn, Feb. 4, 1634, Morr. p. 3626.

<sup>5</sup> Nisbet, June 19, 1630, Morr. p. 3661.

<sup>6</sup> McMath v. Stewart, March 9, 1615, Morr. p. 3659.

<sup>7</sup> *Continued*, p. 98.

<sup>8</sup> Dec. 4, 1635, Spottiswood, p. 108.

No. 21.

Nov. 22, 1836.  
Macrae v.  
Macrae.

which any contract entered into, deed executed, or conveyance made, is set aside, solely on the ground of having been made by a rebel, or except when it affected the rights acquired under the single and liferent escheat? We have seen that an outlaw in England is capable of making a testament; and Julius Clarus lays it down, that "*Bannitus nullo modo efficitur intestabilis, ex quacunque causa sit bannitus.*"<sup>1</sup> And when we consider the very great number of cases to which this form of procedure came to be applied in the 16th and 17th centuries, indeed every case where the King's letters were disobeyed, and the wholesale manner in which it was often exercised at the instance of the Crown,\* of superiors, and of creditors, if such had been the law, as there was no difference so far as the property of the rebel was concerned, from what cause the horning proceeded, it is quite impossible but we should have found abundant traces of it in our law books.† The act 1579, c. 13,<sup>2</sup> complains that the multitude of rebels is so great, that it is difficult to know them from the King's obedient subjects; and 1592, c. 60, commences with stating, that one of the great causes of the present confusion is the multitude at the horn for civil causes. Accordingly, by 1598, c. 3, a Convention of estates appoints the laws to be strictly enforced "for remeid of the universal contempt and rebellion of sic as remaines at the horne, but feir of God or reverence of justice;"<sup>3</sup> and the mode in which this is to be done, as ratified in a subsequent convention of Estates, shews with how little effect previously such sentences had been attended.<sup>4</sup>

In truth, so frequent had escheat become, and so much was it an object for the cupidity of those in power, that gifts of escheat were applied for and obtained when the parties should afterwards be denounced rebels. This was put an end to by 1567, c. 23, and the same frequency introduced the practice of interfering with the process of law, by granting licences and supersederes, "*quhilk daily uses to be grantit to sik as be themselves or uther friendes hes credite of his Majesty they*

<sup>1</sup> Sentent. p. 13.

\* As one instance, may be noticed that John Forbes of Pitsligo, three sons, and seventy-three others, are all denounced rebels under one indictment, 26th January 1535-6: Pitcairn, vol. i. p. 172.

† In those days the being at the horn never seems to have affected their transactions except with the Crown, the superior, or party at whose instance the horning issued. See the account of a singular contract entered into at Edinburgh between John Napier of Merchiston and the too celebrated Robert Logan of Restalrig, in July 1594, although he had been ordained to be denounced a rebel by the Court of Justiciary on 13th June preceding.—Napier's Life of Napier of Merchiston, p. 220.

I may also refer to a sasine<sup>1</sup> in favour of Andrew Master of Jedburgh, 12th July 1622, of a conveyance by John Home of Swanscheill, "*cum consensu et assensu honorabilis viri Joannis Preston de Pennycuick et Joannis Erskine de Balgonie donatoris escheate et vitalis redditus domini Magistri Joannis Home et Margarete Forrester ejus sponse.*" It was not that the deed of the rebel was null that it was confirmed by the donator; but as it was a conveyance to a disponee, immediately to take effect, the consent of the donator, whose interest it was to affect, became necessary. Preston was probably an adjudger. Home was probably still at the horn unrelaxed; yet the disposition is not null, but received by the disponee, and acted upon both by him and the superior when thus assented to.

<sup>2</sup> Thomson's Acts.

<sup>3</sup> Thomson's Acts, vol. iv. p. 160.

<sup>4</sup> 30th Oct. 1598, p. 174.

being at his Majesty's horn, either for causes of treason or none satisfying of their debt to their creditors, or not obtemperand decreets and charges." These are prohibited in time coming by 1587, c. 47. Part of the revenue of the town of Edinburgh arose from a grant of the escheats, *delinquentibus in dicto burgo, et captis ibidem et convictis*. This was not held to apply to the escheat where the criminal was fugitive, since it fell, because the man was put to the horn, and not because he committed the slaughter.<sup>1</sup>

No. 2

Nov. 22, 18

Macrae v.

Macrae.

When such was the frequency of this process and the effects were the same whether in civil or criminal process, and when it was competent for a person at the horn to execute so many deeds, and no utter incapacity is ever hinted at, I cannot suppose that it could have been the privilege of an heir, after the interest of the superior is at an end, to object to any conveyance or disposition affecting the property made by a person at the horn, without some trace of such being found in the decisions of our Courts. Prior to 1693, there could be no disposition or change of investiture after the death of the rebel; moreover, the superior was not bound to admit of any change; and as the heir would succeed on the death of the rebel, there was little motive for a rebel to make any new disposition. But if it was made, I cannot see that the heir, who took the estate by service as heir, and of course was liable to fulfil the debts and obligations of his predecessor, could object to it, or disregard it, on the ground that the maker was at the horn at the time.

The change which was introduced by Geo. II. c. 20, abolishing escheat on hornings in civil causes, was the only difference besides that by 1612, ever made by statute as to the effect of hornings, although the influence of an improved state of manners introduced a difference in the practice during the 18th century; and this may be one reason why so salutary a change was not introduced at an earlier period into our law. At the same time, as a proof how seldom any change, even the most obvious improvement, can be made on our legal institutions without the occurrence of some unlooked for inconvenience, I may notice that, however unlikely it was that any such should have arisen from this abolition of escheat, such was soon felt in the case of Fairlie against Earl of Rothes,<sup>2</sup> 1752, Kames, where the question occurred how an obligation *ad factum præstandum* was now to be enforced, where the defender being a peer, was privileged from caption; the point was not solved in that case, and "the question was delayed through hopes of an accommodation." Since that time, an alternative has been introduced into a summons for implement, which obviates the difficulty which could not there be surmounted.

Upon the whole, then, I am for sustaining the defences in the original process.

With regard to the supplementary process, which calls for reduction of the order of the Court, authorizing registration of the deed of entail, on the ground that the late Mr Macrae being an outlaw, had no right, either by himself, or by granting a mandate to others, to appear for him, to take any privilege or benefit of the law or of the statute 1685, and farther, that such mandate fell by his death on 16th January 1820, I am of opinion, that although Mr Macrae could not appear in Court in his own person to enforce any right or obligation contracted in his own favour,

<sup>1</sup> Ormiston, 25th May, 1542, p. 2265. See also a grant of Escheats already granted, or to be incurred, in favour of the Lords of Session, Acts of Sederunt, 15th Decr 1579.

No. 21.  
 —  
 ov. 22, 1836.  
 acrae v.  
 acrae.

the trustees whom he authorized to execute an entail of his lands (a deed which, in my opinion, he could have executed himself), were entitled to apply to have it recorded; and that their mandate to this effect did not fall by his death, as the implied mandate under which they acted was not for behoof of the mandant, but of the heirs of entail, any one of whom might have applied to have the deed recorded; and, therefore, it did not fall by the death of the mandant.

I am, therefore, for sustaining the defences in the supplementary process also.

LORDS JUSTICE-CLERK and MEADOWBANK.—In answer to the questions submitted by the First Division of the Court in this case, I do not deem it necessary, after having seen the very full and elaborate opinion of Lord Medwyn, to enter at any length into a review of the various topics that have been discussed both in the written and oral pleadings of the parties, but shall content myself with stating, generally, the opinion that I have formed on a deliberate consideration of what has been urged regarding this important question in law.

Upon a review of the authorities and decisions of our law, there do not appear to me sufficient grounds for holding that, in so far as regards the right to and power of disposal of real property, there exists any solid distinction between the effects of outlawry and denunciation in regard to crimes in the Court of Justiciary, and of the procedure which flows from process in the civil Court, by horning and denunciation in regard to civil debts. It is no doubt fixed law, that on failure to appear when duly cited on a criminal charge, a person is declared to be an outlaw and fugitive from his Majesty's laws, and ordained to be put to the horn, yet the proceeding, while it has in practice assumed the form of a sentence, expressly bears only to take place "for his contempt and disobedience in not appearing the said day and place, in the hour of cause, to underlie the law for the crime charged against him." The nature and magnitude of the offence charged, has not the smallest effect upon the procedure, which, proceeding not upon the presumption of guilt, as in England in cases of treason and felony, with us in every case, even of the most insignificant crime, leads to sentence of outlawry against the person accused who has failed to appear, and who is thereby held to be in rebellion against the sovereign and his laws. In like manner, in regard to civil debtors, when charged on letters of horning under the Royal Signet, and failing to obey, they are held also as being in rebellion on account of their disobedience. In point of form the two proceedings are different, but in substance they are in reality the same. Sir George Mackenzie states, that "a person at the horn is by the English law always, and oftentimes in our law, said to be outlawed; and to be outlawed imports the loss of all the privileges of law; and in our law they are said non habere personam standi in judicio; nor puts our law any distinction between civil and criminal cases." And though there follows some reasoning, which may at first sight appear to limit the effect of these last words, yet, on consideration, it will be found rather to amount to the speculative views of the author than to a contrary exposition of the law. For the same author, in his observations on the act of the 12th Parliament of James VI. c. 145, has these words:—"By the last clause of this act, it is provided, that the treasurer or his depute may cause secure the houses of the committers of the crimes upon the expenses of the readiest of the escheat goods, that is like that annotatio bonorum allowed by the civil law in cri-

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<sup>1</sup> Criminal Works, part ii. tit. 19, sect. 5.

minis against absents; and though the act specifies only that this may be done in crimes, yet I conceive that all rebellion is comprehended under the word crimes; for in all cases, even for civil rebellion, not only may the treasurer seal till caution be found, but even the Lords of Session, will, upon a bill, allow sealing of the rebel's goods at the donator's instance till caution be found." No. 21  
Nov. 22, 1  
Macrae v.  
Macrae.

A sentence of fugitation or outlawry ordains, that the person outlawed shall be put to the horn, and the denunciation further bears that all his goods and gear shall be escheat for his Majesty's use; and when this sentence is duly recorded, and the outlaw remains unrelaxed for year and day, his liferent escheat also falls, and the right of his superior to enter into possession of his heritable estate undoubtedly takes effect. But this rule of law, according to the authorities, applies to all persons put to the horn and denounced rebels. These are unquestionably serious consequences, resulting from the contumacy exhibited by the outlaw, independently of the other attendants of the sentence of outlawry, on which it is unnecessary to enlarge. But farther than the forfeiture of his liferent escheat, and the known legal interests that in consequence belong to the person entitled to that forfeiture of his vassal or to his donatory, I can discover no express dictum or authority for holding that, according to the law of Scotland, a vassal is further punished in consequence of his outlawry, by being deprived of all powers as to the fee of his heritable estate. It is no doubt true that the person under denunciation of outlawry can execute no deed, or do any act that can injure or impair the interests of his superior or his donatory in his liferent escheat, the exclusive enjoyment of which remains with them; but quoad the fee of what is the subject of that escheat, and upon which the superior or his donatory has no legal claim whatever, the rights of the outlawed vassal remain entire, subject no doubt to the limitation, that he cannot appear in a court of justice to sue or defend regarding it while unrelaxed. It is accordingly clearly established by the cases referred to in the pleadings, that in so far as they do not trench on the rights of superiors or donatories, the acts of the person denounced as rebel are recognised as perfectly legal. He has not forfeited the fee of his estate by the sentence of outlawry. The law has not declared him incapable of disposing or limiting the enjoyment of it after his death—for it seems inconceivable, that if every act of a person after sentence of outlawry and denunciation recorded under it were utterly null and void, it should not have been so stated in some authority or other. Nobody will deny that a person outlawed, though said to have thereby suffered the capitis diminutio, may succeed to an estate which, at his death, will pass to his heir, or that he can enter into a legal marriage, and that a lawful child begotten and born after sentence of outlawry will be entitled to succeed to its father, though it has been the practice to grant a relaxation or dispensation for enabling one in such circumstances to be duly served, in terms of the brieve of mortancestry. It would be a violation of legal principle, however, to hold, that with regard to an estate in which the person outlawed stood invested in fee simple, but of the enjoyment of the rents and profits of which he was merely deprived during his life by the operation of law, from his incapacity to discharge the duties of vassal, he should farther be held debarred from all power of regulating the succession of it after his death. This is a penalty resulting from outlawry which would require either to be established by express statute, or to have been declared to attach to the outlawed person by a series *rerum judicatarum* of a declarative nature, but of which I have seen no evidence in this case.

Here, enlarging further, and feeling indebted to Lord Medwyn for

**No. 21.** the laborious researches made by him, I am of opinion that, independently of the specialty that occurred in this case from the late Mr Macrae having granted the disposition of his estate to Mr Alexander Young, prior to the sentence of outlawry pronounced against him in the Court of Justiciary, the entail of the estate of Holmains is not reducible on the ground on which it is rested in the first question put to the consulted Judges, nor on that stated in the second question, as that entail having been executed by trustees was competently recorded on application by them, as it might also have been at the instance of any one having an interest in the succession under it.

Nov. 22, 1836.  
Macrae v.  
Macrae.

**LORD MONCREIFF.**—If the deed of entail here sought to be set aside had been the direct act of Mr James Macrae, after the sentence of outlawry and fugitation pronounced against him by the High Court of Justiciary, and after the letters of denunciation on that sentence had been executed, the said sentence never having been recalled, or if that entail must in law be regarded in the same light as if it were his direct act, I should have considerable hesitation in thinking that it ought to be sustained. The question, whether the falling of the liferent escheat, upon denunciation on letters of horning for a civil debt, before the statute 20th Geo. II., had the effect of disabling the party so denounced rebel, from executing any deeds of conveyance of his heritable estate, has been argued at great length in the cases and in the hearing. But, as it does not appear to me that the solution of that question in the negative would be sufficient for determining that a denounced outlaw, by the sentence of the Criminal Court, could effectually execute a deed of entail, I shall only observe on that point, that it does not seem to depend on the supposition of a forfeiture of the fee of the estate as in the person of the rebel, or on the clearest settlement of the reverse. There can be no doubt, that the fee is not forfeited, to such an effect as to preclude the heir from taking it up on the expiry of the liferent, or to allow it to be carried by any gift of the liferent escheat. The proper question is, concerning the powers of the rebel, after denunciation, to perform legal acts affecting the heritage thus fallen for the time into the hands of the superior; and this seems to me to depend, not so much on the point, whether, in the abstract, a party so situated was disabled from executing deeds of conveyance, as on the difficulty of holding that any one except the superior could legally object to them.

But, after giving all the attention in my power to the arguments and authorities laid before the Court, I have not yet been convinced, that there is not, in relation to the present question, an essential difference between the effect of a sentence of outlawry by the Criminal Court, and the effect formerly given to denunciation for a civil debt. Both, no doubt, produced the liferent escheat, whereby the estate falls into the superior's hands during the rebel's life. So far there is a similarity; and it has never been maintained, that there was any forfeiture of the fee to the superior or the crown, such as might follow on an express sentence to that effect on trial and conviction of a crime. The real question is, whether, the estate remaining under the liferent escheat, to be taken up by the heir of investiture on the expiry of it, the party denounced outlaw under sentence of the Circuit Court is legally capable, without recall of the sentence, to do the acts which are implied in the execution of an entail under the statute 1685?

“ From the note in Elchies on Stair, p. 194, and the authorities there referred to, it appears that the forfeiture of the liferent escheat had taken place on denunciation on a criminal sentence of outlawry, long before the same consequence was applied

to the case of a party at the horn for a civil debt; and that the act 1535, c. 32, was only passed in order to remove a doubt, still at that time existing, as to the latter case. But, though that act declared the law to be, that the liferent escheat fell in all cases of parties denounced rebels, except for treason and lese majestie, it does not at all follow, that that was the only consequence resulting from completed outlawry by sentence of a criminal court, which stood on the undoubted criminal law, at all events for slaughter, independent of that statute altogether.

No. 21.

Nov. 22, 1836.

Macrae v. Macrae.

The clear doctrine of the law was and is, that a party denounced outlaw on such a sentence is "*civilitur mortuus*,"—that "*amittit legem terræ*,"—that there is "a forfeiture of his person in law," &c. Hume, ii. 270, 3d edit. The effect of this is explained to be, that he cannot bear testimony in any court; that he cannot hold an office of trust; that he cannot pursue or defend in any "process, civil or criminal;" that he cannot "claim any personal privilege, or benefit whatsoever of the law."—*Ibid.* The principle is equally stated by all the authorities, though it is variously expressed.

These are consequences of a very strong and decided nature: they are given only as examples of the effects of the general rule of disability; and it seems to me to be very clear, that some of these at least did not, in all cases, follow on denunciation for civil debt. A passage in Sir George Mackenzie's Criminal Law, vol. ii. Works, p. 225, has been quoted in this cause, as proving that there is no difference. It appears to me very singular that it should be so thought. I humbly think that it is a direct authority to the contrary. The question is stated in the beginning of the paragraph, whether "a person at the horn, or excommunicated, may pursue?" By pursuing, the author clearly means prosecute for a crime in the criminal court; for it is of such pursuits only that he is treating. He says that the point is debatable; and then proceeds to state the reasons for and against the admission of such accusers. In stating what "may be alleged" for the negative, he mentions, that a person at the horn is held to be outlawed, and that outlaws are held "*non habere personam standi in judicio*;" and he closes this statement of what may be alleged on that side of the argument with the words relied on, "nor puts our law any distinction betwixt civil and criminal causes." I think it very apparent, that these words, even if they were unexplained, and could be taken as expressing Sir George Mackenzie's own opinion, do not at all relate to the sentence of outlawry by the criminal court, on the one hand, or the denunciation on letters of horning for civil debt, on the other; but clearly to the cause, civil or criminal, in which the outlaw attempts to appear as a party. There really can be no doubt that this is the meaning, both from the whole scope of the passage, and from the use of the word *causes*, which cannot apply to a charge of horning. But, after stating these arguments for the one opinion and the other, Sir George goes on to endeavour to resolve the question. And how is this done? "For reconciling which difficulty, it may be alleged, that there is a distinction betwixt the being outlawed for a criminal or civil cause, and that those who are denounced fugitive upon any criminal account cannot be pursued until they be relaxed, which is incontrovertibly true in our law; seeing if a person be denounced for not finding caution for his appearance to answer the law, he will not be admitted to propound any defence till he be relaxed; but though a person be at the horn for a civil cause, it appears most unreasonable, that, because a person is not able to pay a great sum, for which he is denounced, he shall not therefore be permitted to defend his own innocence against a charge. It seems likewise reasonable that some distinction should



**No. 21.** be made betwixt a pursuer and defender in this case; for it seems unreasonable; that he who accuses another for a crime should debar him from self-defence, though the debarring him from pursuit be not so unfavourable." And then he quotes a case, *Spence and Bannatyne*, in which it was actually found by the Court that the pursuer in a criminal pursuit could not by horning for debt debar the accused a defendendo.

Nov. 22, 1836.  
*Macrae v.*  
*Macrae.*

It seems to me to be impossible to hold, that Sir George Mackenzie, in this passage, gives an opinion, either in words or in true meaning, that there is no difference between the effects of outlawry on criminal sentence, and that arising from horning for civil debt, or to doubt that he does distinctly say that there is a very important distinction. He does not precisely resolve the case of a person at the horn pursuing for a crime; but, in the very point of disability to pursue or defend, which is the thing he is treating of, he says expressly that there is a distinction between the cases, and gives authority for the assertion.

I do not, however, think it necessary to go at large into the authorities which were cited on this subject. I have thought it proper to explain my view of the passage in Mackenzie, which has appeared to others to be express on the point against that view. But all I mean to say is, that I have not yet been convinced, that there is not an essential difference in principle, between the effect of outlawry by the sentence of the Criminal Court, and that of outlawry, under the former law, for civil debt; or that the rules applicable to the latter will settle the former case.

And, if the facts were such as fairly to raise the question, I should not be prepared to say, that, under the rule as laid down by Baron Hume and the other authorities, an outlaw by such a sentence could effectually execute a deed of entail. The proper form of making a deed of tailzie is by resigning the lands in the superior's hands, for new infeftment to special heirs, and under conditions. According to the ancient principle, that should be done by the vassal appearing in the superior's court: The doing it by procuratory was an indulgence. How could the outlaw perform such an act? How could he state himself as vassal? How could he claim the privilege conferred on 'his Majesty's subjects' by the act 1685? How could he demand registration under it by an application to this Court, or authorize another to do so for him? In a word, I cannot see how a person who is "civilly dead," who has "lost the law of the land," and "can claim no privilege or benefit under it," can be in a capacity to perform the *acta legitima* which are implied in the making of a deed of entail.

But, notwithstanding the difficulty which I have in adopting the argument of the defender in this view of it, I am of opinion, on the actual facts of the case, that the entail is effectual. I think it a point of extreme importance in the case, that the estate was conveyed by Mr Macrae, by an absolute disposition, on the 8th May 1790, to Mr Alexander Young, before even the execution of the criminal letters against him, and that infeftment followed on the 15th May thereafter. There was nothing in law to prevent the execution of such a deed—supposing all questions with creditors or the superior to be waived or reserved. It was an effectual conveyance to divest Mr Macrae of the estate in form, and to place all the powers of the fee in another person. No doubt, it was understood to be given in trust only for the benefit of Mr Macrae and his family; but it was so entirely out of his own power, that he could never, unless relaxed, have enforced the trust in a court of law. So far as he was concerned, it stood on the honour of the disponees. Holding it on such an understanding, Mr Young, acting on Mr Macrae's personal

instructions, but solely by his own powers as in the fee, conveyed it to other trustees; then these trustees executed a declaration of trust, in conformity to Mr Young's deed; and at last, on receiving the mandate of 6th May 1807, executed the deed of entail now in question.

No. 2  
Nov. 22, 1  
Macrae v.  
Macrae.

The question is, on what ground can the pursuer, Mr Macrae's heir-at-law, challenge that deed? He cannot reduce Mr Macrae's disposition to Mr Young: For the grantor was then in the full fee as unlimited proprietor. The pursuer's own title, therefore, can only stand on Mr Young's disposition, and the subsequent declaration of trust by the other parties. But, though Mr Young, and the other trustees by his conveyance, might act under the personal instructions of Mr Macrae, all the acts legitima were done by them, who were under no legal disability; and all flowed from the absolute and unqualified disposition to Mr Young, which was a valid and unchallengeable deed. If Mr Young had never conveyed the estate, and there had been no declaration of trust, the pursuer could only have recovered it as heir of his father after his death, by proving the trust by Mr Young's oath. But what title can the pursuer have to complain of the exercise of the powers of the disponee, according to the reality of the trust, as Mr Young knew it, and must have sworn to it? That Mr Macrae gave his instructions afterwards, and that the trustees, for their own exoneration, took formal mandates, does not appear to me to alter the state of the case. The case would have been the same, if Mr Young had originally had all the necessary instructions for executing an entail, and had at last made it. His trust was more general and absolute. But, by whatever instructions it was carried into execution, and ultimately brought to the creation of the entail, these were but personal movements extraneous to the title; and, if Mr Young in the first instance, and the other trustees afterwards, held it to be their duty to act on them, they had the power and the right to do so, without entitling any party to challenge their acts.

In truth, the only case, in which it is conceivable that the pursuer could be entitled to object to the acts of the trustees, would be the supposable event that they had disregarded the instructions of Mr Macrae, or acted contrary to what they might have admitted in writing or upon oath to be the nature of the trust, under which they held the title of property. But this cannot be said: The pursuer's case is on an assumption of the reverse. And, as the granters of all the deeds of conveyance, up to Mr Macrae himself in his disposition of May 1790, were perfectly in titulo, and under no disability at the dates of them, it is difficult to find any thing like a relevant ground of reduction.

The pursuer lays down the proposition, perfectly true in general and to certain effects, that an estate being held in trust for a party is still in the substance of the right of property his, and under his command. But the question here depends on the form of the title, or the power to make it. As to the substance, Mr Macrae could in May 1790 have given the estate to Mr Young absolutely without any trust, if he had chosen to do so. He did give it absolutely in form, though on an understood trust. The trust has been fulfilled according to his will; and the title created stands on rights, in which there is no inhabilitie in the persons, and no defect in the form of conveyance. The objection is, that it is made according to the values or instructions of Mr Macrae. I am of opinion, that this is not relevant, and that the formality of the writings expressive of such instructions does not alter the substance of the question arising on the title.

2. I am on the whole of opinion, in answer to the question stated,

No. 21. that the deed of entail therein referred to is not liable to reduction, at the instance of the pursuer as heir-at-law of his father Mr James Macrae.

Nov. 22, 1836.

Macrae v.  
Macrae.

LORD GLENLEE.—I concur in the foregoing opinion.

LORD COCKBURN.—I concur in the opinion of Lord Moncreiff.

LORD COREHOUSE.—I agree entirely in the conclusion at which Lord Medwyn has arrived. Independently of the light which his researches have thrown on the subject, it appears to me that the question may be decided by a reference to clear and familiar principles. It is settled law, that a sentence of fugitation in the criminal court (except in the case of treason) does not operate as a conviction or attainder; it does not even create a presumption that the fugitive is guilty of the offence of which he is accused. It is the punishment of a different offence altogether, that of disobedience to the King's will in failing to appear for trial. That disobedience is the same, and is visited with the same punishment, however heinous the crime, or however slight the misdemeanour with which the party is charged.

The penal consequences of fugitation, to a certain extent, are clearly defined by statute and usage. The single escheat falls immediately after the sentence is pronounced. The liferent escheat falls when the fugitive has remained for a year and day unrelaxed. It is fixed, by the express authority of all the writers, that the fee of his heritable property is not affected by this sentence; the superior has nothing more than the usufruct, that is, the profits and issues of the fee during the fugitive's life.

The only other penalty consequent on fugitation, as is admitted, is, that the fugitive becomes an outlaw—*amittit legem terræ*. What the import of this expression is, must be gathered from authority or usage; and here, as in every other case in the administration of penal law, the offender has the benefit of a rigorous construction in his favour.

Now, it is distinctly laid down in all the books, that the outlaw has no longer a *persona standi in judicio*; that he is incapable of suing or being heard in defence in any court: therefore he can vindicate no right, he can protect himself against no claim by means of judicial proceedings. As he is not recognised in judgment, he is said to be *civiliter mortuus*, and on that account it has been decided that he can exercise no public function; for example, he cannot officiate as a judge, or serve on a jury, or give testimony as a witness, or act as a magistrate, as a notary, or as tutor. Further than this I see no authority or precedent to show that the penalty extends. The fee of his landed estate, as has been observed, remains in him during his life, and at his death is taken out of his *hæreditas jacens* by the service of his heir. It is nowhere said that he is incapable of contracting an obligation in favour of others, or of imposing an obligation upon them; or that he is incapable of acquiring an heritable estate during the subsistence of his outlawry, or conveying it by a deed *inter vivos* or *mortis causa*, and that either absolutely or under conditions. Indeed there is an express authority, "that the fee of his lands, though the rights of the same supervene to him after sentence, descends to his heir,"<sup>1</sup> under the exception, that if the lands were purchased with moveable funds belonging to him at the date of the sentence, they would go to the Crown as a *surrogatum* for what the fugitive had fraudulently attempted to withdraw from the single escheat. Indeed it is manifest that no act of his can be effectual to the prejudice of the

<sup>1</sup> Bankton, ii. p. 253.

rights vested in others, by his fugitation, whether it be the King or the superior, or their donataries. No. 2

The argument on which the pursuer chiefly relies is, that, as the outlaw is said <sup>Nov. 22, Maorne v Macrae.</sup> to be *civilliter mortuus*, it is implied in that expression that he has lost every privilege of a subject, and therefore, among other privileges, that of disposing of landed property. But it is plain that the import of a general, and that too a metaphorical, term, requires to be defined by statute or usage. If it were to be taken in all the extent of which it admits, and in which it is employed in some systems of jurisprudence, it would infer that the outlaw neither could contract marriage, or have lawful children, or have any right whatever vested in him. But there is no authority that civil death is so construed in the law of Scotland. On the contrary, as has been already stated, he can hold property, he can purchase property, and his son, begotten and born after the sentence of outlawry, can serve nearest and lawful heir to him after his death.

If any of the numerous and important disabilities which the pursuer represents as following a sentence of outlawry, really existed, it is certain that some notice would have been taken of them in the books. But he has not produced, and cannot produce, an authority for any of them, with the exception of those which have been already alluded to; and more particularly, he has produced no authority that an outlaw cannot dispose of his heritable estate. The weight of negative evidence is, in my opinion, of itself conclusive of this question; and if the outlaw, though said to be civilly dead, can contract the most important of all civil contracts, and if he can purchase landed property, and hold it in fee, there is no reason why he should not convey it also.

But, independently of negative evidence, and of the strictness with which all penal laws are construed in favour of the offender, it is thought that there is satisfactory positive authority on the very point now at issue. Without stopping to inquire whether the consequences of denunciation on a charge of horning for a civil debt, are in every respect the same with those which result from a sentence of fugitation in the Criminal Court, it is enough to say, that, in both cases, the person denounced or fugitated (before the change of the law by the Jurisdiction Act) was declared an outlaw, his single and liferent escheat fell in the same manner, and produced the same effects. In both cases he was deprived of a *persona standi in judicio*, and could neither sue nor defend; in both he was pronounced to have lost the benefit of the law; and in both to be *civilliter mortuus*.<sup>1</sup>

It has been repeatedly decided in the cases cited by the defenders, that a person denounced on a horning can make an assignation of an heritable subject, if it is not to the prejudice of the fiak.<sup>2</sup> If, therefore, outlawry in a civil case, though the fugitive's escheat has fallen, though he has lost the privilege of the law, though he has no *persona standi*, though he is civilly dead, does not disable him to dispose of his heritage, what ground is there to infer that the outlaw, by the sentence of the Criminal Court, on whom the same penalties, and no others, are declared to attach, has not the same power? Is the general and metaphorical term, civil death, to be construed in the one case in one sense, and in the other case in a totally different sense, and that without the shadow of authority in the books?

With the benefit of Lord Medwyn's researches, and after careful enquiry, I have

<sup>1</sup> § 10, 11.

<sup>2</sup> March 21, 1623; Clerk, Dec. 10, 1629.

No. 21.

ov. 22, 1836.

Iacrae v.  
Iacrae.

not been able to discover that the consequences of a denunciation on a horning are different from those of fugitation in the criminal court, or in any respect less severe, with the exception of the distinctions introduced by express statute, or in one or two instances rendered necessary either from the different forms of procedure in the civil and the criminal courts, or from obvious views of expediency and justice. I do not think that outlawry for failure to implement civil obligations was introduced for the first time by the act 1535, c. 32.<sup>1</sup> The contrary is proved by a passage in the Regiam Majestatem, where it is said, that, if the seller of any property fails to relieve his cautioner, he shall be outlawed forth of all the realm of Scotland wherever he shall be found or apprehended. It was doubted by the Court of Session in 1535 whether the liferent escheat fell either in civil cases, or in any case except slaughter, but on a reference to Parliament, the Lords of the Articles found "that the use in times bygane has bene, that the mailles and dewties of the landes of them that has been zeir and day at the horne, halden of other superiours than the Kingis Grace, zeir and day being by-paste, returned again to the superiours of the saidis landes, for the lifetime of them that sustained sik process of horning zeir and day, as said is, except crimes of treason and lese majestie." However this may be, it is certain that in 1612 the penal consequences of outlawry for debt were as severe as those of outlawry in the criminal court, because it required a statute in that year to prevent the outlaw in the former case from being destroyed as a wild beast with impunity.

Sir George Mackenzie, in a passage quoted in the pleadings, lays it down in general terms, "that our law puts no distinction in this matter between civil and criminal causes," by which it is thought he means outlawry by denunciation for a civil debt, and outlawry by fugitation in the criminal court. But he goes on to mention an exception, the necessity of which is quite apparent. If a person is prosecuted in the criminal court for a crime, and is prevented by the accuser from stating his defence, by a sentence of fugitation pleaded in bar, it is in the power of the criminal court, if they see cause, to repone him against the fugitation de plano, that he may be heard. But if the accused in the criminal court is barred from defending himself by denunciation on a horning, the criminal court have no power to repone him, and he must have letters of relaxation under the signet, either in consequence of paying the debt, or by a judgment of the civil court, before he can be heard. In that view, and considering also that the diets in the criminal court are peremptory, unless this exception to which Sir George Mackenzie alludes were admitted, the outlaw on a horning for debt would be in a much worse situation than the outlaw by a sentence of the Court of Justiciary.

The pursuer has endeavoured to distinguish the consequences of civil and criminal outlawry in various particulars. But, even if he had been successful, it would not, in my apprehension, have been material to the issue as long as he could produce no express authority, that in the one case the outlaw could dispose of his heritable property, and in the other that he could not. But I am of opinion, that, under the exceptions I have already alluded to, his attempt has entirely failed. Thus, he states "that the outlaw" (by which he means one who has been fugitated in a criminal court) "has not, and never had, any persona standi in judicio," and "that such disqualification does not attach to the debtor, and never did." By debtor he means one denounced on a charge of horning. So far is this from being

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<sup>1</sup> I. 18. 3.

the case, that it is stated by Stair, Erskine, and Bankton,<sup>1</sup> in various decisions, and indeed by the concurrence of all the authorities, that one denounced on a horn-ing has no *persona standi* any more than the fugitive by sentence. The pursuer refers to the case of Chalmers, where a person who had imprisoned a debtor who was at the horn was obliged either to liberate him or aliment him. If it had not been so found the prisoner must have perished, because there was no other fund from which he could be alimented. If he had been outlawed by the criminal court, he would have been alimented at the public expense. The pursuer next says, that a person fugitated cannot be a witness, but that a person at the horn may. Unfortunately he refers to Erskine, who cites a case where the person admitted as a witness was at the horn, not for debt, but by denunciation on letters of inter-communing upon account of conventicles;<sup>2</sup> a crime so heinous at that period that the accused were by special statute deprived of the privilege of all other criminals, being prohibited to take the advice of counsel even in private. Then he says, that an outlaw is incapable of holding a feu, while a rebel at the horn may. For the first proposition there is no authority at all. On the contrary, the reverse is laid down in the books:—"Persons under a civil rebellion, by being at the horn, or for not appearing in a criminal process, are under no disability as to acquiring heritance."<sup>3</sup> A fugitive in the criminal court cannot be admitted to bail until he is relaxed, because the punishment of outlawry has been inflicted on the very ground that he has fled from justice, after being cited to appear. To say, as the pursuer does, that the outlaw forfeits all the rights and privileges of a British subject, while the debtor at the horn retains every privilege, with the exception that he may be deprived of his personal liberty, is an assertion in the face of every authority. It has been decided that the outlaw for debt can neither be judge, juryman, nor tutor, or exercise any other public office more than the outlaw for a crime.<sup>4</sup>

Since, therefore, it is settled law, that the outlaw for debt can dispose of his heritable property, it appears to me to follow, by the plainest analogy, that the outlaw for a crime has the same privilege.

It has been said, that the proper way of executing a tailzie is, by the vassal resigning in the hands of his superior, and that the outlaw cannot resign. I see no reason nor authority for holding that the outlaw cannot resign if the superior chooses to accept his resignation. If he does not think fit to resign in person, he may do so by means of a procurator, which has been the established form of the ceremony for centuries; or lastly, he may grant a bond or obligation of tailzie which the person in whose favour it is granted, can render effectual by the common modes of procedure.

I agree entirely in that part of Lord Moncreiff's opinion, in which he holds the entail in this case to be effectual, on the ground that the estate was conveyed by the late Mr. Macrae to Mr. Young, not only before his outlawry, but before the execution of the criminal letters against him. I have nothing to add to what his Lordship has said upon the subject.

**LORD FULLERTON.**—I concur in the opinion of Lord Corehouse.

**LORD JEFFREY.**—I entirely concur in the opinion of Lord Corehouse. I think there is no substantial difference between the legal consequences of outlawry for

No. 2.

Nov. 22, 1  
Macrae v.  
Macrae.

<sup>1</sup> Stair, i. 200 cit; Ersk. ii. 5, 60; Bank. ii. 3, 41; Chisholm, March 8, 1631.  
<sup>2</sup> Bankton, l. iii. 15.


*Persona standi.*



**No. 21.** civil debt, and for disobedience to a criminal citation, and I am of opinion that the outlaw, in either case, retains every power of disposing of his property which can be exercised without prejudice to the rights of those who may have an interest in his single or liferent escheat.

Nov. 22, 1836.  
Macrae v.  
Macrae.

The cause was again resumed by their Lordships of the First Division.



**LORD PRESIDENT.**—The whole consulted judges have arrived at one result, though they vary in some respects as to the grounds of their opinion. Independently of the more general question raised in this cause, there is a strong specialty in favour of the defenders, which has led me to modify the view I formerly took of this case. I allude to the circumstance, that the late James Macrae, before being even cited under the criminal letters, executed an *ex facie* absolute disposition in favour of Alexander Young, W.S., who was immediately infest. That being done, and all the subsequent *acta legitima*, which are necessary to the success of the defence, being referable back to this unchallengeable disposition, I do not feel warranted in sustaining the reasons of reduction. It is true that after Macrae's outlawry he never could have appeared in Court to complain of any breach of trust which Young might have committed under the powers which were conferred on him by the *ex facie* absolute disposition. But no question of that sort occurred. The question is not whether the deed of entail is reducible, as being contrary to the trust, held by Young and his disponees, but, whether it is reducible on account of its conformity to the desire of Macrae the truster. On that question, I think there is strong ground taken by the defenders; and I incline to sustain the entail. On the other point in the case, which involves the general question, whether a sentence of fugitation and outlawry in a criminal court, followed by denunciation at the horn, incapacitates a man from subsequently performing any deed whatever which shall be valid in law, I incline to hold the same opinion which I formerly did, especially in so far as regards any application made in Court, by the outlaw, or any mandatory of his.

**LORD BALGRAY.**—I agree in the opinions of Lord Corehouse and Lord Medwyn. I think there is no difference between the effects resulting from a charge of horning, following on a sentence of fugitation and outlawry, and a charge of horning on a civil decree, always excepting those limited and special differences which have been introduced by statute. The sentence of outlawry does not imply conviction of the crime of which the outlaw had been accused. No forfeiture of the fee of any heritage followed on it. The penal consequences were of a well-known and well-defined character, and we cannot enlarge them without the clearest precedent or practice for doing so. Without such a warrant, we are not entitled to aggravate the penalties of outlawry. I am further influenced in this opinion by finding, after some enquiry into the law of England, that, in those cases in which that law is parallel to our own in not holding the sentence of outlawry to be equivalent to conviction, the only penal consequences are, like ours, the single and the liferent escheat. The *jus testamenti-factionis* is not taken away, and I think it remains here too.\*

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\* A more detailed opinion of Lord Balgray, with which the Reporters are to be favoured by his Lordship, will be given in an Appendix to this volume.



**LORD GILLIES.**—I formerly felt that this cause was attended with much doubt and difficulty. But after the very full discussion which we have had, and after considering the opinions which have been delivered, my doubts are removed. I am satisfied that there is no material distinction between the denunciation of rebellion, following on a sentence of outlawry in a criminal court, and the denunciation of rebellion, following on a decree in a civil court. On this point I concur with those Judges who have expressed that opinion. But in regard to the specialty which has been now referred to by your Lordship, and adopted by some of the other Judges, for whose opinions also I feel a high respect, I own that I entertain much doubt. I allude to the circumstance that there was an *ex facie* absolute disposition executed by Macrae, in favour of Alexander Young, W.S., before he was outlawed, or even cited under the criminal letters. That disposition, whatever it might be, in form, was, in substance and reality, a trust for behoof of Macrae; Young was merely Macrae's trustee; and as to every deed done by him in furtherance of the trust, and to fulfil the wishes of the truster, I think the maxim applies, *qui facit per alium, facit per se*. If these were deeds which Macrae was incapacitated from executing directly, I do not think they became valid, because of his using the agency of a trustee to execute them. The deed was in substance the deed of Macrae as much in the one case, as in the other; and therefore, if I continued to be of opinion that Macrae was incapacitated, by outlawry, from executing the deed of entail, I should think that the entail was equally liable to challenge, if executed by his trustee, acting under his direction. Such, at least, is the leaning of my opinion on that point, but it is not necessary to give an express judgment upon it, in disposing of this cause.

**LORD MACKENZIE.**—The opinion of Lord Corehouse is precisely mine, except in so far as his Lordship adopts that part of the opinion of Lord Moncreiff which holds the entail valid in consequence of the *ex facie* absolute disposition by Macrae to Young, before his outlawry. On that point I concur in what has fallen from Lord Gillies just now, and I should hold it would be something very strong indeed to give effect to an opposite doctrine. For, if Macrae had been incapacitated, by outlawry, from executing a deed of entail, the trustee, Young, would thereby just have been rendered the holder of the estate in trust for the heir-at-law of Macrae, till after Macrae's natural death. And as Macrae, *ex hypothesi*, would be deprived of all power whatever to direct or govern Young's proceedings, Young would have no right to execute this entail, unless it could be maintained that he had an absolute right, *proprio motu*, to execute any deed affecting the estate, or even to sell it if he chose. It is true, that Macrae, by outlawry, was disabled from complaining judicially of any act of Young, whether contrary to the nature of his trust or not. But Young's right was nevertheless a mere trust right; and if the whole powers of Macrae, the truster, were destroyed, it would seem to follow, not that Young might execute either an entail or any other deed affecting the estate to the prejudice of the heir of the truster, but that he should hold the estate in trust for that heir, in the same state in which it stood, when the incapacity of Macrae took effect upon him. It is unnecessary, however, to give any express judgment on this point.

**THE COURT**, in both actions, pronounced this interlocutor:—"Sustain the defences, absolve the defenders from the whole conclusions of the libel, and find no expenses due to either party."

and MILLERSON, W.S.—MOWBRAY and HOWDEN, W.S.—Agents.

No. 21

Nov. 22, 11  
Macrae v.  
Macrae.

**No. 22.**      **THOMAS KENNEDY, Pursuer.—*D. F. Hope—Maitland—Coventry.***  
**ov. 22, 1836.**      **ROBERT CARLYLE, and OTHERS, Defenders.—*Rutherford—G. G. Bell.***  
**ennedy v.**  
 **Carlyle.**

*Lease—Excambion—Proof.*—1. Circumstances in which, held, that notwithstanding a certain change of possession, and also of rent, during the currency of a lease for 99 years, the lease had not been renounced, but still subsisted. 2. Circumstances in which, held, that sufficient real evidence existed of a contract of excambion between a landlord and tenant relative to a very inconsiderable portion of certain subjects, which were held under a lease for 99 years, so that the tenant enjoyed a right of lease in the portion acquired by the excambion, which was good against a purchaser of the landlord's estate.

**ov. 22, 1836.**      **IN 1808 John Beattie of Chappelhill, entered into a contract of lease,**  
**ST DIVISION.**      **by which he “let to John Beattie, joiner at Wallacehall of Chappelhill,**  
**d. Corehouse.**      **and his heirs (secluding subtenants and assignees), legal and voluntary,**  
**D.**      **without the consent of the proprietor, all and whole that enclosure of**  
**land, part of Chappelhill, on the turnpike roadside from Springkell to**  
**Langholm, measuring five acres two roods and thirty-six falls or thereby,**  
**with the dwelling-house and workshop and others thereon built by the**  
**said John Beattie, joiner, bounded,” &c. together with a servitude of**  
**casting peats from an adjoining moss, “and that for the space of twenty-**  
**one years, from and after the term of Whitsunday last, both as to the**  
**houses and pasture, which is hereby declared to have been the term of**  
**the said John Beattie, joiner's entry to the premises, notwithstanding the**  
**date thereof. But in case the said John Beattie, joiner, shall slate the**  
**foresaid dwelling-house and workshop during the currency of the said**  
**twenty-one years, then it is hereby conditioned and agreed on, that this**  
**present lease shall subsist and endure for the space of 99 years, but only**  
**as to the dwelling-house, workshop, yard and pertinents, and also as to**  
**the servitude and privilege of peats for the use of the subjects, from and**  
**after the said term of Whitsunday last 1808.” Beattie, the tenant,**  
**bound himself to pay “£5, 14s. 6d. of rent for the said field of land,**  
**including the houses and yard, during the said period of twenty-one**  
**years, and at the rate of 9d. sterling per fall, so far as the space of ground,**  
**over which the houses and yard extend, shall measure, in name of rent**  
**for the said dwelling-house, workshop, yard and pertinents, for the**  
**remaining period of the 99 years, after the expiry of the said 21**  
**years, in the event of their being slated as aforesaid.” Wallacehall of**  
**Chappelhill consisted of a few small houses having pieces of ground and**  
**yards attached to them.**

John Beattie of Chappelhill died in 1809, having possessed the estate above three years upon apparency.

In 1810, Beattie, the joiner, for a price of £100, sold and assigned to Robert Carlyle, merchant, “and his heirs, secluding subtenants and assignees, legal and voluntary, without the consent of the proprietor, all

and whole a tack or lease," being that which was above set forth: The No. 2  
 assignation also conveyed right to another lease of twenty-one years, be-  
 tween the same parties, including about six acres of ground and some Nov. 22, 1  
 houses, called Viewfield, at a rent of £9: Kennedy  
 Carlyle.

The assignation purported to be with consent of the tutors and curators of William Beattie of Chappelhill. It was not, however, signed by any of them. Carlyle entered into possession of the subjects. The title of William Beattie was, after some litigation, reduced by Ninian Little, in 1812, who took up the estate and entered himself as heir to the predecessor of John Beattie of Chappelhill.

The subjects thus acquired by Carlyle, besides the field, consisted of two small parcels of ground, separated from each other about fifteen feet, and running back in a direction nearly parallel to each other, from a turnpike road. The stripe of ground interjected between them was occupied by one of Little's tenants, and a similar stripe was interjected between the eastmost of Carlyle's two pieces of ground and the field occupied by him, which stripe was also in the occupation of Little's tenants. On the west of all, lay the ground of Little.

At Whitsunday 1814 a change of possession took place, by which the two narrow stripes of ground intervening between the different subjects occupied by Carlyle, were taken possession of by Carlyle and his tenants; and a portion at one end of the ground hitherto occupied by Carlyle, was taken possession of by Little and his tenants. These respective portions contained each a house and garden, and were of nearly equivalent value. From that time downwards Little continued to let and to draw rent from the subjects to which he thus entered into possession, and Carlyle continued to let and to draw rent from the subjects to which he had entered. He soon afterwards erected a house, thereby completing a row of houses fronting the turnpike road. This row and the adjoining garden ground, included the subjects to which he had entered in 1814, and he now put a slate roof on all the houses in the row, besides making other alterations, especially on the fences, which were adapted to the new state of possession. The change of possession, and these subsequent proceedings, were in the full knowledge of both Little and Carlyle, though the whole subjects were in the actual occupation only of the tenants of each.

On 24th September, 1813, Carlyle had paid to Little four and a half years' rents which were then in arrear, including part which was due by his cedent Beattie, the joiner. Little entered these payments in his cash book, and he made this separate written memorandum:—"Mr Carlyle's lease of Wallacehall commenced at Whitsunday 1814, at £10, 10s. per annum for sixteen years—of the grounds and house 93 years—and 20 years of his new house, after Whitsunday 1814." Little also executed subsequently another written memorandum in the same terms. In 1815, Little received rent from Carlyle of the same amount, and with these memoranda. In 1816, Little addressed a holo-

No. 22. graph letter to Carlyle:—"In the mean time, I hereby confirm your agreement with the late John Beattie of Chappelhill, with regard to the said possession (Wallacehall), in case your proposal should not be eventually accepted of. I remain," &c.

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iv. 22, 1836.  
Kennedy v.  
Carlyle.

In 1828, Thomas Kennedy bought the estate of Chappelhill from Little, and entered into possession, inter alia, of those portions of ground and the house which Carlyle had ceded in 1814, and which Little had ever since possessed. In 1829, Carlyle paid rent to Kennedy at the same rate as he had done to Little, and in conformity with the terms in Little's memoranda already quoted. The twenty-one years' lease of the field under the tack of Wallacehall then came to an end, and the possession of the field was given up, but a dispute arose between Kennedy and Carlyle as to their respective rights in the rest of the subjects, Carlyle contending that he was entitled to occupy them for the remainder of 99 years from 1808, and also to subset them, and Kennedy, on the other hand, contending that he was instantly bound to remove from the whole, and was at all events debarred from subsetting. Kennedy raised a declarator against Carlyle and his subtenants to have it found that they occupied without any legal right or title, and concluding for decree of removing.

A proof was led which established the facts already stated, and in which Little, after being discharged of all claim of relief by Carlyle, was examined by him as a witness. He narrated the facts relative to the state of possession and drawing the rents of the respective subjects from 1813 downwards, and stated that Carlyle since then had always paid £10, 10s. per annum of rent "for his whole possession at Wallacefield as altered." Excerpts from Little's cash-book also proved the rents as thus stated. From the agent of Kennedy, as a haver, the following document, purporting to be a copy of a missive by Little to Carlyle was also recovered. "24th September, 1813.—Mr Carlyle having left the rent of Wallacehall entirely to myself, I hereby agree to let to him at ten guineas a-year, commencing at Whitsunday 1813, during the currency of the leases signed by the late John Beattie, Esq. of Chappelhill, the rents to be paid at two terms in the year, viz. Whitsunday and Martinmas, the first half year's rent to be paid at Martinmas next."

In these circumstances, Kennedy pleaded, 1. The original lease was granted by John Beattie of Chappelhill, who was never infeft, and had no power to grant it, so as to make the right good against a purchaser. 2. Even supposing that Little's letter of 1816 were held to apply to the assignation to Carlyle, and to confirm it, still Carlyle had no right to occupy by subtenants without the landlord's consent, and they must all be removed. The tolerance, by Little, of such subsets from year to year, did not amount to a surrender of his right to challenge a subset at any new term when he pleased, and still less could it affect a singular successor. 3. In 1814 the original lease had been in substance abandon-

ed and renounced by Carlyle, as sufficiently appeared from the change in the possession, and the change in the rent; and he had failed to acquire any valid written title in place of the old one. And even if that lease subsisted to any effect, still the possession of Carlyle, so far as acquired in 1814, was not held in virtue of any written title, as it was not comprehended in the original lease, and no contract of excambion between him and Little was either admitted or competently proved. Such agreement could only be proved by writ or oath of party,<sup>1</sup> and though the facts and circumstances on which a plea of rei interventus might be founded, could be proved by parole, yet these were of no avail unless the contract of excambion itself was first proved by competent evidence.

The defenders answered, 1. John Beattie of Chappelhill possessed above three years, on apparency, and Little took up the estate by service to his predecessor. Little had also by his letter of 1816 expressly confirmed the assignation to Carlyle. He was therefore bound by the lease as effectually as the grantor of it. 2. With the full knowledge of Little, the subjects had always been occupied by subtenants of Carlyle, which amounted to a waiver of the clause excluding subtenants without the landlord's consent. But, at any rate, that clause merely applied to the field, or agricultural portion of the lease, which was let for twenty-one years only, and was never meant to apply to the houses and yards, when the eventual prolongation of the lease as to them for 99 years was to take effect. 3. The right under the original lease had never been renounced or abandoned. And there was written evidence, in the memoranda made by Little, relative to the possession of Carlyle as at 1814, and to the alteration then made, which, together with the rents subsequently paid, and the actual change of possession, and the alteration of the fences, both by Little and Carlyle, amounted to evidence of the alleged excambion; connected as these writings were with the previous lease and assignation, and followed as they had been by so strong a rei interventus, Carlyle was entitled, especially considering the smallness of the subjects, to maintain that his written title, modified by the excambion, embraced his whole possession, and would endure for 99 years from 1808, even when challenged by Little's singular successor. And, in any event, if Carlyle could be compelled to give up any part of his present possession, he must be allowed to reacquire possession of the subject ceded in 1814.

The Lord Ordinary pronounced findings in reference to the delineations and plan in process, and found that Carlyle had established a right as tenant to that part of the subjects to which he had entered under the agreement in 1814, "and that for the space of 99 years from Whitmonday 1808, at the rent specified by him in the record, and to that effect

<sup>1</sup> Maclean, July 1, 1834 (ante, XII. 865).

**No. 22.** assoilzied the said Robert Carlyle from the conclusions of this act found that the said Robert Carlyle, under the lease to which he has by assignment, is not entitled to subset any of the houses, or any part of the land contained in that lease, and that the consent of the late proprietor, Ninian Little, to subleases from year to year, does not bar the suer from challenging the subleases now current; and therefore find that the defenders, John Davidson, &c. (subtenants), are bound to remove from the tenements at present occupied by them at the ten of Whitsunday next, and decerned." \*

Nov. 22, 1836.  
Kennedy v.  
Carlyle.

Kennedy reclaimed in so far as the interlocutor had found that Carlyle had established a right as tenant to any part of the ground in question, and Carlyle reclaimed in so far as he had been found to have no right to subset.

**LORD PRESIDENT.**—The writings founded on in this case, though not expressing a contract of excambion, yet necessarily imply it, and, taken in connexion with the real evidence of the facts and circumstances, I hold that the excambion is sufficiently proved. Indeed when I consider the smallness of the subjects which were excambied, for the obvious mutual accommodation of both parties, and all that followed on the excambion, it would be a very serious case if it could now be set aside. The rigorous application of the law in that manner would be highly injurious to many cottars and small tenants throughout the country. In regard to the right of subset, it is no doubt very unusual to insert such a clause in a

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\* **NOTE.**—There is satisfactory written evidence of the lease granted by Beattie, the proprietor of Chappelhill, to John Beattie, the joiner, and of the assignment of that lease by Beattie, the joiner, to the defender, Robert Carlyle. There is also written evidence of the assignment being confirmed by Ninian Little, who succeeded to Chappelhill, in his letter produced, of the 15th June, 1814. Little, in that letter, calls it the agreement with John Beattie of Chappelhill, not with John Beattie, the joiner; but it is so termed correctly enough, because the assignment would not have been effectual (assignees being excluded) unless the landlord had agreed to it. There is no evidence that the original lease had been surrendered, and an entirely new transaction entered into, as the pursuer tends, for the letter of 24th September, 1813, is plainly a confirmation of Beattie's lease, as assigned to the defender, Robert Carlyle, with the deduction of a shilling or two from the rent, and it strongly supports the defender's pleas. Little's memoranda as to Carlyle's possession at Wallacehall (Proof, p. 27), are also material written evidence to the same effect, and likewise the excerpts from his book (pp. 28 and 29).

"The only difficulty in the case arises from the excambion; but the Lord Ordinary thinks that the defender's averment on this point also is sufficiently established, for it is proved by the most conclusive evidence, and particularly by the testimony of Ninian Little himself, the proprietor at the time, that at Whitsunday 1814 he ceded possession of Graham's house and garden, and some additional ground to the east, to Carlyle; and, on the other hand, that Carlyle ceded to him Beattie's workshop, and the ground marked on the plan 'Garden ground belonging to Kennedy.' And it is proved, that possession has been maintained accordingly since, under the eye, and with the consent of Mr Little, while he remained proprietor. It is thought that this is sufficient real evidence of an excambion between the landlord and a tenant, more particularly in a case of subjects so inconsiderable as those in question."

enduring for 99 years, especially when restricted to such subjects as houses and adjoining gardens, but the parties to a contract of lease may agree to what they please, in this respect; and it appears to me, that, by the terms of this lease, the exclusion does apply throughout the whole course of it.

No. 2  
Nov. 22,  
Farish v.  
Magistrate  
Annan.

LORD GILLIES.—In proving the contract of excambion, writings or memoranda, even the most informal, may be referred to. And when I consider the writings here produced, and the relative facts and circumstances which have been competently proved by parole, I think the contract of excambion, followed by a rei interventus, has been sufficiently proved. As to the reason for inserting an exclusion of assignees and subtenants, in a lease of these subjects for 99 years, I do not know what it may be. But the clause stands in the contract, and it must receive legal effect.

LORDS BALGONY and MACKENZIE concurred.

THE COURT adhered on both notes, and remitted to the Lord Ordinary to proceed farther; reserving expenses.

BRODIE and KENNEDY, W.S.—W. STEWART, W.S.—Agents.

JOHN FARISH, Suspender.—*D. F. Hope—H. J. Robertson.*  
MAGISTRATES OF ANNAN, Respondents.—*Rutherford—G. G. Bell.*

No. 2

*Public Officer—Burgh Royal—Town Clerk.*—A town-clerk having been appointed for five years, and the council at the end of that period having elected another person, found, in a suspension and interdict, that he was not summarily removable, and the council interdicted from carrying the new appointment into effect, without prejudice to any declarator the council might be advised to institute for having it found that the office came to end by the lapse of the stipulated period.

THE office of town-clerk of the royal burgh of Annan having become vacant in 1829 by the death of the then clerk, Richard Graham, who had for many years discharged the duties of the office by his deputy, John Foot, the magistrates and council, on the 16th of April of that year, “considering that it would be for the advantage to the burgh to elect two clerks,” appointed Foot and the suspender Farish, “to be conjunct town-clerks for the space of five years” from the date of appointment, the emoluments to be divided between them in the proportion of two-thirds to Foot and one-third to Farish. On the 4th of April, 1834, in anticipation of the expiry of the five years mentioned in the minute of appointment, the then magistrates and council, who had been in the preceding November elected by the inhabitants under the provisions of the Municipal Reform Act, “appointed a meeting to be held in the town-house on Friday the 4th instant, for the purpose of electing a town-clerk or town-clerks.” At the meeting so held the following proceedings took place, as recorded in the minutes:—“The provost stated that this meeting had been called for the purpose of electing a town-clerk, or town-clerks, in terms of the resolution of the council of the 4th current. He then moved, that the council do immediately proceed to elect two town-clerks, which motion was seconded by Mr Robert

Nov. 22, 1  
2d Division  
Ld. Mon.  
T.



**No. 23.** **Dickson**, whereupon Mr Farish, one of the present town-clerks, protested in the terms stated in a paper apart, authenticated by the initials of the provost. The motion was put to the vote and carried unanimously. Bailie Richardson then moved that Mr John Foot, the present senior town-clerk, be elected senior town-clerk for the period from the 16th of April current, until the day of the annual election of the magistrates and other office bearers in November 1835, with the same share of salary and emoluments of office which was provided for him by the minute of his election in April 1829. This motion was seconded by James Little, and carried unanimously. Bailie Forrest then moved that Mr George Underwood, writer in Annan, be elected junior town-clerk for the same period as is before specified in reference to Mr Foot, with the same share of the salary and emoluments of office which was provided to Mr Farish by the minute of election of April 1829. This motion was seconded by Mr James Little. Mr Blacklock moved as an amendment, that Mr John Farish, the present junior town-clerk, be elected junior town-clerk for the period above specified as in reference to Mr Foot, and with the same share of the salary and emoluments of office which he enjoys at present under the minute of April 1829; which amendment was seconded by Mr Weild. The amendment was then put to the vote, when Messrs Pool, Nicholson, Blacklock, and Weild, voted for it; and Messrs Little, Sawyer, Thom, Baxter, Dickson, McLe Montgomery, B. Nelson, Richardson, and the provost, against it; thus negating it by a majority of eleven to four. The motion was then put and carried by the same majority, and Mr George Underwood was elected junior clerk accordingly, for the period and on the terms specified in the motion."

The protest mentioned in this minute, as taken by Farish, was in these terms:—"Whereupon Mr Farish, on behalf of himself, and without meaning any disrespect to the provost, magistrates, and council, solely from a regard to his own rights and the rights of his successors in office, represented that it was ultra vires of the council to remove the present clerks from office, or to elect others in their place, as had been established by repeated decisions of the Supreme Court, and particularly in the case of *Simpson v. Tod* and others, 17th June, 1824, the report of which is contained in the third volume of *Shaw and Dunlop's Cases*, 150-1-2. Mr Farish then read to the meeting, and protested for himself against all and any proceedings to which the council might either now or hereafter have recourse, with a view to deprive him of his office, and that he would hold the Magistrates and council liable to him in damages and expenses if such illegal proceedings should take place; and, lastly, Mr Farish respectfully declined writing any minute of deprivation or election for the reasons above stated, and others to be hereafter condescended to. Following up this protest, Farish immediately presented a bill of interdict and inhibition against the magistrates and council carrying the minute into execution, or interfering with him in the exercise of

actions of town-clerk. The bill having been passed and letters expedé, No. 23.  
 'which contended—

The office of town-clerk is a public office, involving functions the independent exercise of which is of great importance to the lieges, and the policy of our law has always been to hold that the appointment to such offices must necessarily be *ad vitam aut culpam*, and to disregard, as infirm and incompetent, any attempted qualification or condition contrary to this principle. Accordingly in the case of *Simpson v. Tod*,<sup>1</sup> where the question was very deliberately considered, the Court refused to allow a town-clerk expressly appointed "during pleasure" to be summarily removed by the council without order of law, and although a question was there raised as to whether the resolution of removal was regularly made by a proper quorum of the council, the Court did not rest on that ground, but, on the contrary, recalled a finding of the Lord Ordinary founded upon it. There are also other analogous cases supporting the same rule<sup>2</sup> which is not based on any supposed construction of the terms of the appointment, but on a general principle as to the nature of such offices, which will not allow effect to such conditions as were here subjected to the appointment, and at all events precludes its being brought to an end without legal process on the part of those attempting to effect that object. Then as to the new provision in the 3 and 4 Will. IV. c. 76, allowing clerks to be appointed from year to year, it necessarily proceeds on the assumption that previously such an appointment would not have been legal.

Nov. 22, 183  
*Farish v.*  
*Magistrates of*  
*Annan.*

On the other hand it was pleaded for the magistrates—

There is no sufficient authority for laying it down as an absolute rule in the law of Scotland that appointments to public offices, such as this in question, must be *ad vitam aut culpam*, and the provision in the late statute is strongly against the assumption of such a rule, based, as it is alleged to be, on grounds of public policy, since it cannot well be presumed that this provision would have been introduced into the new act had the legislature so esteemed it. In the case of *Simpson v. Tod* there was a specialty arising from the resolution of removal not having been adopted at a regular meeting when a proper quorum was present, and the decision there, and in other cases referred to, proceeded on a construction of an appointment "during pleasure" that it was not to be held during caprice, but during reasonable pleasure,<sup>3</sup> and that therefore, in order to bring it to an end, a legal process was necessary to show that there were grounds of removal consistent with that construction. Here, however, the appointment is for a time certain, the mere lapse of which requiring no process of law to establish it, clearly brought the officeship

<sup>1</sup> June 17, 1834 (ante, III. 150).

<sup>2</sup> *Bogle*, June 27, 1756 (13126); *Kemp v. Magistrates of Irvine*,

*Magistrates of Forfar v. Adam*, May 14, 1822 (ante, I. 400).

<sup>3</sup> *Ibid.*, at *supra*.

No. 23.

Nov. 22, 1836.  
 Farish v.  
 Magistrates of  
 Annan.

to a close, so that here there could be no occasion for the magistrates and council having recourse to legal proceedings, while such a course was incumbent on Farish, if he chose to attempt to make out that he was entitled to hold the office in the face of the express terms of his appointment. Besides, even supposing the appointment illegal, he having accepted it could not quarrel it, and if he could, the result would be, not to get rid of the qualification, but to cut down the election altogether as contrary to law.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : \*—“ In respect of the express judgment of the Court in

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\* “ The Lord Ordinary is clearly of opinion that there is no material difference, in regard to a possessory question of this kind, between an appointment of a clerk nominally for *one year*, or for *five years*, or *during pleasure*. If there be any distinction, the power of arbitrary removal is clearest in the last case. But still the principle of law, indicated throughout all our books, that a town-clerk of a royal burgh, as a *public officer*, holds generally his office for life, and that it must lie with those who think that there is an arbitrary power of removing him in any particular case, to show this in a proper process of declarator, was very fully established in the case of Simpson, referred to in the interlocutor. It is said that that decision is of little weight, and the respondents endeavour to explain it away. The Lord Ordinary does not know *why* it should be of little weight, being the judgment of the Supreme Court in a matter of pure Scotch law. It was very carefully considered. The Lord Ordinary knew it well at the time, and has minutely examined the papers in it, and there is this very marked point involved in the judgment in the advocacy (which is what the Lord Ordinary holds to bind him), that it was pronounced *in the question of possession purely*, waiving entirely the merits of the *reduction and declarator*, brought, not by the magistrates, but by Simpson, with a view to a claim of damages, although the terms of the judgment in that declarator, pronounced some time after, are also exceedingly material in the present cause.

“ Having this opinion on the state of the question as presented in the suspension, the Lord Ordinary does not think that it is necessary to enter into the general argument as to the power of the magistrates to remove the suspender. He has understood it to be clear law in general, that a town-clerk of a royal burgh is *not* a mere servant of the town council, but a *public officer*, having very important duties to the community, and even to the state, to discharge, in which he *must* hold himself as entirely independent of the town council. In consequence of this, the general law is, that it is a life office. Accordingly, *it did not fall, whatever were the terms of the appointment, even by the disfranchisement of the corporation of the burgh*, under the old rules. The respondents have argued in this case, that because the term of the appointment was limited to five years, the office ceased, ipso facto, when the period expired, and a new appointment became essential. But, if this were sound, the consequence would be very serious ; for if the council had dismissed the suspender, *and appointed no clerk in his place*, it would follow that the burgh might have ceased to have a clerk altogether, and the public franchises of the people, as well as the most important interests of the Crown, the corporation, and the burghage heritors, have been defeated, or essentially impaired. The Lord Ordinary thinks, that, from the nature of the office, it *could not expire*, ipso facto, under any terms of the appointment, which raises at once the peculiarity in principle whereby the possessory question seems to him to be ruled.

“ The Lord Ordinary has also one observation to make on the statute of 3d and 4th Will. IV. c. 77. It seems to him, that the twenty-sixth section of that act distinctly recognises the previously *understood law of Scotland* on this point. It provides ‘ that it *shall be lawful* for the magistrates and council of any such burgh or town to elect a town-clerk, for such burgh or town, *for one year*.’ Why make

it, when lodged, to the auditor to be taxed."

magistrates and council reclaimed.

D GLENLEE.—The question is, if the appointment be of such a nature as entitled the magistrates to turn out the suspender, and all that is decided they must proceed by process of law, and we would need, before we could his interlocutor, to hold it perfectly clear that the appointment came to an entire lapse of the five years. So far from that, however, being the case, contrary to all our impressions, and to the decisions, which establish the fact such an officer cannot be turned out without a declarator and legal process. The Municipal Reform Act does not affect the question, as it only legalizes it for a year in future when there is really and truly a vacancy, and it is impossible to say that it is so plain that there was here *eo ipso* a vacancy by lapse as to recal the interdict, and therefore I am for adhering.

D MEADOWBANK.—I am entirely of the same opinion.

D MEDWYN.—When I first read the case, I thought there was something singular in a party accepting a qualified appointment and then attempting to convert it into an unqualified one. But looking more into it, and

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revision that it *shall* be lawful so to do, if it had not been well known that previous law held a principle opposed to the *legality* of such a limitation? At with such a provision in the statute book, it must be difficult to say that was no previous law on the subject, or that the case of Simpson was of no use. But the clause goes on more materially to touch this *possessory* question. 'Without prejudice to his re-election, and also without prejudice to the right of any existing town-clerk in any such burgh or town, to hold his office of town-clerk, or clerk to the magistrates and council, *ad vitam aut culpam*.' Lord Ordinary does not say that this determines that, in any particular case, a clerk must hold his office *ad vitam aut culpam*. But it most manifestly *supposes* that there may be cases in which, notwithstanding an appointment for one

**No. 23.** seeing that this is merely a possessory question, I think, *hoc statu*, it is not clear as to entitle the magistrates to appoint another. In Tod's case, though appointment was during pleasure, I cannot think it very different from this, and if that case can only be got rid of by holding that "during pleasure" is not "during pleasure," I do not think it can be got over. It seems to me to rest on the nature of the office. The town-clerk is not the servant of the magistrates, but an officer of the town analogous to that of sheriff-clerk, and at present I incline to hold that adjunction of any condition is illegal, and that this cannot be distinguished from the case of Tod.

Nov. 22, 1836.  
Stewart v.  
Stewart.

**LORD JUSTICE-CLERK.**—I do not wish to anticipate any thing in the declaration but we have solid grounds in the case of Tod and Simpson, and other cases, in viewing the suspender as holding a public office from which he cannot be arbitrarily removed, and that he is not to be turned out without process at law. I do not see the difference attempted to be made out between an appointment during pleasure and for a limited term, and, therefore, I am for maintaining the suspender in possession, leaving the magistrates to bring their declarator.

**THE COURT** accordingly adhered.

**WILLIAM MARTIN, S.S.C.**—**WILLIAM STEWART, W.S.**—Agents.

**No. 24.** **MRS MARIA CAMPBELL STEWART, Pursuer.**—*D. F. Hope—More.*  
**FERDINAND STEWART CAMPBELL STEWART, Defender.**—*Keay—M'Neill.*

**Transaction—Agent and Client.**—Three parties having entered into an agreement compromising their respective claims to the succession of a relative deceased and a reduction having been brought by one of the parties on the ground that she was thereby injured, and was led into it in ignorance of her rights, and in consequence of erroneous advice from her professional agent, who was also agent for the other parties;—Circumstances in which held that grounds of reduction had not been established, and Observed that a transaction or arrangement of doubtful rights was of all agreements the most difficult to set aside.

**Nov. 22, 1836.** In the year 1815, the late Frederick Campbell Stewart, a native of America, succeeded as heir of entail to the estates of Ascog and Whitebarony. These estates he was advised to sell, and thereafter a litigation ensued as to the conditions of the entail, in which the Court of Session found that he had a right to sell the estates, but was bound to reinvest the purchase-money on land in Scotland.<sup>1</sup> Against the latter part of the finding Stewart appealed to the House of Lords, and while it was yet uncertain whether the judgment of the Court of Session would be affirmed or reversed, he executed, in 1826 and 1827, various deeds providing for either event, in favour of Mrs Stewart, his wife, of his two daughters of his brother, Ferdinand Stewart, and of his sister, Mrs Anna Stewart. He soon afterwards died in France, as did also his daughters. In 1830 the House of Lords decided that he was under no obligation to reinvest the price of the estate.<sup>2</sup> Doubts being entertained by Mr Wardlaw

2D DIVISION.  
Ld. Cockburn.  
R.

<sup>1</sup> Feb. 23, 1827 (*ante*, V. 416).

<sup>2</sup> June 16, 1830 (4 W. & S. 196).

wart, the defender, Ferdinand Stewart, and his sister, Anna which, after stating the particulars as to the succession of the , set forth that, owing to various causes, great uncertainty pre- on whom had devolved the right of succession to the prices of sold, and to the other personal property of the deceased; "there- with a view to avoid litigation, and being mutually disposed to ble arrangement," the parties above mentioned consented and hat the free proceeds of the whole estate and effects, other than led estates, should be divided equally among them.

; agreement Mrs Stewart subsequently brought a reduction, on ds, 1st, That she was induced to enter into it in ignorance of s and claims against the succession, and in consequence of being id erroneously informed in reference thereto by her agent, who g for the other parties as well as for herself; 2dly, That at the bscribing the agreement, she was not aware of the existence of l by her husband in which she was favoured, or at least that was overlooked by her.

efence was, 1st, That the pursuer had set forth no sufficient for reducing the agreement; 2d, That she was in perfect know- her rights, and of all the circumstances; 3d, That she had ho- d the agreement.

ord having been made up, and the parties having produced in of their averments respectively a variety of correspondence and uments, the Lord Ordinary pronounced this interlocutor, and e subjoined note:—\* " Finds, That the pursuer has not esta-

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- No. 24. blished any sufficient ground for setting aside the agreement brought under reduction ; sustains this defence, assoilzies the defender, and decerns :  
 Nov. 22, 1836. Finds the pursuer liable in expenses."  
 Stewart v. Stewart.  
 Mrs Stewart reclaimed.
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disension are brought into the calculation, the reality of her lesion is at the least doubtful.

" The exact nature and extent of her ignorance is equally uncertain. That she did not know the whole law of her case, or cases, is probably true,—as it is of most parties. But the *certainty and the degree* of her ignorance is by no means clear. Her evidence of it consists entirely of letters which passed between her and her agent ; but it is proved that she had personal interviews with him ; and the points on which she now says that she was in the dark, were ones on which it is very improbable that no communication then passed between them. Accordingly, she herself acknowledges in several letters that she always meant to make a sacrifice, and on grounds which show that she knew more of her true legal position than is now admitted. For example, one of the principal averments on which this action rests is, that, in sharing the property with her brother and sister-in-law, she was not aware that the law of Scotland gave her more than a third, or rather than a fiferent of the third. Yet in her important letter of the 29th December, 1831, to her sister-in-law, in which she explains what her inducements to enter into the contract had been, she says, '*I was quite aware that if I had recourse to a law-suit the whole would probably be mine.*' There are other letters with similar avowals.

" But assuming both injury and ignorance ; she was confessedly misled *solely by her own professional adviser* ; a gentleman against whose intelligence or character nothing is said. It is alleged that he was also the agent of the opposite parties. But this was known to her, and it is not averred on the record that he betrayed the one client to the other ; nor is there in any other respect the slightest fraud imputed to him. He honestly thought it best for her that she should enter into this arrangement, and she took his advice. She wrote to him, saying she thought the bargain better for her brother and sister-in-law than for her, '*but I submit all these matters to your better judgment.*'—(Letter 26th April, 1830). Eight months after this she repeats the objection in very explicit terms. '*I do not think the chances equal.*'—(Letter 2d December, 1830). Nevertheless, after another pause of above two months, and more explanation from her agent, she signs the contract, which sets forth the various deeds, judicial proceedings, professional consultations, and 'conflicting opinions, by different eminent counsel at the Scottish bar,' and declares, that the compromise is gone into '*with a view to avoid litigation, and being mutually disposed to an amicable arrangement.*'

" It was found in the case of Macalister (29th June, 1827), that the circumstance of a party losing a judgment by being kept in ignorance by his agent, formed no ground for disturbing the party who had obtained it. On the same principle, whatever claim the pursuer may have *against her agent*, it does not appear to the Lord Ordinary that the ignorance or inadvertence of the legal adviser by whom she chose to be guided, can, *in a case free from all fraud*, be made to affect third parties, who are not said to have been accessory to her being misled.

" The Lord Ordinary has not decided upon homologation *as a separate defence*, because he conceives it to be superseded *hoc statu*, by the failure of the pursuer to establish her own case. But undoubtedly, the acts from which homologation is inferred do throw a strong light on the real state of her mind and views, in reference to her own grounds of action. For they amount to this,—*that, at a period when it is nearly impossible to believe that she was in any ignorance of her rights*, she deliberately enforced what she held to be the meaning of this very contract, and gained materially at the expense of the defender by doing so."



LORD JUSTICE-CLERK having gone over the facts of the case, in regard to which his Lordship arrived at the same conclusion as the Lord Ordinary, observed, —We come now to consider what principle of law ought to regulate the decision of these facts. Our law writers hold that an agreement or transaction regarding doubtful rights is the most difficult of any to upset. So solemn is the nature of agreements of this kind, that Lord Stair seems to think they cannot be “ransacted” even by writings newly recovered,—*ex instrumentis noviter repertis*.<sup>1</sup> Bankton is equally decisive upon the point. The case of M‘Allister,<sup>2</sup> which is relied on by the defender, appears to me to bear closely on the present question. I am for adhering to the interlocutor.

LORD GLENLEE.—I have come to the same conclusion. After going through the case, I cannot find the least vestige of any thing like fraud. The principle of not disturbing agreements of this nature is one of the best founded in our law. It was well laid down by Lord Alloway in the case of Johnstone v. Paterson (Nov. 29, 1825), that a transaction could not be set aside without an allegation of fraud or concealment, or something equivalent. It is of no consequence that the party did not get all she was entitled to.

LORDS MEADOWBANK and MEDWYN concurred.

THE COURT accordingly adhered.

W. A. G. and R. ELLIS, W.S.—AINSIE, MACALLAN, and GRAHAM, W.S.—Agents.

— SHIRREFF, Pursuer.—*Moncreiff*.

— SHIRREFF’S TRUSTEES, Defenders.—*Walker*.

*Jury Trial—Reference to Oath—Process.*—The Court refused to delay a motion for applying a verdict, and subjecting the pursuer in expenses, though he alleged that he had it in contemplation to refer the whole cause to the oath of the party; the

LORD PRESIDENT observing that such a reference might be made after the verdict was applied, as well as before it.

J. KNOX, S.S.C.—WALKER, RICHARDSON. and MELVILLE, W.S.—Agents.

<sup>1</sup> Stair, i. 17, 2.

<sup>2</sup> June 29, 1827, ante, V. 871 (new ed. 809).

No. 26.

GEORGE GRASSIE, Petitioner.—*Dingwall.*

Nov. 24, 1836.

Grassie.

Keith v.

Archer.

*Poor's Roll—Process.*—A party petitioned for the benefit of the poor's roll, in order to lodge a claim in a multiplepinding where there were above 100 competing claimants; he had not made intimation "to the adverse party," in terms of A. S. June 16, 1819, prior to emitting his declaration before the minister and elders, having been prevented from doing so, by the expense it would occasion: the Court, in the circumstances, ordained intimation of the petition on the walls and in the minute-book, and notice to the raiser of the multiplepinding.

Nov. 24, 1836.

1st Division.

It is required by A. S. June 16, 1819, § 3 and 4, that in any application for the poor's roll, the applicant must first obtain a certificate, as to his condition and circumstances, from the minister and two elders of his parish, and that ten days' previous intimation shall be given "to the adverse party" of the time and place fixed for appearing before the minister and elders. The certificate of intimation is declared, § 5 to be one of the warrants for presenting a petition to the Court for the benefit of the poor's roll.

In a multiplepinding where there were said to be above 100 competing claimants, George Grassie was desirous of getting on the poor's roll, and lodged a claim; but, to avoid the heavy expense of intimation to these parties, he emitted his statement before the minister and elders, without making any intimation at all. This was brought under the notice of the Court at moving the petition for the benefit of the poor's roll, and

THE COURT in the circumstances, pronounced this interlocutor:—

"Ordain intimation on the walls and in the minute-book, for ten days, of this petition, and notice to the raiser of the multiplepinding."

J. Jopp, W.S.—Agent.

No. 27.

JAMES and WILLIAM KEITH, Advocator.—*Sol.-Gen. Cunninghame.*WILLIAM ARCHER, Respondent.—*Rutherford—Deas.*

*Title to Pursue—Tutor—Pupil.*—1. An action of damages for personal injury sustained by a pupil, was raised in a Sheriff Court at the instance of the pupil nominatim, with concurrence of his father, as his administrator-at-law, and also at the instance of the father nominatim, as such administrator; the conclusion was for payment of damages and expenses to the pupil nominatim; the Sheriff dismissed the action as defective in the instance;—Held, in an advocacy, that this judgment was erroneous, and remit made to the Sheriff to proceed in the cause as should be just. 2. Opinion by the Lord Ordinary, that though "a pupil, by himself, has no persona standi in judicio, yet, as soon as his tutor or administrator concurs in the action, the defect of his nonage is supplied, because there is a pursuer insisting who has a persona standi."

*Reclaiming Note—Advocation—Expenses.*—Terms of a reclaiming note in an advocation, which held only to apply to the expenses of the Court of Session, and not of the inferior Court.

No. 2

N.v. 24, 1

1st Division

Ed. Corbett

Keith v.  
Archer.

An action was raised before the Sheriff of Forfarshire, by "James Keith, son of William Keith, farm-servant near Lochee, and living in family with his father, with concurrence of the said William Keith, his father, and him, as administrator-at-law for his said son." The summons further set forth, "That the said James Keith was engaged with William Archer, farmer," to serve him as herd-boy; that he had been cruelly assaulted by Archer and obliged to fly home for safety; "that the said James Keith is entitled to damages," &c., but although Archer "has been required" to make reparation, yet he refuses, &c.: "Therefore the said William Archer, should be decerned, &c., to make payment and satisfaction to the pursuer, the said James Keith," of £20, as "damages and solatium;" and "farther, he should be decerned to make payment to the pursuer of the expenses of process." The will of the summons directed Archer to be charged to compare and "answer at the instance of the said pursuers."

In the defences, it was stated as a dilator, that there was no good instance, because James Keith was in pupillarity, and the action should have been raised solely in name of his father as his administrator in law. This was the style set forth in all the style books. But, if the instance was cured, in consequence of the father being also set forth, in that character, as pursuer, then the summons became incongruous, as it was thus a summons in name of the father alone, and yet contained no conclusion for payment except to the son alone, who, if he had no title to pursue, could not grant a discharge, or be the party in whose favour decree should pass. The pursuers answered that the instance was unexceptionable, as it set forth both the pupil, with concurrence of his father, and also the father as administrator in law for his son; and as the action was brought for behoof of the son, and for reparation of personal injury sustained by him, it was competent to conclude for payment to the son, which the defender would be safe in making, provided he got a discharge from the father, and without which he could not be called on to make it. There was, therefore, no incongruity in the summons, even if the father's instance alone was maintainable. But the pupil, so soon as he had the concurrence of his administrator, was possessed of a *persona standi*, and could competently set forth his own instance, as had been recognised in a series of decisions.<sup>1</sup>

<sup>1</sup> *Flemyng*, Feb. 9, 1545, (16221); *Johnston and his Tutor*, Jan. 16, 1740, (16346); *Young*, Nov. 7, 1740, (16346); *Baird*, Jan. 13, 1741, (16346); *Park*, May 13, 1823, (ante, VI. 336); *Dick*, May 15, 1828, (ante, VI. 798); *Duke of Argyll*, Feb. 2, 1757 (12575); *Lord Seafield*, May 24, 1822, (ante, I. 435);

No. 27.  
Nov. 24, 1836.  
Keith v.  
Archer.

The sheriff “in respect it is admitted that the pursuer James Keith is a boy not ten years of age, and in respect the summons concludes for payment to the said pursuer only, who, in law, has no *persona standi*, sustained the dilatory defences, dismissed the action, and decerned; and found the pursuer, William Keith, liable in expenses.”

An advocacy was brought in which the Lord Ordinary “remitted to the sheriff with instructions to alter the interlocutors complained of, and to proceed in the cause as shall be just: and found the advocator entitled to the expenses incurred by him in this Court, subject to modification, and decerned.”\*

Archer reclaimed on the merits; and Keiths on the point of expenses. The prayer of Keiths’ note was “to alter the above interlocutor, in so far as it finds the advocators entitled to expenses, subject to modification, and to find the advocators entitled to full expenses, without any modification; or to do otherwise in the premises as to your Lordships shall seem proper.”

LORD PRESIDENT.—I think the interlocutor of the Lord Ordinary is well founded, and that the Sheriff ought not to have dismissed the action. There is a sufficient instance set forth, and I see no difficulty in the defender’s getting a good discharge from the administrator-in-law for any payment which he may be compelled to make under this action. But I incline to alter the interlocutor as to expenses, and allow full expenses to the advocators.

LORD BALGRAY.—I think the interlocutor right. There are cases where it is not disputed that an action may be raised at the instance of the pupil alone, as where he has to pursue his own administrator. I give no opinion whether these are the only cases in which this can be done, but I refer to them as cases where the competency of so raising a summons is not disputed. In those cases the summons must, of course, conclude for payment to the pupil alone. Such a summons

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\* NOTE.—“The Sheriff has dismissed this action as incompetent, because it is brought in the name of a pupil, with the concurrence of his father as his administrator-in-law, instead of being brought in the name or at the instance of the father alone. It is true that a pupil, by himself, has no *persona standi in judicio*, but as soon as his tutor or administrator concurs in the action, the defect of his nonage is supplied because there is a pursuer insisting who has a *persona standi*. In practice, this concurrence, even when given subsequently to the raising of the action, operates retro, and validates the pursuit. Thus, if a pupil has no tutor or administrator, an action nevertheless may be brought in his own name, and after it comes into Court, a tutor *ad litem* may be appointed, with whose concurrence the action proceeds; and it is no objection that the summons was raised and executed in the pupil’s name alone, and before any tutor *ad litem* was appointed. A fortiori, therefore, this action, in which the pupil’s father, as his administrator-in-law, concurs from the first, and is a party to the summons must be competent. See the Decisions, 16th January 1740, Johnston; 22d February 1798, McNeill.

“But as there has been an unnecessary departure from the ordinary style, as prescribed by all the formalists, from Dallas to Darling, The Lord Ordinary thinks, that the expenses of process found due to the pursuer should admit of a small modification, to mark that the Court does not approve of the manner in which the summons is framed.”

is made valid if a tutor ad litem be appointed by the judge when it comes before him, and then it is followed out, without objection, to a decree. But the very same incongruity, or nearly the same, which is said to exist here, between the instance and the conclusions, must exist in that well known class of cases, where no such objection has ever been sustained. It is true that I do not think the style of the summons in this instance is the most proper that could have been adopted, but that only goes to the question of modifying the expenses. The summons is sufficiently apt and relevant, and ought not to have been dismissed.

No. 2  
Nov. 24, 1  
Keith v.  
Archer.

LORD GILLIES.—I think the interlocutor right except in so far as it modifies the expenses awarded. I see no ground for modification. In general, such a dilatory defence as this can only be stated at the peril of paying all the expenses of the discussion thereby created.

LORD MACKENZIE.—I think the interlocutor is right on the merits. It was scarcely possible to frame a summons more cautiously or safely, so far as regards the instance, for it sets forth both the instance of the pupil with concurrence of the administrator, and also the instance of the administrator himself. The objection therefore is rested solely on the terms of the conclusion, which is for payment of damages to the “pursuer, the said James Keith,” who was the pupil. I think this objection is too critical. This must be read, I think, as a conclusion for payment to be made to James Keith with consent and concurrence of his father as his legal guardian. And I am not at all sure that the opposite conclusion for payment to the other pursuer, William Keith, for behoof of his son the pupil, would have been the best form of a conclusion, or even if it would not be liable to considerable objection. The action may be raised when pupillarity is nearly at an end, so that it expires before decree, and no tutor remains; or the individual tutor may die, and a new tutor may be in his place. It may therefore be unsuitable to insert a conclusion for payment to the individual tutor who raises the action. But without deciding on the effect of any of these contingencies at present I shall merely observe that I have much doubt whether the form of conclusion pointed at by Archer is that which is the best. And in this case where the instance is undoubtedly sufficient, I rather think the conclusion, as it stands, is sufficient also. But even if I were wrong in this, why was the action dismissed? The proper remedy would have been to allow an amendment of the libel, which was all that was required. In regard to expenses, I think there should be no modification. A party who chooses to raise a discussion on a point like this, should, in all the circumstances, be made to pay the cost of it. If he merely had the bona fide object in view, of taking care to get a good discharge, he should have asked for nothing more than an amendment of the libel.

The advocates now moved for expenses in both Courts, and contended that this was embraced within their prayer “for full expenses.” The respondent answered that every prayer, intended to embrace expenses in an inferior court, as well as this Court, set this specially forth: and that, in particular, from the structure of the prayer of this note, it was evident that it was limited to the expenses of this Court, which were asked as “full expenses” in contradistinction to the modification by the Lord Or-

No. 27.

Nov. 24, 1836.  
Laird's Assignees v.  
Murray's Trustees.

**LORD BALGRAY.**—On looking at the prayer of this note it seems to be limited in its own terms, to the expenses incurred in this Court. I do not think we can give more than these, but, in terms of the opinion of the Court, they should be the full expenses without modification.

**LORD PRESIDENT.**—The advocacy brings every thing before us, and it was certainly competent to have asked the expenses of both Courts: and I am doubtful whether the words “full expenses” do not include this.

THE COURT ultimately adopted the view expressed by Lord Balgray that the prayer of the note was not so framed as to apply to the expenses of the inferior court, and the following interlocutor was pronounced:—“Recal the interlocutor of the Lord Ordinary reclaimed against, in so far as it finds that the expenses ought to be modified; and find the advocates entitled to full expenses in this Court; and refuse the desire of the reclaiming note for William Archer.”

GREIG and MORTON, W.S.—BROWN and MILLER, W.S.—Agents.

No. 28. LAIRD and COMPANY'S ASSIGNEES, Pursuers.—*D. F. Hope—Christison.*  
MURRAY'S TRUSTEES, Defenders.—*Rutherford—Shaw.*  
JAMES LOCKHART and OTHERS, Defenders.—*Wilson.*

**Trust.**—The residue of an estate conveyed by trust-deed was declared to be payable to A on the occurrence of a certain event, the deed likewise specially providing a sum of £2000 to be invested on heritable security, in the persons of the trustees, to A in liferent, and her children in fee: the necessary expenses of management were to be defrayed out of the trust funds; A assigned to B her claim to the residue of the estate; thereafter the event in question happened, and certain expenses were subsequently incurred necessary for the keeping up of the trust and the management of the special provision:—Held, that these expenses fell to be deducted from the residue payable to B, and a sum allowed to be reserved by the trustees to meet the future expenses of management.

**Process—Calling Defenders.**—The record in a process having been closed, and the Lord Ordinary having pronounced an interlocutor on the merits, which was submitted to review,—The Inner House allowed certain pupils having a material interest in the cause to be sisted as defenders, and in case of failure, appointed them to be called as parties in the process.

Nov. 24, 1836.

2D DIVISION.  
Lord Jeffrey.  
T.

IN the year 1811, the late James Murray of Stirling executed a deed of settlement, conveying to certain trustees, with power to assume others, his whole heritable and moveable property, 1st, For payment of debts; 2dly, To hold the residue for behoof of Mary Murray, his daughter, under burden of an annuity of £50 to Janet M'Callum, his mother, to meet which annuity a capital sum was in the first instance to be set apart, but after the death of Janet M'Callum was to fall into the residue and be payable to Mary Murray; and this residue including the capital sum so set apart, was declared payable to Mary Murray, on her arriving at majority or being married, should the annuitant be then dead: the testator farther appointed the sum of £2000 “to be laid out on good heritable

he bond or bonds for which shall be taken payable to my said daughter and their foresaids, for the use and behoof of my said daughter, and of the lawful issue of her body in fee, it being hereby declared that the capital sum shall remain for behoof of her children, vested in trustees, and the survivors or survivor of them, and that the interest thereof shall be payable to her upon her own receipts and, and not be subject to the jus mariti of her husband, or affect his creditors." The proceeds of this sum of £2000 were to be paid to Mary Murray, amongst with the residue above-mentioned, on her being single, or being married. The trustees were empowered to employ an agent or factor, the allowance to whom, "as well as all necessary expenses incurred by them in the administration of this trust, shall be defrayed out of the trust funds, and be sufficiently ascertained by any statement subscribed by the acting trustees."

No. 28.  
Nov. 24, 1836  
Laird's Assignees v. Murray's Trustees.

Murray died in 1811, his daughter being then six years of age, the trustees under the settlement thereafter accepted and acted in, investing the greater portion of the funds, as directed by the deed, on heritable security. In 1823, Mary Murray was married to James Lockhart, clerk in the house of Laird and Company of Glasgow. By her marriage-contract, she conveyed to him her whole interest in the residue of her father's trust-estates, including the principal of the £500, but excluding the above-mentioned sum of £2000. In 1825, James Lockhart, having become indebted to Laird and Company in the sum of £1000, executed, amongst with his wife, a disposition and assignation of his whole property (with the exception of the special provision of the deed, and particularly of their "claim to the free surplus funds of Murray's trust-estate," in favour of the pursuers, Buchanan and Partners and assignees of Laird and Company.

On the 8th January 1831, Janet M'Callum died. Thereafter, James Lockhart's sole surviving trustee executed a deed of assumption, appointing James Buchanan and Partners to be trustees along with him, and disposing and assigning the trust-estate and the £2000, and the trust-estate generally to himself and the new trustees. Infestment was taken on this disposition. The trustees then paid to Laird and Company, in terms of the disposition, to Mr and Mrs Lockhart, the several sums of £700 and £100 to be paid out of the general residue of the trust estate. Disputes having arisen in the manner in which the farther expenses incidental to the trust-estate were to be defrayed, Laird and Company's assignees raised an action against the trustees, narrating and founding on the provisions of the deed, the marriage-contract of Lockhart and Mary Murray, the deed of assumption and assignation by these parties, and the consequent payments made by the trustees and Company on the death of Janet M'Callum, and concluding that the trustees and Company were liable for the balance and residue of

in defence, that they were ready to account for



**No. 28.**  
**Nov. 24, 1836.**  
**Laird's As-**  
**signees v.**  
**Murray's**  
**Trustees.**

and make payment to the pursuers of the balance of the trust-funds, but under deduction of the expense incurred by the execution of the deed of assumption and relative assignation and infestment, and certain other accounts incurred to their agents in the administration of the trust; submitting farther, that as the trust must still continue in relation to the sum of £2000 provided to Mrs Lockhart's children in fee, such children being then in existence, they should be allowed to retain a portion of the residue above-mentioned, to the extent of £40, to meet the expenses of administering this branch of the trust. They accordingly pleaded, that, in terms of the trust-deed, the "necessary expenses" of management were to be paid out of the trust-funds; and, as the expenses proposed to be deducted were obviously necessary, and the special provision of £2000 ought not to be encroached upon, the deductions in question must be made from the balance of the residue concluded for.

Laird and Company's assignees replied, that they were entitled, under the assignation in favour of the Company, to the free balance of the residue of the estate, which, in terms of the trust-deed, became payable on the death of Janet M'Callum, when the trust must be held to have closed in regard to that part of the estate; and this without deduction of any of the expenses bygone or future, connected with Mrs Lockhart's £2000, excepting always the expenses of the first investment of that sum.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—\* "Finds, Imo, That up to the time of the death of

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\* "The preceding findings are grounded on the terms of James Murray's trust-deed, which, if the interlocutor is taken to review, should be printed for the use of the Court. By that deed it is expressly provided that the whole balance of the residue shall be *paid over* to Mary Murray on the death of Janet M'Callum, if she is then married or of age, provided a sum of £2000 shall have been previously *set aside*, and then stand vested in heritable security, for the use of Mary Murray and her children. There is no provision, express or implied, that the trustees shall always keep in their hands funds sufficient absolutely to ensure the payment of the whole £2000 to the children, at the mother's death; or that the residue now due to the pursuers shall only be ascertained as at *that* period. On the contrary, it is expressly provided that it *shall be paid* on the death of Janet M'Callum, and being so paid and discharged, it appears to the Lord Ordinary that it must then *cease* to be any part of the trust-estate, and can no more be charged with the *future* expenses of management than any special legacy which might have been directed to be paid over on the same event. That it is called *a residue* can obviously occasion no perplexity, when the circumstances and the whole provisions of the deed are duly attended to. It is not the residue after *the whole* purposes of the trust are affected by *paying over* the £2000 to the fiars in that sum after the death of the liferentrix, but the residue, *expressly, after setting aside that* £2000, vesting it on heritable security, and leaving it so vested at the time the residue is payable. Though not liquidated to a specific amount till such vesting is accomplished, and kept up securely till the time of paying the residue, it is necessarily liquidated by those occurrences, and comes from that moment to consist of a definite amount of pounds, shillings, and pence, as specially as if that amount had been *set forth* in the trust-deed from the beginning. As soon, therefore, as those interested in the sum so liquidated are entitled to be finally paid off, they plainly have no farther interest in the trust, or concern with its management. The trust as to them, in

Janet M'Callum (which is admitted to have happened in 1831, though the month is not specified) the trust must be held to have subsisted, and

No. 21  
Nov. 26, 11  
Lord's Assn  
signes v.  
Murray's  
Trustees.

but, is absolutely at an end, and having nothing to do with the funds remaining with the trustees, they cannot be in any way responsible for their management or security. The trustees have hitherto spoken only of the expenses of *management*, and in fact require no other allowances than may be requisite on that account. But if right on principle, they are plainly entitled to go much farther, and to insist upon retaining what may be sufficient, not only for the future administration of the £2000, in which the pursuers have no possible interest, but for any *losses* which may arise on it without their fault, and it may serve to illustrate the fallacy of the principle to consider this application of it. It is obvious that a great part of the whole trust funds might be lost in this manner, after they had been realized and invested, by latent defects in the borrower's title, a fall in the value of land, or blunders in the security, though prepared by eminent conveyancers, who may have afterwards died insolvent. Now, if this occurred before the residue was payable, and while the whole funds were still lawfully at the disposal of the trustees, the Lord Ordinary thinks it clear, that the loss must have fallen on the residuary fund exclusively, and that the whole of it might have been taken to set aside and invest the £2000 specially provided by the settlement, and this because it was only the residue, *after setting aside that special provision* that could be claimed, when the day for paying over such residue arrived, and if there was then no such residue, nothing could be due. But if the loss occurred *after* the residue had been so liquidated and paid, he takes it to be equally clear, on the grounds already stated, that no part of it could possibly be reclaimed or called back from the pursuers, any more than special legacies could be reclaimed from legatees to whom they had been duly paid at the same period. Suppose the deed had provided, that immediately upon Janet M'Callum's death, *one-fourth* of the whole funds should be paid over to one person, and the other *three-fourths* vested on heritable security for a life-*rent* and fee to others; and suppose that this is accordingly done, £1000 paid over on a discharge to A, and £3000 vested in security to B and C, for their respective rights of life-*rent* and fee: If *after this*, the security proves insufficient, and a loss of £2000 occurs upon the £3000 so invested, could it possibly be maintained, that A would be bound to repeat one-half of what he had received, because it had not been given as a special legacy, and would still be equal to *one-fourth* of what would be ultimately received by those to whom three-fourths had been destined. The answer would be, that what he was entitled to was one-fourth of the funds, *as they were when he was entitled to payment*, and that he was no more answerable for losses that might *afterwards* occur on the shares not then payable, than if they also had been then paid, but afterwards lost in the hands of the payees themselves. If the sums paid, however, could not be reclaimed to meet such a loss, it is plain, that they could still be retained in contemplation of it: and it is obviously quite impossible to take any distinction between the case of loss or diminution by bad securities, &c., and loss and diminution by expenses of management. The trust deed provides, no doubt, that necessary expenses shall be paid out of the trust funds. But a sum expressly directed to be finally paid over at a certain time, is *after that time*, no part of the trust funds, and it is only on the funds actually and lawfully in the management of the trustees, that the expenses of managing and protecting such funds can ever be chargeable.

There are other points at issue between those parties, but the Lord Ordinary hopes, that when this main question is settled, the parties will be advised to adjust the rest without further litigation. He cannot but regret that the whole had not been left, as originally proposed, to arbitration. The whole sum in dispute is insignificant, and the parties interested in the reversion, in poor circumstances. It is, therefore, to see the progress of a litigation, which must soon swallow up far more than the sum immediately contested. The Lord Ordinary's opinion at present on the merits of the claims now referred

**No. 28.** been carried on, for the benefit of those having right to the general residuary fund, as well as of the fiars and liferentrix in the special sum of £2000, and that the whole necessary expenses of management must, up to that date, be chargeable indiscriminately on the whole trust estate, and must consequently fall on the said general residuum, and not on the special provision of £2000 aforesaid : But finds, 2do, That upon the death of the said Janet M'Callum, when the whole of the said residuum became payable to the pursuers of this action, the purposes of the trust must be held to have been accomplished, in so far as related to this residuum, and no part of the future expense ought to be charged against it, except only what might be incurred in the actual uplifting, paying over, and discharging the said residuum itself ; and in particular, finds, 3tio, That no part of the expense afterwards incurred in relation to the management of the said special provision of £2000, whether in renewing the securities and investments thereof, in paying and keeping accounts of the sums due to the liferentrix, in assuming new trustees to protect the interests of the said liferentrix and fiars, or otherwise, can be charged upon those entitled to the said general residuum, and that no part of such residuum can be retained for future contingent expenses, relating to the special provision of fee and liferent aforesaid, and before further answer appoints the cause to be enrolled, that parties may state whether they are agreed as to the effect of the preceding findings, on the actual state of the accounting, and whether they insist for judgment on the remaining points in the cause."

Murray's Trustees reclaimed.

On the note coming to be advised (December 18, 1835),

*Rutherford*, for the Trustees, suggested that the children of Mary Murray ought to be called as parties to the process.

The *Dean of Faculty*, for the Pursuers, answered, that having advanced so far in the case, and the defenders having joined issue with them on the closed record, this proposal came too late, and the pursuers were now entitled to judgment.

The Court held, that the children, as in right of the fee of the provision of £2000, had a material interest to oppose the interlocutor, and should be called accordingly ; which, if they were satisfied that the children ought to be in the field, it was competent to allow at this stage of the process.

Their Lordships accordingly, " before farther advising, allowed the

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to, but he has a strong impression that it would be advisable for the pursuers to allow the expense of the discharge taken from Mary Murray and her husband in 1828, and to waive their claim for a full investigation of the whole trust accounts, from the death of the truster, downwards. The minor questions, as to overcharges and interests, might be easily settled by the agents or the auditor of Court."

children of Mary Murray to be sisted as parties in the process; and, in case of failure, appointed them to be called by the pursuers as parties therein."

No. 26

Nov. 24, 18  
Laird's Assignees v.  
Murray's Trustees.

Thereafter, Laird and Company's assignees raised a supplementary action, calling as defenders, for their interest, the children of Mrs Lockhart, together with their tutors and curators nominate in reference to the provision of £2000, and also Mr and Mrs Lockhart, and concluding to have the two actions conjoined, and to have it farther found and declared, that the trust subsisted only till the death of Janet M'Callum, up to which time the expenses of management were chargeable on the general residuum of the estate; but that, after that event, the whole of the residue became payable to the pursuers, and the purposes of the trust, in so far as related to it, were accomplished, and also that no part of the expense incurred in relation to the special provision of £2000, whether in renewing the securities or assuming new trustees to protect the interests of the liferentrix and fiars, could be charged upon the pursuers who were now in right of the general residue. The summons then concluded, in terms of the former action, for count and reckoning, and payment of the free balance of the residuary fund.

A tutor ad litem having been appointed to the children, they made appearance, and, without making up a record, maintained, generally, in defence, that the expenses in question ought to be deducted from the balance pursued for.

The cause was this day put out for advising on the merits.

**LORD JUSTICE-CLERK.**—The testator requires the trustees to make the £2000 effectual by the bonds being taken to themselves, showing that he contemplated a continuance of the trust. Then all the necessary expenses of the trust are to be defrayed out of the trust-funds, according to the express terms of the deed. Now, were not the deeds of assumption of trustees to fulfil the purposes of the testator, as well as the expenses attending the bonds for the £2000, such as inferred "necessary expenses?" The expense attending them must be retained out of the general trust-funds, and not laid on the special provision of £2000. I am therefore for altering the interlocutor.

**LORD MEADOWBANK.**—I agree, and this was my opinion from the first.

**LORD GLENLER.**—I am also for altering. It appeared to me very plain that the first part of the interlocutor was expressed in too positive terms, as to the trust being ended by the death of the old woman. The deed only provides for the residue being then payable; but the death of Janet M'Callum did not put an end to the trust, which must subsist till the issue thereof, and till the residue be ascertained.

**LORD MEDWYN.**—This is one trust, and the whole of the fund of £2000 is to go to Mary Murray in liferent, and to her children in fee. The case might have been different, had there been separate interests under the trust; but I cannot separate the interests of the mother and the children. The trust is to be kept up till Janet M'Callum's death, its continuance being clearly contemplated by the deed. The £2000 is provided entire to the parties beneficially interested.

**No. 28.** We cannot lay the expenses of the trust—and no trust can be kept up with expense—either on the liferentrix or the fiars.

Nov. 24, 1836.

Inch v.  
Thomson.

THE COURT accordingly altered, and found that the necessary expenses the trust must be defrayed out of the general residue of the trust-fund and allowed £40 to be reserved for future expenses of management; finding the defenders entitled to the expenses of the discussion on this point both here and in the Outer-House.

Forlong v.  
Taylor's  
Executors.

WILLIAM RENNY, W.S.—JOHN LIVINGSTON, W.S.—Agents.

**No. 29.**

JOHN INCH, Pursuer.—*Robertson.*

JAMES THOMSON and OTHERS, Defenders.—*Neaves.*

*Expenses.*—The pursuer of an action of damages for wrongous apprehension held, in the circumstances of the case, not entitled to expenses, though he obtained a verdict for one shilling damages.

Nov. 24, 1836.

2D DIVISION.  
R.

THE pursuer in this case, who had obtained a verdict for one shilling damages (see ante, XIV. 1129), now moved for expenses.

THE COURT, looking into the circumstances of the case, refused motion.

GEORGE HILL, S.S.C.—JAMES BENNETT, W.S.—Agents.

**No. 30.**

MRS AGNES FORLONG, Pursuer.—*Penney.*

TAYLOR'S EXECUTORS, Defenders.—*Ivory.*

*Husband and Wife—Marriage Contract—Clause.*—A military officer, by marriage contract, bound himself to provide his wife, in the event of his premature decease, with an annuity, payable to the widows of officers from a certain fund which he was a subscriber, which annuity was, by the regulations of the fund, subject to reduction by the directors on a falling off of funds, and to suspension on a second marriage of the widow:—1. Terms which held to import that the widow was not entitled to have made up to her by her husband's representatives, a deficiency arising from reduction by the directors, but was entitled to have so made up to her its failure consequent on a second marriage. 2. Question, whether the contradictory correspondence could be referred to in explanation of the terms of the marriage contract.

Nov. 24, 1836.

2D DIVISION.  
Lord Jeffrey.  
T.

By the regulations of the Bombay Military Fund, the widow of a Lieutenant-Colonel in the Company's service subscribing to the fund was entitled, on his death, to an annuity of £365. Amongst the regulations were the following:—"If a widow who is an annuitant on

fund should marry, her annuity shall cease during her coverture; but in case of her again becoming a widow, she shall then be entitled to receive the annuity formerly granted to her." And, "Should the fund, however, at any period fall short of the demands upon it, so that the annual income will not defray the amount of the annuities and other claims, then it shall be in the power of the directors to make a proportionate deduction from the annuity of each annuitant, and from the payments to other claimants above the rank of subaltern, until the state of the fund shall afford the means to complete payment; when, if a surplus income exists, the arrears shall be made good from the amount of surplus, but not otherwise."

No. 8  
Nov. 24, 1  
Forlong v.  
Taylor's  
Executors.

In the year 1822, the late John Taylor, then Major in the East India Company's service, married the pursuer, Agnes Forlong. Certain previous communings took place as to the settlements, between Miss Forlong's father, and Taylor, from which it appeared that the latter was possessed of about £6000 in India, in addition to his commission. In a letter to Mr Forlong, Taylor wrote as follows:—

"I take the liberty of sending you the East India Register, wherein you will find, at page 336, that the widow of a major is entitled to receive from the military fund, of which I am an original subscriber, the sum of

£273 10 0 annually,	
Add half that sum secured from my own funds,	136 15 0
	£410 5 0

A lieutenant-colonel's widow to the sum of

365 0 0	
Add half as above stated,	182 10 0
	547 10 0

A colonel's widow to the sum of

456 5 0	
Add half that sum as above stated,	228 2 6
	684 7 6

"All this I can do from my present funds, and the remainder of what fortune I may die possessed of shall be left to my children, if I have any, save and except the sum of at least £100 a-year to my sister Helen, should she survive me. \* \* \*

"Do not, however, misunderstand me, for I am perfectly willing that any farthing you or Mrs Forlong may leave your daughter shall be at her own free disposal, provided you do not bind me down to any settlement in addition to the military fund, as it would only injure me, without in the smallest degree benefiting your daughter. Let the money be at her disposal, and I am satisfied."

The East India Register for 1822 was, in terms of this, sent to Mr Forlong, but it did not contain the regulations.

**No. 30.** above quoted. No farther particulars were communicated as to the nature of the Military Fund referred to.

**Nov. 24, 1836.**

**Forlong v.  
Taylor's  
Executors.**

In the marriage-contract, Taylor bound and obliged himself “and perform all and whatever may be necessary and incumbent upon as a subscriber to the Bombay Military Fund, to secure to his promised wife, in the event of his predeceasing her, the benefit of the pension or annuity payable from the said fund to the widow of a subscriber, according to the rank he holds or shall hold in the Company’s army for the time; and failing thereof, or in case the said pension or annuity, for whatever cause, shall not be available to his promised wife, in the event of the foresaid, saving and excepting only through her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude her from all benefit thereby, then the said John Taylor binds and obliges himself, his heirs and successors, to make payment to the said Agnes Forlong, his promised wife, in the event of her surviving him, of a clear yearly jointure or annuity, equal to the pension that hath hitherto been paid or shall be payable from the said fund to the widow of a subscriber holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death, and at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term’s payment of the said jointure or annuity at the first term of Martinmas or Whitsunday that may happen after the death of John Taylor’s death, and so on thereafter half-yearly during her life with the lawful interest,” &c. “Declaring, that in the event, as long as the said Agnes Forlong shall draw and receive from the said military fund a pension or annuity equal to the pension that has hitherto been paid, or shall be payable, therefrom to the widow of a subscriber holding same rank, which now belongs, or shall belong, to the said John Taylor, at the time of his death, or would have been entitled to draw and receive such pension and annuity, had she not possessed such separate funds, as by the rules and regulations of the said fund exclude her from all benefit thereby, as is before provided, the personal obligation he hath undertaken by him shall be suspended, any and while she is provided with the aforesaid from the said fund, or has lost the benefit of the fund from any cause above referred to: And for a provision or jointure in favour of the said promised wife, in the event of her surviving him, the said John Taylor hereby assigns to the said Agnes Forlong the benefit of the pension or yearly annuity to which she may be entitled as his widow from the said fund as aforesaid, and also the benefit of the pension or annuity payable from any other fund to the widow of an officer of his the said John Taylor’s rank in the service of the said Honourable East India Company, and that agreeably to the rules and regulations of the said fund or funds respectively, and likewise all right, title, and interest in the provision secured on the said Agnes Forlong by her father as after mentioned,



nouncing, as the said John Taylor hereby for ever renounces, his jus No. 34  
mariti therein, and in all and every subject, means, and estate, real or  
personal, which the said Agnes Forlong may conquest, acquire, or suc- Nov. 24, 11  
ceed to in any manner of way during the subsistence of the said mar- Forlong v.  
riage, the administration and management whereof shall belong to the Taylor's  
said Agnes Forlong, exclusively." Executors.

He likewise became bound to provide to the children of the marriage—if one, a sum of £3000, if more than one, £5000; and these provisions were to be accepted by the wife and children in full satisfaction of their legal rights. Mr Forlong, on his part, "in consideration of the marriage, and of the jointure or annuity settled upon his daughter, and of the obligations undertaken in favour of the expected issue of the marriage," bound himself to pay to his daughter and Taylor during his own life an annuity of £150; and, at his death, a sum of £3500, in liferent, the fee being provided to the children of the marriage.

The parties having thereafter gone to India, Taylor subsequently attained the rank of lieutenant-colonel, and died in 1828, leaving one child, a daughter. By his last will he named executors, bequeathing his whole property (from £12,000 to £15,000), to this child, whom failing, to his sisters, and stating in regard to his wife, "No provision is herein made for my wife, Agnes Forlong, she being already amply provided for by the marriage-contract."

Colonel Taylor having regularly paid the rates of the Bombay Military Fund, his widow became entitled, at his death, to the annuity of £365. Upon the footing of this amount of annuity, the directors of the fund settled with her up to 30th April, 1831. In the spring of that year, it was ascertained, from the report of a professional gentleman, "that the resources of the fund were not adequate to provide for the benefits held out by the present regulations;" and the directors accordingly resolved upon certain reductions on the scale of annuities, in terms of which resolution, Mrs Taylor's annuity was reduced from £365 to £250.

Thereafter Mrs Taylor made application to her husband's executors to make good the difference between the rate of the annuity thus reduced and the rate as it stood at the date of Colonel Taylor's death, and also intimated that, in the event of her again marrying, and thus forfeiting her right to payment from the fund, she would look to the executors for an equivalent out of her husband's estate.

On the executors refusing to recognise these claims, she raised action against them, concluding to have the executors ordained to make payment of the sums necessary to make up her annuity to £365, from and after 30th April, 1831; and farther, to have it found and declared that, in the event of her entering into a second marriage, and thereby forfeiting her right to the annuity payable from the fund, she should be entitled

No. 30.

to a jointure of £365 per annum out of Colonel Taylor's estate during the subsistence of the second marriage.

Nov. 24, 1836.  
 Orleong v.  
 Taylor's  
 Executors.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note ; \*—Finds, that, upon a just construction of the marriage

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\* " There is some difficulty in this case, from the consideration that the amount of provision from the Military Fund must have been known to be liable to fluctuation ; and that the pursuer would clearly have had the benefit, if the rates had been raised instead of lowered, subsequent to her husband's decease. But, considering the plain equity and expediency (and consequent presumption of intention) of rendering the conventional jointure of a widow (for which she had conveyed a large tocher, and renounced her legal rights) in some measure, fixed and secure, the Lord Ordinary can put no other construction upon the very broad words of the subsidiary obligation of the husband, in all cases ' where the pension shall not be available, *from any cause whatever*,' to make up the deficiency, than that they entitle her to have it at all times made up to the sum which the fund either yielded, or might have yielded at the period of the husband's death. If it had not this meaning, it is difficult to understand why it was at all introduced ; and it is obvious that, if not so guarded, the provision might fluctuate in the most distressing manner, or substantially fail altogether, without the widow having any recourse whatever. Take even the case first contemplated for a recourse on the husband's estate, and which the defenders represent as most favourable for their construction of the whole clause, viz. the case of the widow having no claim on the fund, in consequence of the husband having forfeited all right to it before his death, by neglecting to do what was necessary to keep it up, withholding his termly contributions or otherwise. Suppose that, in this way, the husband had ceased to have any interest in the fund ten years before his death, what would then have been the claim of the widow on his private estate ? Would it have been for a fixed and invariable jointure or life annuity of the same amount, as she would have drawn the first year of her widowhood from the fund, if she had had right to it ? Or to an annuity fluctuating with every variation in the state, or regulations of a foreign fund, out of which she was never actually to receive any thing, and with which her husband had had no connexion for years ? Even in that case, the Lord Ordinary would decide for the fixed annuity ; and would hold that the fund was only to be looked at, as the army list was to be looked at, viz. in order to ascertain, by the one, what rank was held by the husband *at his death*, and, by the other, what was *the amount then* payable to the widow of such an officer, from the fund. Those things it would be necessary to ascertain, because they were the elements by which *the amount* of the life annuity out of the husband's estate was directed by the contract to be fixed. But, except for that purpose, the parties had nothing to do with the fund—not with its past or future fluctuations. In the case that had occurred, the widow was to be provided wholly and entirely by *a jointure out of the husband's estate*—and it was only to settle its amount that a fund with which he had once been connected was referred to. But, that amount being once settled, her right, for all the rest of her life, was a right to a jointure out of property in Britain—and nothing could be more contrary to the nature and object of such a provision, than to suppose that it was to vary with the variations of a foreign institution, in which none of the parties had any interest—and that the husband's representatives were to send out to Bombay, every six months, before they could know with what jointure his estate was chargeable.

" But the actual case is much stronger ;—for the contract expressly provides that the widow shall have recourse for a jointure on the husband's estate, not only if he fail to do all that depended on him to give her right to the fund, but if '*from any cause whatsoever*, the said pension shall *not be available to her*.' Now, what pension is it that is here spoken of ? And what is meant by its not being available ? To the Lord Ordinary it appears plain that it is the pension payable to the pursuer,

contract labelled, the pursuer is entitled (except in the special case therein expressly excepted) to a free yearly jointure or annuity out of the funds and

No. 8  
Nov. 24, 1  
Forlong v  
Taylor's  
Executors

at the time of her husband's death—and that it ceases to be available when more than one half of it is withheld.

"The defenders seemed chiefly to rely on the clause in the contract, by which the pension from the fund is made over 'agreeably to the rules and regulations of the said fund;' and on the allegation that it was in accordance with one of those regulations that its amount had been recently abridged. Now the Lord Ordinary is of opinion that the rules and regulations here referred to, mean only the rules as to the mode and manner of payment, the certificates to be produced, the agents to be applied to, &c., and not conditions of restriction or forfeiture of the pension itself, and he thinks this construction is confirmed by that which, at all events, furnishes a conclusive answer to the whole defence, viz. that the clause binding the husband to provide a jointure, if the pension shall from any cause cease to be available, is qualified by one anxious and express exception,—which would be altogether unmeaning and unnecessary if the pension had been understood to be given under the purview of those rules and regulations, which imported a contingent forfeiture or restriction. The exception is, that, in spite of the broad and general words already quoted, the husband shall not be liable for a jointure, in the case of the pension not being available to the widow, 'through her right to and possession of such separate funds, as by the rules and regulations of the said fund, would exclude her from all benefit thereby;' and it is anxiously provided, that 'saving and excepting that case only,' he shall be liable for jointure whenever, from whatever cause, the pension shall not be available. Now, it is utterly impossible to explain or account for the introduction of these words, except upon one of two suppositions—both equally conclusive in the pursuer's favour—either, first, that the rules and regulations referred to in the clause assigning the pension, did not mean rules and regulations of this description at all; or that they were all meant to be superseded (except in the case specially excepted) by the important, and the Lord Ordinary will add, most just and necessary clause, binding the husband to supply, from his own estate, what might from any cause be actually deficient in the provision.

"The defenders seemed also to maintain that the pension, though diminished in amount, was in point of fact still available to the pursuer,—that it had not been *entirely* cut off, as they expressed it,—and that though compensation might be due for a total privation, it was not for a partial. To the Lord Ordinary, however, this seems quite untenable, considering the *onerous* and *favourable* nature of the claim especially. Suppose that, instead of being reduced from £365 to £250, it was reduced to £5 or to 5s., do the defenders really maintain, that in that case the husband's estate is to pay nothing, while it would have been chargeable with a jointure of £365, if the 5s. also had failed, and it was reduced to nothing? If the Lord Ordinary be right in thinking that the obligation truly was to secure an annuity equal to the pension as at the husband's death, then it is plain that the obligation became prestable, whenever any part of that was withheld, or when her provision was diminished, whether by a third, or a half, or the whole.

"It is needless to say any thing as to Lord Clive's fund, from which it is admitted, the pursuer never received any thing—and to which it is obvious that she never was entitled.

"The argument that the pursuer must forfeit all claim on her late husband's estate, as well as on the fund, if she should ever marry again, is of course sufficiently answered, if the Lord Ordinary is right in holding that the clause relied on by the pursuer supercedes, and was intended to protect her against, all forfeiting regulations, except that which is specially excepted. But the terms in which the obligation to grant a jointure is conceived, seemed to have been intended specially to exclude this particular case. For while the regulations expressly bear that the pursuer shall enjoy their pensions 'during their widowhood, and not otherwise;' he provided to the pursuer, is expressly covenanted to be paid half 'her life.'"

No. 80.  
 Nov. 24, 1836.  
 Forlong v.  
 Taylor's  
 Executors.

estate of her late husband, of such an amount, as, along with what she may draw from the Bombay Military Fund, shall make up an annual allowance of £365, and that for all the days of her natural life, and whether she shall or shall not enter into any second or other marriage; and therefore repels the defences, and declares and decerns in terms of the conclusions of the libel: Finds expenses due, allows an account thereof to be given in, and remits the same when lodged to the auditor for his taxation and report."

The executors reclaimed.

The Court having ordered cases, the pursuer, who had in the mean time contracted a second marriage to a Mr Joseph, maintained, in support of her action:—

1. The marriage contract in question is to be construed according to what may be regarded as the intention of the parties, gathered from its whole terms and import, and also from the evidence of the previous communications; and this intention was, to secure to the pursuer, as Colonel Taylor's widow, a jointure which should be of a fixed and permanent description.

2. Looking to the actual terms of the contract, fairly and not judaically interpreted, the pursuer became entitled, in return for the onerous equivalents thereby conferred on her husband, to have secured to her a jointure or annuity equal in amount to the pension payable, and expressly held out as payable, by the Bombay Military Fund at the date of the marriage; and so far as there is a deficiency from the jointure so secured, in the sum at present received from the fund, she is entitled to have that amount made up to her from her husband's estate. The circumstance, *inter alia*, of the contract providing that the jointure should not be made up, when reduced by the operation of a particular regulation (*viz.* that as to the widow's possession of such separate effects as by the rules of the fund would exclude her from the benefit thereof), and should be made up in all other cases whatever, clearly proves, that in the present case where the jointure has failed by the operation of another regulation altogether, the deficiency thereby arising must be made good. Again, the obligation undertaken by Colonel Taylor to make payment of an annuity equal to the pension that "has hitherto been paid, or shall be payable" from the fund to the widow of a subscriber holding the same rank "which now belongs or shall belong" to himself at the time of his death, exclude the idea of a fluctuation of the fund having been contemplated; at all events not after the date of Colonel Taylor's death.

3. The pursuer is further entitled, under her marriage-contract, to have the amount of this annuity made up to her from her husband's estate, in the event of the pension payable from the fund ceasing in consequence of her entering into a second marriage; the marriage-contract specially providing that such should be the case, whenever "the said pension or annuity, from whatever cause, shall not be available," &c

And the annuity being also specially provided to be paid at two terms N  
in the year, &c. "during her life."

The defenders, on the other hand, argued :

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1. The leading clause of the contract, in express words, assigns for a provision or jointure, the benefit of the pension or yearly annuity, to which the pursuer may be entitled, as widow, from the Bombay fund ; and her jointure must be held therefore as consisting specifically of what the contract expressly provides therefor ; the main portion of the other clauses have nothing more for their object, than to impose the obligation on Colonel Taylor, of keeping up his subscription, for the purpose of securing his widow a place upon the fund.

2 In estimating her annuity, the pursuer is not entitled to be placed in any more favourable situation, as regards the deductions which the directors of the fund are entitled by its rules and regulations to make, than other widows of the same class and rank.

3. Neither the deduction therefore which has been made in respect of the inadequacy of the Bombay fund, nor the forfeiture to which the pursuer has given occasion by her own act of entering into a second marriage, are to be regarded as deductions against which she has any right to be restored, at the expense of her husband's estate and her child's succession. These views are confirmed by the evidence of intention to be gathered from Colonel Taylor's letter to Mr Forlong, previous to the marriage.

4. The estate of the deceased is, according to the contract, liable only in two events, viz. his own failure to keep up the benefit of the fund for his widow, and the event of the widow's being deprived of her right to claim against the fund from some other cause ; but, as to the first, it is admitted that the contingency has not occurred, and as to the second case, the benefit of the fund can never be said to have become unavailable to the pursuer, seeing that, as just stated, it is at this moment not less available to her than it is to every other widow of the same rank similarly situated, and that nothing that her husband could possibly have done would have had the effect to place her, in this respect, in any more favourable position than that in which she actually stands.

The cause was put out for advising, February 25, 1836.

**LORD JUSTICE-CLERK.**—In considering the proper meaning and construction of the contract, I think we are not warranted, even though it is ambiguous, in resting upon the previous correspondence. The deed was an onerous contract solemnly entered into, and from it we must take the rights of the parties, keeping in view no doubt their relative situation at its date. We must look at the contract as a whole, in order to ascertain the true nature of the obligation undertaken by Colonel Taylor. I cannot begin with what is comparatively an insignificant part of it, viz. the clause assigning to the pursuer the benefit of the annuity from the fund. The main obligation is, that we are to look to the relative situation of the parties respectively to perform. Going to the commencement of

No. 30.

Nov. 24, 1836.  
 Forlong v.  
 Taylor's  
 Executors.

the contract, the lady is to receive a considerable sum from her father ; Colonel Taylor undertakes expressly to secure her effectually in the full interest demandable by the widow of an officer from the fund to which he was a subscriber, and " failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife," he binds and obliges himself to make payment to her of a clear yearly jointure, *equal* to the pension payable from the fund. Having regard, then, first to his obligation to make the annuity from the fund effectual, and next to the alternative contemplated of its not being available from any cause whatever, saving and excepting *one* cause only,—I can see no principle to warrant me in going beyond this single exception, and holding that the annuity is not to be made good, if it should fail from any other cause. When Taylor became bound to secure the pursuer in a jointure, " equal to the pension that has hitherto been paid, or shall be payable " from the fund, to the widow of a subscriber holding the rank which " now belongs, or shall belong," to himself at the time of his death, the words " shall be payable " must be held to apply to the possibility of his rising to a higher rank. I see no vestige of reference to a second marriage. On the principles applicable to such cases, and looking to the contract itself, which is not to be stretched or perverted, I agree with the Lord Ordinary. If the whole fund had been swallowed up in India, which is not an impossible supposition, where houses have failed to the extent of seventeen millions sterling, would Mrs Taylor have been left without a jointure at all ? Colonel Taylor appears to me to have taken the annuity provided by this fund, as the measure of his obligation ; and the expressions used in the deed seem clearly to imply that this lady was to be secured in a jointure to the extent of the annuity payable at his death. I am for adhering to the interlocutor in all respects.

LORD MEDWYN.—I ought to give my opinion with diffidence, as it is contrary to that now delivered from the Chair. In this case we are to look to the intention of parties, and how that intention has been carried into effect. Considering the deed as a whole, I think it was Colonel Taylor's intention, that his widow should receive no jointure, but only the pension competent to his widow out of the Bombay fund, which was a fluctuating fund. I have no objections to begin at the commencement of the contract. The contract says, that Colonel Taylor shall do what is necessary to provide for the lady on his death. But it is a jointure only she is to have from him ; and, to show from what source it is intended this jointure shall be supplied, he " assigns " to her the benefit of the pension from the fund. Now is this a fixed annuity ? I cannot so view it. All that Taylor undertakes to do, is to make the pension effectual. From the terms used, it seems to be clear that Mrs Taylor is entitled to be provided only to the pension the fund can afford, and has no claim beyond other widows. Suppose it had risen, we shall say to £400, she would have been entitled to receive this increased annuity. The clause " or in case the annuity, from whatever cause, shall not be available " is a difficult part of the case. I think it refers to a total failure of the fund. The fund might have been given up, or been ruined by bankruptcies ; and for such events only the alternative provision is made. She now draws what other widows do ; if the fund should improve, the arrears will be paid up. It is easy to put extreme cases, as that her annuity might be reduced to £5 ; but this would be a total failure, and our powers as a court of equity might in such a case have enabled us to give relief. In regard to the second marriage, if in consequence of it the lady fail to receive her



annuity from the fund, she is not entitled, because she has chosen to enter into another marriage, to have it made up from her first husband's estate.

LORD GLENLEE.—I have great difficulty. This is a marriage contract sui generis. I am inclined to think that the loss of the pension in consequence of the second marriage will fall to be made up by the defenders. As to the other part of the question, I incline to Lord Medwyn's opinion. We must take the rights of the parties from the contract, and cannot refer to the extrajudicial correspondence. I think one assumption of the Lord Ordinary is erroneous, as to the presumption of intention (that the jointure should be fixed), arising from the father having conveyed a large tocher; it is truly all the other way, the husband being excluded from the fund and from all jus mariti. The contract gives it to the wife, and nothing to the husband. I think the obligatory words should be taken against the husband as narrowly as is proper. It seems to me that all he warranted was the pension which, at his death, became payable from the fund to his widow. As to its becoming unavailable by a second marriage, I incline to agree with the chair that, in such case, the defenders are liable, as it is a cause different from the possession of another fortune, and there is no provision as to forfeiture in the event of a second marriage.

LORD MEADOWBANK.—I cannot understand on what principle it can be considered that this lady's right is subject to be curtailed by a second marriage, of which there is no mention in the whole of the contract. It is not to be curtailed by inference or implication. As to the other point, I think no stronger words could be used to fix a certain provision, and see no evidence that it was ever supposed, at the period of the marriage, that the fund in question was a variable fund. It is plain that Colonel Taylor held out to his father-in-law, that here was a fixed annuity, which should be the mean and measure of the provision Mrs Taylor had to look to in the event of his death, whether he died major or colonel. The terms of the contract, which have been already referred to, seem to me clearly to imply that in the event of the pension from the fund not being available from any cause, except the one which is mentioned, Taylor bound himself to make payment to his widow of a jointure equal to such pension; and I must see words equally clear in support of the opposite view, before consenting that the right of this party shall be infringed upon.

The Court being thus equally divided, the cause was allowed to stand over. Thereafter the other judges were consulted, and returned the following opinions:—

LORDS PRESIDENT and GILLIES.—We are of opinion that the interlocutor of the Lord Ordinary is well founded, and ought to be adhered to, and as we entirely agree in the views taken by the Lord Ordinary in his note, we do not think it necessary to assign any other reason for our opinion.

LORD FULLERTON.—I think the judgment of the Lord Ordinary right; and in this I concur in the reasonings by which the interlocutor is supported.

In addition, I may be permitted to express a doubt, whether one consideration supposed to create the chief difficulty of the case, has not been somewhat exaggerated. I see no ground for holding that the rates of provision from the fund are known to be subject to rise or fall. In the first place, even "Regulations of the fund," founded on by the defenders, I see

No. 9

Nov. 24, 1841  
Forlong v.  
Taylor's  
Executors.



No. 30.  
 Jan. 24, 1836.  
 Morlong v.  
 Taylor's  
 Executors.

no provision for, or allusion to, any rise of the rates ; and, secondly, I think it quite clear from the previous correspondence of the parties, that the only information held by the lady's father, on the subject of the military fund and its regulations, was that given in the East India Register of 1822, in which there is not a word of the power of the directors to reduce the rates. On the contrary, the sums there specified are described " as the annuities which the widows are entitled to receive ;" those annuities being subject, indeed, to certain conditions and deductions, but in other respects dependent only on the rank held by officers at their death. And it is to be observed, that those specified annuities are not only generally referred to, but are proved by the correspondence to have formed the data on which various other pecuniary calculations entering into the contract were framed.

Considering that this was information communicated by Colonel Taylor, one of the contracting parties, and evidently acted on by the other, I hold myself entitled to look to it in canvassing those disputed or ambiguous passages of the contract, on which the defenders now endeavour to fix a construction decidedly unfavourable to the party to whom those representations were made.

Keeping this in view, I think both the letter and the spirit of the contract are in favour of the pursuer's claims.

By the leading clause, Colonel Taylor binds himself to perform whatever may be necessary for him " as a subscriber to the fund," to secure to the lady, on his predecease, " the benefit of the *pension or annuity payable from the said fund* to the widow of a subscriber, according to the rank he holds or shall hold at the time." And he afterwards assigns that pension or annuity to the lady, which assignment, however, was no more than a mere form ; as, if the subscriptions were paid, the annuity must have taken effect in her favour without it. If the matter had rested there, she probably might have been held to confine her claims to the benefit of the military fund, subject to all the hazards attending it. But it is needless to inquire into this, because by the contract, there is expressly superadded, a personal obligation on the part of Colonel Taylor ; and the whole question turns on the meaning of that obligation.

By it, failing his performance of what is incumbent on him as a subscriber, " or in case the *said pension or annuity, from whatever cause, shall not be available* to his promised wife," saving and excepting one case (which it is unnecessary here to notice), he binds himself to pay to the lady " a jointure or annuity, *equal to the pension that has hitherto been paid or shall be payable* from the said fund to the widow of a subscriber, holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death."

The first question here, regards the contingency on which the personal obligation is to be called into operation, viz., whether it comprehends the case of the deficiency of the military fund ? Now, upon this I cannot entertain a doubt. The parties, in the passage immediately preceding, had been dealing with " the *pension or annuity payable from the fund* to the widow of a subscriber, according to the rank he holds or shall hold in the Company's army." In construing a marriage contract, a deed intended to regulate the pecuniary interests of parties, it would be absurd to suppose that those expressions bore reference merely to the source from which the annuity was payable, and not to its actual amount ; and, accordingly, it is proved in this case, by the previous correspondence, that the East India Register was sent to the lady's father for the very purpose of shewing what the amount

the pension or annuity was. The "*said pension or annuity*," then, I hold to be in sound construction, that pension or annuity, which, according to the husband's representation, was payable from the fund, viz., a certain amount in pounds, shillings, and pence; and there is the less difficulty in this, because there is no dispute, that, at the time, his representation was true. It seems to me to follow, that "such pension or annuity" ceases to be "*available*," when the party by whom it is due cannot pay it. The term "*available*" includes the two conditions, of the title of the creditor on the one hand, and the capacity of the debtor to pay, on the other; and cannot remain applicable where only one of the conditions exists. It would be rather startling to maintain expressly, what is done by implication here, on the part of the defender, that a widow's right to an annuity from an insurance office or benefit society, must, in a question with her husband's representatives, who are subsidiarily bound, be held to be "*available*" to her, merely because she has a right to make the demand, and independently altogether of the consideration how far the society or insurance office is enabled to meet it.

The only other point, then, to be enquired into, is the extent of the personal obligation come under by the husband. He is bound to pay a jointure or annuity equal to the pension, "that has hitherto been paid, or shall be payable," &c. And it is here that, in my opinion, the only difficulty lies; because the words *may* admit of the inference, that the parties had in view the possible fluctuations of the rates of allowance from the fund.

But, in the *first* place, that inference is not absolutely necessary. It may be merely a tautological form of expression, suited in the tense, to the double or alternative form of the conclusion of the sentence, in which reference is made to the rank "*which now belongs or shall belong to the said John Taylor* at the time of his death; according to which view, the future or contingent form of expression would merely apply to the change of rate which might arise from the husband attaining, before his death, a higher rank than that which he then held. At all events, and even admitting the expression to be dubious, I am bound to adopt that one of the *two constructions*, which is most consistent with what I consider to be the only admissible presumption, viz., that the parties contemplated no other fluctuation of the amount of the annuities, than that which arose from the gradations of military rank.

But, 2dly, I rather think, that, even on a stricter examination of the terms employed, the clause in question is quite consistent with the claim now made by the pursuer. For here, too, the defender's argument will be found to assume a particular sense of the term, "*payable*," viz., that which the military fund *does or can* pay. But that is not the only sense, nor is it the most usual sense. Certainly not that which must be adopted in construing a subsidiary obligation of this kind. Its most ordinary, and, as I think, its legitimate meaning is, what the debtor *ought to* pay, in other words, that which is due. Now, in this sense, the original annuity is still payable. The clause in the regulations, referred to by the defenders, does not authorize the directors to wipe off the debt, but only to oblige the annuitants to accept a dividend, under an express reservation of their claims, if the funds of the institution ever afford a *surplus*. It provides, that if the "*fund falls short*, the directors shall have the power to make a proportional *deduction from the annuity* of each annuitant, until the state of the fund shall afford the means to *complete* the same. If a surplus income exists, the arrears shall be made good from the same."

No. 30.  
 Nov. 24, 1836.  
 Forlong v.  
 Taylor's  
 Executors.

It does not appear to me that, even by this clause, the annuities, as originally fixed, have absolutely ceased to be "payable." Therefore, even if it could be shown, which it is not, that the marriage-contract was framed in the knowledge and contemplation of that clause of the regulations, I should rather think that the words, "*which shall be payable*," must be held not to limit the personal obligation to that which, independently altogether of such obligation, the widow could get from the fund, but to bind the husband to make good the annuity, which though continuing "payable," or "due," the military fund might be at the time unable to pay.

From the great difference of opinion which has arisen on this case, it would be presumptuous to deny its difficulty. But, upon the fullest consideration which I have been able to bestow on it, I cannot help thinking, that unless an unusually rigorous interpretation should be adopted, in construing this marriage contract, the claims of the widow must be sustained.

LORD JEFFREY.—I entirely concur in this opinion. I do not think I had any other variation in view than that which might arise from the husband's advancement in military rank. I have nothing material to add, except that the clause in the contract, which contemplates the *temporary* suspension of the widow's available right to the fund, and makes her claim on her husband's estate defeasible at the revival of such available right, taken along with the clause in the regulations entitling the widows, whose allowances have been restricted, to "complete payment" out of any surplus that may afterwards accrue, appears to me to afford a strong confirmation of the view adopted in the preceding opinion, and in my original interlocutor.

LORD COCKBURN.—I am of opinion that the interlocutor of the Lord Ordinary ought to be reversed.

I can see nothing in the contract, as it actually stands, except an obligation by the husband to keep up his interest in the military fund, and an assignation to his widow of the benefit of it after his death, whatever it might at any time amount to. Her "*provision or jointure*" is expressly declared to consist of "the benefit of the pension or yearly annuity to which she may be *entitled* as his widow from the said fund, &c., *agreeably to the rules and regulations*." There is no guarantee that the fund shall produce any particular annuity. On the contrary when he anticipates that it may not be available to her, and engages to provide a substitute, he only binds himself to pay her a yearly sum, "equal to the pension that has been paid or *shall be payable* from the said fund, to the widow of a subscriber holding the same rank in the army which now belongs, or shall belong to the said John Taylor at the time of his death." These last words were plainly not intended to fix, and do not in fair construction import, that the annuity which the fund might happen to afford at his demise, should in all time coming be kept up out of his estate. They merely import that she should receive the pension, *whatever it might periodically be*, due to the widows of those holding the same rank which her husband held when he died. There is no obligation *to make up deficiencies* below this as a fixed sum. The only failure that he provides for is a *total* one; and, accordingly, the only substitute created is, not that any *deficiency shall be supplied*, but that the widow shall receive out of his estate "a pension equal to what *shall be payable from the said fund*." It was surely not meant that he should pay her a sum equal to what she got from the fund.

I hold, therefore, that the parties had a source of income *liable to variation* in

their view, or at least that, though they may not have thought of this at all (which is not improbable), the deed they executed implies it, and that, though unfortunate results may be stated as arising out of partial, or nearly total, failures of the fund, it is not the business of a court to correct this. Arrangements by assignments of property liable to change in its productiveness—such as shares in the public stocks—are not uncommon, and similar results are incident to them all. The military fund might possibly have risen instead of fallen, and the widow have got the benefit of this rise.

I am farther of opinion, that her losing the military pension by entering into a second marriage was not an event for which her husband's estate must provide. I am aware that he makes his "property responsible if the pension shall become unavailable from whatever cause, saving and excepting only through her right to, and possession of, such separate funds, as, by the rules and regulations of the said fund, exclude her from all benefit thereby." But I do not think that these words can reach the case in which the fund is made unavailable *by the act of the wife herself*. There are many acts of hers, besides contracting a second marriage, by which she may deprive herself of the benefit of it. She may decline to claim, or may omit the periodical certificates or affidavits. Can it be maintained that her late husband's property and heirs are to suffer by such proceedings, whereby she, having the full benefit of the fund, chooses to forego it? It would require very unequivocal words indeed to sanction such a result—a result which I am the more inclined to resist, from the extreme improbability that it was ever intended to enable the widow to marry a second time at the expense of her first husband, and to reach his property by voluntarily quitting her hold on a prior equivalent provided by him. The military fund has not proved unavailable from any cause, but she has renounced it.

LORDS MACKENZIE, CORNHUSE and MONCREIFF.—The interlocutor of the Lord Ordinary finds, that, "upon a just construction of the marriage-contract libelled, the pursuer is entitled (except in the case therein expressly excepted) to a free yearly jointure or annuity out of the funds and estate of her late husband, of such an amount as, along with what she may draw from the Bombay Military Fund, shall make up an annual allowance of £365," and that for her life, *whether she marries again or not*. The question proposed for our opinion is, whether the interlocutor ought to be adhered to.

We have read the marriage-contract carefully. We do not find that there is expressed in it any obligation for a specific annuity of £365, to proceed either from the Bombay Fund or from any other source. The contract appears to be framed on a different principle.

The funds brought by the lady are secured in a certain manner for her own benefit; and it was of course foreseen, that, if she should be left a widow, she would in all events enjoy the benefits of those provisions.

The husband, however, in consideration of the marriage, and any other benefits given to him by the contract, came under a clear and definite obligation in favour of the wife, which, though it ought to be fairly and liberally interpreted in her favour, cannot be changed into any thing different from what it is, according to the terms employed to express it.

It is clear, that the marriage-contract does not bear any express obligation for the annuity assumed in the interlocutor. But it is supposed, that, on equity and expediency, it should be presumed that the intention

No. 30.

Nov. 21, 1836.  
 Forlong v.  
 Taylor's  
 Executors.

was to make it fixed and secure. We are of opinion, that it was intended to make the annuity fixed and secure, so far as that was consistent with the nature of the *only* obligation undertaken, or which there is any indication of an intention on the part of the husband to undertake. But we cannot discover any ground in the provisions of the deed for presuming that there was any intention, in the one party or the other, that the annuity should be *warranted* or *guaranteed* to be of *any fixed amount*.

The obligation is simple and clear—"to do and perform *all and whatever may be necessary and incumbent upon him as a subscriber to the Bombay Military Fund*, to secure to his promised wife, in the event of his predeceasing her, *the benefit of the pension or annuity payable from the said fund* to the widow of a subscriber, according to the rank which he holds, or shall hold, in the Company's army for the time." This is the main and leading obligation. It binds to a specific duty, but to no precise sum of annuity to be secured by means of it. If the *duty be fulfilled*, it manifestly rests on the contingency of the amount payable by the rules of the fund, what the annuity shall be. But, if the right against that annuity fund be made secure, that seems to us to be fulfilment of the obligation, so far at least as the above quoted words go.

But the clause of the contract proceeds:—"And failing *thereof*, or in case *the said pension or annuity*, from *whatever cause*, shall not be available to his promised wife, in the event foresaid (her surviving)," saving and excepting the case of her being excluded from the fund in consequence of the possession of separate funds, "then the said John Taylor binds and obliges himself," &c. to pay to his wife surviving him "a clear yearly jointure or annuity, *equal to the pension that has hitherto been paid, OR SHALL BE PAYABLE, from the said fund*, to the widow of a subscriber holding the same rank in the army, which now belongs, *or shall belong*, to the said John Taylor *at the time of his death*," &c. In a subsequent clause, the contract farther declares, that for a provision to his promised wife, Major Taylor assigns to her "the benefit of the *pension or yearly annuity to which she may be entitled* as his widow from the said fund, and also the benefit of the pension or annuity payable from any other fund to the widow of an officer of his, the said John Taylor's, rank in the service of the said Honourable East India Company, *and that agreeably to the rules and regulations of the said fund or funds respectively*."

Taking all these clauses together, it appears to us, that the only obligation undertaken is to do the acts necessary for securing the widow's right to the pension or annuity which, *according to the rules and regulations of the Bombay Military Fund*, should be payable to the widow of an officer holding the rank which Major Taylor should last have held preceding his death; with a farther guarantee, that if that pension, *whatever its amount might be according to those rules*, should from *any cause, except one event*, become *unavailable*, that is, *cease to be payable*, his representatives should be bound to make good an equal annuity according to the same rules.

The clause which is thought to sanction a different construction is that beginning with the words "and failing thereof, or in case the said pension or security, from whatever cause, shall not be available to his promised wife." There are here two things, 1st, "And failing *thereof*;"—Failing *what*? Clearly it is, failing Major Taylor's *doing and performing what was necessary* to secure the pension "payable from the said fund" according to his rank. So far the matter is clear, and can ad-

mit of no doubt. It is his failing to pay the subscriptions, and comply with any other rules of the institution affecting him. But if he *did* do and perform all that was necessary, there was *no failure* in this point, and his engagement being fulfilled, the alternative provided on such *failure* could not come into operation, whatever might be the amount of the pension payable according to the state and existing rules of the fund. But, 2. There is another case supposed—"or in case *the said pension or annuity*, from whatever cause, shall *not be available*" to the wife. We may not exactly see all the events contemplated, in which the pension might not be *available* in the meaning of the clause, notwithstanding that Major Taylor has done all that was necessary for securing it. If it be held to be clear that the words cover the event of the widow marrying a second husband, by which, according to the rules she is said to forfeit the benefit *for the time*, there is at least one clear case in which the words have a precise and very appropriate operation; and we are of opinion, that this is the sound construction. But the first question here stands quite independent of any such difficulty as to the events contemplated. "Shall not be *available*:" In case *what* shall not be available? The words are express—"In case *the said pension or annuity*" shall not be available. Whatever may be the *causes* contemplated, the *thing* supposed to become *unavailable* is *the pension payable* to the widow of an officer of such rank by the rules of the society, and nothing else. There is not one word of provision as to the amount of such pension; and, therefore, whenever the pension payable to the widows of *other officers* of the same rank was *equally available* to the wife under this contract, it seems to us very clear that the case of the pension being unavailable had not taken place, whatever might be the amount thereof.

It must be observed that the deed contains no determination of the pension as fixed in amount at any particular time, or at the death of Major Taylor. We understand the principle of the fund to be different, and that the pensions may rise or fall after the officer's death, according to circumstances. And the obligation of this contract is framed accordingly in perfectly indefinite terms. In the first binding words there is nothing said of the time of Major Taylor's death; and in the penal or alternative obligation, on *failure*, or *the pension* not being *available*, while the thing to be done is again simply to secure "a jointure or annuity equal to *the pension* that has hitherto been paid, or *shall be payable*, from the said fund," there is still no reference to any fixed time at which the amount of such pension shall be definitely determined. The words in the first clause "for the time," and those at the end of the last "at the time of his death," evidently refer, not at all to the payment or the emergence of the annuity, but solely to the *rank* which Major Taylor might hold in the army. It is an annuity equal to the pension which has been or *shall be payable* to the widow of a subscriber "holding *the same rank* in the army *which now* belongs, or shall belong to the said John Taylor *at the time of his death*." His *rank* could not vary after his death, and therefore it is defined. But the pension described is that only which *might be payable* to the widows of subscribers of the same rank; and if in their case it varied in amount, we are of opinion that the pursuer gets all that was provided for her, and all that she could have got if Major Taylor had *failed* to secure the pension, if she were to receive the pension which is payable to the widows of other subscribers, according to the rules of the society.

—ver, of opinion, that the event of the pursuer entering into a second marriage (which we understand has taken place), whereby, by the rules of the

No. 30

Nov. 24, 18

Forlong v.

Taylor's

Executors.



No. 30.  
 —  
 Nov. 24, 1836.  
 Morlong v.  
 Taylor's  
 Executors.

fund, she forfeits, under certain qualifications, the benefit of the pension, must be held to be a case in which the pension has become *unavailable* in the sense of the contract, and the obligation to pay an equal annuity takes effect. We are of this opinion, because this is a case in which, without any reference to amount, the pension has become unavailable altogether, from a certain cause which must be presumed to have been contemplated; and because, although this arises from a certain rule of the fund, the *special exception* introduced immediately after the supposition of the pension, from whatever cause, becoming unavailable, viz. "saving and excepting *only* through her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude her from all benefit thereby," renders the inference inevitable, that, while that was a case in itself, if not excepted, comprehended in the meaning of the pension not being available, the other case, of its becoming unavailable by a second marriage, was also comprehended, and, not being excepted, must bring the alternative engagement into operation. But we are of opinion, that the annuity to be paid as long as the exclusion from the fund continues, can be no more than the amount of the pension payable to other widows of officers of the same rank who have not incurred the forfeiture.

We are, therefore, of opinion, that the interlocutor of the Lord Ordinary ought not to be adhered to, but ought so far to be altered as to find, that the annuity payable cannot be greater in amount than the pension from time to time payable from the Bombay Military Fund to the widow of an officer of the same rank.

LORD BALGRAY.—I concur in the above opinion, so far as regards the first point, that there is no obligation created by the contract for a specific annuity; but I concur with the opinion of Lord Cockburn as to the point regarding a second marriage.

The cause was this day put out for advising, when

THE COURT, in accordance with the opinion of the majority of the consulted judges, pronounced the following interlocutor:—"The Lords having resumed consideration of this case, with the opinions of the consulted Judges, —Find that the defenders, as executors of the deceased Colonel Taylor, are bound to make up any deficiency in the provision or annuity payable to the pursuer from the Bombay Military fund, arising in consequence of her second marriage, *quoad ultra*, alter the interlocutor complained of, sustain the other defences, and assoilzie the defenders, but find no expenses due, and decern."

CAMPBELL and MACDOWALL, W.S.—GIBSON CRAIGS, WARDLAW and DALZELL, W.S.—  
 Agents.



ALD GIBSON (Wilson and Sons' Trustee).—*Keay—Robertson.*  
 NRY STEPHENSON and OTHERS.—*Rutherford—Anderson.*  
 Competing.

No. 31.

Nov. 24, 1836  
 Gibson v.  
 Stephenson.

*ration—Trustee—Heritable Creditor—Principal and Agent.*—The  
 a sequestrated estate held also a commission of factory from an heri-  
 itor, with full power to uplift and discharge the debt due to him; the  
 ade up titles as such to the heritable property, sold it, and drew the  
 the dispositions to the purchasers he acknowledged the prices to have  
 him as factor for the heritable creditor; in the books of the estate he  
 mself with these prices, but of the same dates entered them on the cre-  
 s paid to the heritable creditor; he, however, did not as factor execute  
 urge in favour of the estate, and, in his accounts with the creditor, he  
 ertain sum as retained by him to answer the expenses of sale; this sum  
 l to his own uses, charging the expenses in his accounts with the estate,  
 e subsequently audited and passed by the commissioners; having become  
 and resigned—Held, in a competition between the new trustee and the  
 creditor for an outstanding balance of the prices of the properties, that  
 um retained by the former trustee to answer expenses, the estate was  
 le, and that it must be held as still in their hands for the satisfaction of  
 uses chargeable against the heritable creditor.

estates of the Wilsonton Iron Company having been seques- Nov. 24, 1836  
 a 1812, the late James Bristow Fraser, W.S., was appointed

Over the heritable properties belonging to the bankrupts, John 2<sup>d</sup> Division.  
 son, banker in London, on behalf of the company of Stephenson Ld. Moncreiff  
 mington, held a bond for £20,000. To these properties, titles F.  
 ade up by Fraser, as trustee, who from time to time effected  
 the same, drawing in the interim the rents, while the lands  
 d undisposed of. With the prices of the lots first sold he paid  
 ain preferable securities, leaving in his hands a surplus sum of  
 500 applicable to Stephenson's bond. Of date May 16, 1816, he  
 d from Stephenson a commission and factory, containing ample  
 for uplifting the heritable debts due him and granting discharges,  
 ommission he retained till 1819. During this period he received  
 rices of lands sold £5358, but of this amount he only remitted to  
 ason £3005, leaving altogether a balance untransmitted of £2853.  
 drew of rents of the lands £1453, no part of which was account-  
 e Stephenson, making in all £4306. On uplifting the prices of  
 he sold, he granted, as trustee, conveyances to the purchasers, in  
 he set forth that they had made payment of the prices to him "as  
 and commissioner for the said John Stephenson." At the same  
 ever, he entered these prices in the sederunt book as received  
 estate, but, on the other hand, and of the same dates, on the dis-  
 of the account, he wrote them off as paid to Stephenson. In  
 with Stephenson, again, he stated the above mentioned sum  
 ed to pay expenses. He did not, however, so apply

**No. 31.** *Fraser v. Stephenson*  
 it, but misappropriated it to his own uses. The rents drawn by him, on the other hand, were duly applied to the purposes of the estate. Fraser's accounts with the estate were on two several occasions, 1820 and 1825 audited by the commissioners, without their requiring from him discharges on behalf of Stephenson, of the sums set down in his accounts as paid to that individual, and at these audits the commissioners allowed him to take credit for the sums charged as the expenses of realizing the heritable property, including his own commission. Ultimately Fraser became bankrupt, and was allowed, in 1829, to resign his trusteeship, on which event Mr Archibald Gibson, W.S., was elected trustee in his stead. Additional sums to a large extent were, after 1819, paid to a new commissioner appointed by Stephenson, but not sufficient to discharge his claim, and the prices of the lots last sold not having been yet wholly uplifted, Gibson claimed them for the purpose of defraying the expenses of the sequestration, which had all, including those incurred in disposing of the heritable properties, been paid out of the monies, coming from whatever source, into the hands of the trustee, and by contribution among the creditors. Henry Stephenson again, representing John Stephenson, and the assignees of Stephenson and Remington, claimed these unlifted prices as belonging to them under the heritable bond, not affectable for the general expenses of the sequestration; and to determine their respective claims, a multiplepoinding was raised in name of one of the purchasers.

After considerable litigation, the Court (26th June, 1832) found "that Henry Stephenson, Esq., and the assignees of Stephenson and Remington, are entitled to receive the balance of the price of the lands of Cleugh and others, purchased by the raiser of the multiplepoinding, subject only to the deduction of the necessary expenses, if any, of selling and realizing the prices and proceeds of the lands and other subjects contained in the original bond and conveyance to John Stephenson, in so far as these expenses are not covered by the funds, if any, belonging to the claimants, in the hands of the trustee."<sup>1</sup>

Thereafter a remit was made to an accountant, who reported, that the expenses incurred in regard to the sale of the heritable properties could not in any view exceed 3000 guineas, being greatly within the two sums above mentioned of prices untransmitted and rents unaccounted for to the creditor, amounting together to £4306, for which the trustee was accountable to Stephenson, so that there could be no claim on the part of the trustee for any portion of the prices still unlifted.

To this report objections were given by the trustee, which having been repelled by the Lord Ordinary, who preferred Stephenson, &c. to

<sup>1</sup> Ante, X. 711.

in medio, the trustee reclaimed; and having now, for the first No. 31.  
 reversed the dispositions by Fraser to the purchasers, wherein Nov. 24, 1836,  
 avowed receipt of the prices as commissioner of Stephen-  
 Gibson v.  
 obtained a remit of new to the accountant to reconsider his ~~Stephenson.~~

accountant accordingly, after fully hearing parties, gave in an report, in which he adhered to the view originally taken by submitted the following observations:—

instead of remitting to the heritable creditors the prices which his hands as their factor and commissioner, Mr Fraser retained thereof, for the purpose of making those payments enumerated in notes with them, which form Appendix No. IV. and V. of report, page 9.

Notwithstanding of having thus retained his constituents' money for purpose of defraying expenses regarding the subjects contained therein, he charged those expenses in the general accounts of commissions in the sequestration, and was allowed the same by the others in the audits of his accounts, which took place in the 1810 and 1825.

The prices out of which £2853 was retained, were uplifted by Mr Fraser during the years 1815 and 1816, that is, upwards of three years before the first, and upwards of eight years before the second audit of Mr Fraser's accounts in the sequestration, in which those prices are entered as having been received, and as having been paid away, and in which the expenses now claimed were also allowed as having been dis-  
 burser or due to Mr Fraser.

The prices of the lands sold which had been recovered, formed the proper and proper fund for payment of those expenses which had incurred in selling the lands and realizing the prices. The commissioner saw that Mr Fraser had recovered those prices; but instead of allowing him to reimburse himself out of the proper fund, they not only refused him to take credit for the total amount thereof, without requiring him to be discharged from him, but they moreover allowed him credit for expenses now claimed, in which are included charges for trustees' commission, to the extent of £1367, 19s. 6d. exclusive of interest.

It appears to the accountant that neither was there any call on the purchasers or creditors to advance those expenses to Mr Fraser out of their personal funds, nor was there any propriety in their doing so years before the proper fund for payment of them had come into his hands. In the advance or payment made to Mr Fraser of his commission, to the extent of £1367, 19s. 6d. exclusive of interest, seems to have been uncalled for. Before voluntarily making such payments, the purchasers ought surely, in the view of recovering them from the trustee at a distant period, to have held some communication required what had become of the prices, and why they

No. 31. had not been applied to their proper purposes. These precautions were neglected. Mr Fraser's accounts were passed and docqueted by the commissioners without enquiry as to the prices. And in January, 1829, the creditors accepted Mr Fraser's resignation, and a new trustee (Mr Gibson) was appointed.

Nov. 24, 1836.  
Gibson v.  
Stephenson.

"In such circumstances it does not appear to the accountant that the creditors are entitled to recover the advances made by them without giving credit, 1st, For the sum retained by Mr Fraser on that account; and, 2d, For rents accounted for to them. According to this view, the heritable creditors would fall to be preferred on the fund in medio."

The trustee again gave in objections, contending mainly that Fraser being Stephenson's commissioner and attorney, and he having not only acknowledged in his conveyances to the purchasers' receipt of the prices in that character, but having also entered these in his accounts with the estate, on the discharge side, as paid to Stephenson, he must be held to have intromitted with these not as trustee, but as Stephenson's commissioner, and to have discharged the estate of all claim on the part of his constituent, who must consequently bear the loss arising from the misapplication of his funds by his own commissioner acting in that character.

LORD GLENLEE.—As far as I understand the matter I agree with the accountant. It is of no consequence in what capacity Fraser got the money from the purchasers. As trustee he was entitled and bound to retain it for payment of the expenses, and in his accounts with Stephenson he stated a sum as so retained. In the trust-accounts again, he charges the whole sum, and states against it the expenses. The Commissioners ought to have asked vouchers. They gave credit to him without asking a discharge; but how can they now claim credit for expenses which their own act and deed, in passing his accounts, shows to be discharged.

LORD MEDWYN.—This is a troublesome and intricate case; but seeing the accountant's report has not altered my opinion. Independent of Fraser's two characters the case is very peculiar. This is a multiplepointing where the trustee brings a claim, and an offset is pleaded that there is more in the hands of the estate belonging to the heritable creditor than the reasonable expenses of disposing of the properties can amount to; and certainly there seems to be a very ample allowance made by the accountant for realizing the estate. As to the rents there can be no doubt, and there should have been no question as to them, and they were chiefly received before Fraser was appointed factor for Stephenson. Then of the prices retained, L.500 arises from payments received in December 1815, before Fraser became factor, though he was the private agent of Stephenson; and indubitably this also must be added to the rents. As to the rest there is a difference, but it does not appear to me to be sufficient to warrant a different view from that taken by Lord Glenlee. Fraser should not have entered these payments in the books of the estate at all. But then how is Stephenson to be affected by these entries? Fraser was then acting as trustee, and Stephenson had no control over them. If there is any impropriety, who is to suffer? Stephenson, with whom every thing is correct,—or the estate? The way Fraser should have acted was this: He should have given a discharge for Stephenson to himself as trustee on the

state, just as was done by the new factor in regard to payments subsequently made to them for behoof of their constituent; and if there had been a regular discharge by Fraser when factor, there would have been something more in the case. But there is no discharge by him, and I see no ground to take a different view from that adhered to by this respectable accountant on reconsideration. No. 3  
Nov. 25,  
MID v. E  
Mar.

**LORD JUSTICE-CLERK.**—As to the rents, they are entirely out of the question; and as to the other matter, I am satisfied we must find that the creditors are liable, from the way in which they allowed Fraser to pass his accounts. They are to suffer and not Stephenson, who had no control over his actings as trustee. Miller.

**THE COURT** accordingly repelled the objections to the report, and adhered to the Lord Ordinary's interlocutor, and further found the trustee liable in expenses.

**B. MEEKE and J. S. DARLING, W.S.—PEARSON and ROBERTSON, W.S.—Agents.**

**ROBERT MILL, Advocate.—Robertson—J. Anderson.** No. 3  
**THE EARL OF MAR, Respondent.—McNeill—R. Robertson.**

**THIS** was a question turning upon specialties as to the liability of the advocate for a sum of rent due by his deceased brother to the respondent. The Lord Ordinary affirmed the judgment of the Sheriff of Clackmannan, finding the advocate liable, and Nov. 25,  
2d Divn  
Lord Jeff  
F.

**THE COURT** adhered.

**JOHN LIVINGSTON, W.S.—ALEXANDER ROBERTSON, W.S.—Agents.**

**WILLIAM MILLER, Petitioner.—Ivory.** No. 3

**Factor Loco Tutoris.**—A girl of five years of age was presumptive heiress of entail to an estate worth £2000 per annum, the heir in possession of which was a widower aged sixty-seven years; the pupil was wholly destitute; and the Court granted power to her factor loco tutoris, to conclude an agreement with a reversionary insurance office, whereby, in consideration of an annuity of £200 paid to the pupil (for her suitable maintenance and education) during the joint lives of herself and the heir in possession, security was to be granted over the rents of the entailed estate, for an annuity of £238, 7s. payable to the office during the pupil's lifetime, after her accession to the estate.

**WILLIAM MILLER, S.S.C.,** factor loco tutoris to Miss Carsina Gordon Gray, a girl of five years of age, presented a petition, stating that she, by the recent death of a paternal uncle, had become presumptive heiress of entail to the estate of Carse, which was worth nett £2000 per annum; Nov. 26,  
1st Divn  
D.  
her father, Charles Gray, the heir in possession, was a widower years of age; that she was in a condition of absolute des-

**No. 33.** titution, and the rents of Carse were under sequestration by her grandfather's creditors, so that he was unable to assist her; that it was necessary to raise some fund for her suitable maintenance and education, but that it was requisite to obtain the sanction of the Court for the extraordinary acts of administration by which alone such fund could be raised. Miller therefore prayed the Court "to authorize him to purchase an annuity, for the purpose of maintaining and educating the said Carsina Gordon Gray, during the period of her expectancy, at a price payable upon the succession of the estate of Carse opening to her, by the death of the present heir of entail, in case she shall survive him; and further, to effect an insurance on the life of the minor, either simply or against the life of Mr Gray, to the extent of £2000; and to assign the future rents of the estate of Carse, from the period of the succession opening to the minor, and also the policy of insurance, in security of the price of the annuity to be so purchased;<sup>1</sup> or to give the petitioner such instructions as to your Lordships shall seem just and proper."

A remit having been made to an accountant,\* he reported that he had applied to a reversionary insurance office, and they had agreed, either, 1st, "To give an annuity of £200 to the minor, payable during the joint lives of her and her grandfather, the heir in possession, half yearly, and beginning the first payment at entering into the transaction, in consideration of the capital sum of £3440, 7s. 8d., payable at the first term after the death of the heir in possession, in the event of the minor surviving that period;" or, 2d, "To grant the said annuity of £200 to the minor, in consideration of their receiving a reversionary annuity of £238, 7s., payable half yearly, during the life of the minor, after the death of her grandfather, in the event of her surviving him, beginning at the first term, half a year after her grandfather's death." The reporter stated that he considered the offer so made to be reasonable and fair, and, in the ninth article of his report, he "humbly submitted his opinion, that it would be expedient to authorize the petitioner to accept of the offer of the reversionary company above referred to, and to grant a security over the rents of the entailed estate of Carse, which may become payable to the minor during her life, after her accession to the estate, of an annuity to the reversionary company, not exceeding £238, 7s., upon the company securing to the petitioner, for behoof of the minor, an annuity of £200 during the joint lives of her and her grandfather, both annuities being payable in terms of the said offer."

The petition and report were then taken up by the Court.

**LORD BALGRAY.**—I think the transaction, approved by the accountant, is very reasonable in itself, and advantageous to the pupil.

**LORD MACKENZIE.**—I entirely agree in the view taken by the accountant: and

<sup>1</sup> M'Gruthar, Feb. 27, 1835 (ante, XIII. 579).

\* Patrick Cockburn.

I understand it is now merely proposed to set the one annuity against the other, which is the most advantageous and advisable arrangement; and that the other proposal is abandoned. No. 3

LORD GILLIES.—I entirely concur in that view.

LORD PRESIDENT was absent.

Nov. 26, 1  
Gillfillan v.  
Creditors.

THE COURT pronounced this interlocutor:—"Find the proposal contained in the ninth article of the accountant's report, to be the most expedient to be adopted, and, in terms thereof, and of the prayer of the petition, grant warrant to and authorize the petitioner to purchase an annuity for the maintenance and education of the said Carsina Gordon Gray, during the period of her expectancy, on the terms proposed by the reversionary company, and to grant a security accordingly, to the said company, over the rents of the entailed estate of Carse, which may become payable, during the minor's life, after her accession to the said estate, not exceeding the sum of £238, 7s., and decern."

W. MILLER, S.S.C.—Agent.

MICHAEL GILFILLAN, Petitioner.—*Maitland.*

No. 34

HIS CREDITORS, Respondents.—*Sol.-Gen. Cunningham—Patton.*

*Bankruptcy—Discharge.*—In an application for a discharge under the 61st section of the Bankrupt Act, Held, (1.) That contingent creditors must be compared, along with other creditors, in estimating the concurrence of the four-fifths; and, (2.) That, where a petition was presented, and intimated, before the requisite concurrence was obtained, its original incompetency was not cured, by subsequently obtaining the requisite concurrence: and petition accordingly refused.

It is provided by § 61 of the Bankrupt Act, that, "after the period assigned for the second dividend, it shall be lawful for the bankrupt, with concurrence of the trustee and four-fifths of the creditors in number and value, to apply to the Court of Session by petition, praying that he may be held as finally discharged," &c.; and that, after due intimation, and a lapse of three calendar months, the Court shall resume the petition and dispose of it. Nov. 26, 1836  
1st Division  
Ld. Clerk  
B.

In April 1836, after the lapse of the period assigned for the second dividend in the sequestration of Michael Gilfillan, writer and insurance broker in Glasgow, he presented a petition purporting to be with concurrence of the trustee, and of four-fifths in number and value of his creditors. The relative certificate by the trustee bore, "that in my opinion the said Michael Gilfillan has obtained the consent of upwards of four-fifths in number and value of the creditors, &c., but excluding the creditors whose claims have been ranked contingently. Should it, however, be found by the Court, that the creditors who have been ranked contingently ought to be counted in number and value, in that case the



[o. 34. said Michael Gilfillan has not obtained the consent of four-fifths in number and value.”

26, 1836.  
llan v. His  
itors.

The petition was remitted to the Lord Ordinary on the Bills in vacation, with power to grant the discharge if he should see cause. Appearance was made to oppose the petition on the ground that there was not the requisite concurrence of creditors, because it was necessary to compute contingent creditors, and if this was done, the trustee's certificate bore that there was not the requisite concurrence.

The Lord Ordinary, “ In respect it appears, from the certificate by the trustee on the sequestrated estate of the petitioner, that the petitioner has not obtained the concurrence of four-fifths of the creditors in number and value as required by the statute, refused the prayer of the petition, in hoc statu, and decerned ; found no expenses due.” \*

Gilfillan procured additional consents from other creditors, and a fresh certificate from the trustee, that he had now the proportion of four-fifths of the creditors, including all contingent claims. He presented a reclaiming note to the Court against the judgment of the Lord Ordinary, and prayed the Court to grant his petition.

Appearance was made to oppose it, on the ground that it had been at first incompetently presented to the Court, as it was required by the statute that there must be a concurrence of four-fifths of all the creditors, before the bankrupt was entitled to present his petition to the Court. It was therefore an incompetent petition which had been presented and intimated, and the Court could not now grant it.

No attempt was made by Gilfillan to dispute the finding in the interlocutor of the Lord Ordinary that contingent creditors required to be computed. But he pleaded that the original defect had been cured by the subsequent consents.

LORDS BALGRAY, GILLIES, and MACKENZIE, were unanimously of opinion that the petition was incompetently presented, and that its prayer must be refused.

The LORD PRESIDENT was not present.

THE COURT refused the prayer of the note, and awarded the expenses incurred in the Inner-House against the petitioner.

WOTHERSPOON and MACK, W.S.—C. F. DAVIDSON, W.S.—Agents.

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\* “ NOTE.—The Lord Ordinary concurs with Mr Bell in thinking, that ‘ contingent creditors must be included in ascertaining the four-fifths required by the act to sanction the petition. The vague expressions used in the 24th section, cannot be so construed as to deprive a contingent creditor of his right to take part in this important measure.’

“ No expenses have been found due, because the Lord Ordinary is not aware that this point has received the judgment of the Court.”

MRS WADDELL OF RYMER, and HUSBAND, Claimants.—*Rutherford—  
Penney.*

No. 1

WILLIAM WADDELL, Claimant.—*Rutherford—Penney.*

MRS SMITH OF ADAM, and HUSBAND, Claimants.—*M'Neill—  
J. Anderson.*

Nov. 28,  
Waddell v.  
Waddell.

*Alimentary Fund—Assignment.*—Circumstances in which, held, in a competition upon the arrears of an alimentary annuity, that a first assignation thereof, was preferable to a second, where there was as strong ground for presuming the assignation to have been made for an alimentary debt, in the first case as in the second; and farther, that the first assignee was preferable to the cedent.

THE late John Rymer of Cliftonhill, by his deed of settlement, bur- Nov. 26, 1  
dened these lands with a provision to his daughter, and also with a sum 1st Divis  
of £4000 to his grand-daughter, Elizabeth Rymer, “in liferent, for her L4. Fuller  
liferent use allanarly, and to the heirs of her body, equally among them, 8.  
in fee.” It was declared “that the said provisions in favour of my  
daughter and grand-daughter foresaid, shall in no respect be subject  
to the jus mariti or right of administration of any husband or husbands  
whom they may marry, nor liable for, or affectable by, their debts or  
deeds of any kind; the said provisions being intended as alimentary for  
my said daughter and grand-daughter alone.”

After the death of Rymer, his son, John Rymer, allowed the payment  
of the interest on the £4000 to fall into arrear, and, in 1824, Elizabeth  
Rymer, who was then married to Joseph Murray Gilchrist, adjudged the  
lands of Cliftonhill in security of an accumulated sum of £4835, 10s.,  
being the principal and arrears of interest then existing. They also did  
ultimate personal diligence against Rymer, junior. In 1826, when the  
arrears of interest appeared to be about £800, Mrs Rymer or Gilchrist,  
and her husband, in consideration of an advance of £191 from Peter  
Adam, writer in Glasgow, assigned him “in and to the lawful interest  
which is already due, or which may yet become due to us, of the foresaid  
sum of £4000 sterling, all as contained in the deed of settlement and  
decree above recited, to the extent of the sum of £191 sterling, and the  
lawful interest thereof, till payment of it is made or recovered by the said  
Peter Adam and his foresaids, our lawful cessioners and assignees, in and  
to the said deed of settlement itself, decrees, letters of horning and cap-  
tation thereon above mentioned, and decree of adjudication since obtained  
by us, and all other steps of diligence had by us thereon against the said  
John Rymer and his estate, to the extent of the foresaid sum of £191  
sterling, and interest thereof, foresaid,” &c. This assignation was judi-  
cially ratified by Mrs Rymer or Gilchrist, on oath. In 1827, it was  
assigned to the judicial factor in a ranking and sale which had now been  
of the lands of Cliftonhill. Gilchrist afterwards died, and his

No. 35. widow married Archibald Douglas Waddell. Peter Adam also died, and Mrs Smith or Adam came to be in right of the above assignation. In 1834, Mrs Rymer or Waddell, and her husband, executed, in favour of William Waddell, W.S., an assignation of the interest which had accrued or should yet accrue on the £4000. This was done on the narrative "that I, the said Elizabeth Rymer or Waddell, and I, the said Archibald Douglas Waddell, are indebted and owing to William Waddell, W.S., the sum of £50 sterling, contained in our accepted bill to him, dated 23d June, 1834, and payable ten days after date, with interest thereon; as also in the sum of £162 for advances made by him to us for the support and maintenance of ourselves and children, and in a business account incurred by us to him," &c.; and that he was then in the course of making farther alimentary advances to them.

The lands of Cliftonhill having been sold, an interim sum of £700 was set apart, in the ranking, on account of the debt due to Mrs Waddell; and in consequence of various claimants competing on this fund, a multiplepinding was brought to determine their preferences.

William Waddell, W.S., stated that his advances, both before and after the date of his assignation, had either been made in small sums from week to week, for alimentering Mrs Waddell and her husband and family; or consisted of a charge for professional employment, in vindicating, in Court, the alimentary fund itself. All these were equally alimentary debts, and part of them was specially narrated to be so, in the assignation; and as the fund in medio was sacred to alimentary purposes, he ought to be ranked preferably to any common creditor, such as he alleged Peter Adam, the cedent of Mrs Smith or Adam, to have been.

In support of this claim, and also as claiming a preference over Mrs Smith or Adam, Mrs Waddell and husband claimed the fund, as being of a strictly alimentary nature, and absolutely unalienable to any but an alimentary creditor. She alleged that the assignation to Peter Adam had been granted for a debt of her first husband, Gilchrist; and as its narrative bore that it was granted "for a sum paid to us," it must be presumed to have been for money received by the husband. The assignation of an alimentary fund, to pay such a debt, was ineffectual; and Mrs Waddell's ratification could not alter the inherent character of the fund.

Mrs Smith or Adam alleged that the advances made by her cedent, Peter Adam, were altogether of an alimentary nature. Several years had elapsed prior to their date, during which the alimentary annuity had run heavily into arrear; and as no explanation had been given by Mrs Waddell, how she had been enabled to subsist during that period, and as no other creditor for that period was in the field, there was sufficient real evidence that the money of Peter Adam had been truly advanced for alimentary purposes. After his death, and so long an interval, no farther proof could be required. Nor was there any thing in the style of the assignation at variance with this. And, separately, even if it were

ordinary debt, still as the assignation applied only to arrears of interest, and as it had been duly ratified by Mrs Rymer, it formed an effectual conveyance to the assignee, who, being first in point of time, was preferable to William Waddell; especially as he adduced no sufficient evidence that his debt was of an alimentary nature.

The Lord Ordinary "preferred the claimant, Margaret Adam or Smith, primo loco, in respect of the intimated assignation of the 25th of April, 1826, to the extent of £191 sterling, and decerned in the preference for payment of said sum against the raiser accordingly, and with interest thereon from said date." \*

No. 35.

Nov. 28, 1835  
Waddell v.  
Waddell.

\* "NOTE.—By the deed of settlement of John Rymer of Cliftonhill, of 20th March, 1813, the claimant, Mrs Rymer or Waddell, was entitled to the liferent of the sum of £4000, heritably secured on the lands of Cliftonhill and others, belonging to the disponent, her father; and the Lord Ordinary holds, that the terms of that settlement are sufficient to confer on that liferent the character of an alimentary provision.

"At the date of the adjudication obtained by the claimant, Mrs Elizabeth Rymer, in 1824, there was due an arrear of interest of £335, 10s., and no further payment of interest appears to have been made until that which appears to have given rise to the present competition. A process of ranking and sale having been brought of the lands of Cliftonhill, a payment of £700 was made very lately, under the authority of the Court, to Mrs Elizabeth Rymer or Waddell, and her husband, under conditions which made it necessary to raise the present multiplicity, for the purpose of ascertaining the rights of various competitors in regard to said payment.

"The payment, it will be observed, is quite general. Having been made, however, in the terms of the interlocutor in the ranking, and the minute there referred to, as a payment 'of the debt due to Mrs Elizabeth Rymer or Waddell,' it must be held, and seems to be admitted by all parties, that it was a payment to account of the interest due on the above mentioned sum of £4000, heritably secured on the lands; the yearly interest thereon, or annual alimentary provision, is £300; and even supposing the claimant, Mrs Waddell or Rymer, entitled to apply this payment, to that amount, to the current aliment of the year during which the payment was made, there would remain £500, which must be considered as a general payment to account of the arrears of aliment outstanding from the year 1823. Of this, £191 is claimed by Mrs Adam or Smith, in virtue of an assignation granted by Mrs Rymer, with the consent of her then husband, dated April 7, 1826, and intimated to the judicial factor on the estate of Cliftonhill, in April following. This claim is opposed by William Waddell, founding on an assignation by Mrs Rymer or Waddell, dated 16th September, 1834, for behoof of himself and of Mrs Waddell; and by Mrs Waddell, founding on the alimentary nature of the provision, asserting her right to carry off the whole fund: the two latter forming common cause against the former.

"The first point to be considered is, whether, between Mr Waddell, in his own right as a creditor of his cedent, Mrs Rymer, and the other assignee, Mrs Adam, there is any other criterion of preference but that afforded by the respective dates of their assignations; and on that, the Lord Ordinary continues of the opinion expressed in his interlocutor of the 11th July, 1835. It does not appear to him that, in so far as regards the sums said to have been advanced by the claimant Mr Waddell, he is entitled to any preference as an alimentary creditor. An alimentary creditor is understood to be one who has either actually furnished articles, or in description of aliment, or is vested with the right of parties who are the claimant, Mr Waddell, is neither in the one situation

**No. 35.**     **Mrs Rymer or Waddell and Husband, and also William Waddell,** reclaimed.

**Nov. 26, 1836.**

**Waddell v.**

**Waddell.**

nor the other. The ground of his claim is money advanced to Mrs Rymer self; being, in the first place, the sum of £50, contained in an accepted bill for her and her present husband: secondly, a sum of £162, for advances said to have been made by him to them for support and maintenance of themselves and children; and, lastly, a business account, amounting in all, with interest, to £400. The Lord Ordinary sees no ground for holding the terms of this assignation to confer any right on Mr Waddell as an alimentary creditor. He has no assignment from the parties who made any alimentary furnishings to Mrs Rymer. He merely holds an assignation from Mrs Rymer herself for money advanced to her, and in this particular, stands exactly on an equal footing with Mrs Adam. It is very probable that the money so advanced was expended in alimentary purposes, as the alimentary provision itself was not then tangible; and it does not appear that she had any other source of support. But the same presumption will apply with equal force to the assignation granted to Mrs Adam's author in 1826, and as the rights of the creditors stand in every particular on the same footing, the Lord Ordinary is of opinion, that no preference can be created by the circumstance of the cedent, the debtor, choosing to declare, in the assignation of the later date, that the advances were made for the support of her and family.

“ The other question being that properly arising between Mrs Rymer and the competitor, Mrs Adam, is attended with more difficulty. But the Lord Ordinary is of opinion, that here, too, the latter is entitled to prevail. It will be observed, in the first place that there are here no alimentary creditors, in the proper sense of the term; and, second, that after setting apart the full current year's aliment, the fund in medio consists entirely of a payment to account of arrears of aliment, running from the year 1822. There is no room here, then, for the application of the rule laid down in the case referred to, of Monypenny against Buchanan, 11th July, 1835, in which the competition related to certain successively sums of aliment, and was decided in favour of proper alimentary creditors. The competition here is, in the first place, for arrears of an alimentary provision, and, secondly, it takes place between a creditor who had advanced, in the year 1826, a sum of money on the security of that provision, to which the debtor gave an assignation, and the debtor in that sum of money, who now seeks to carry off the fund, upon the ground that it was not affectable by her own deed. A competition of this kind does not appear to the Lord Ordinary to admit of the application of those rules by which the case above alluded to was determined.

“ Though it may be true that an alimentary fund in one sense, is not assignable, that is, does not admit of being prospectively alienated in consideration of a present advance, it does by no means follow, that when the annual alimentary payments are either allowed to accumulate, or are accumulated in consequence of temporary inability of the debtor to pay them, those accumulations or arrears are not effectually carried by an assignation granted to a party who has advanced money. It is true, that if proper alimentary creditors were competing, they, from the very nature of the fund would be entitled to a preference. But if there be no proper alimentary creditors, one of two presumptions must hold, either that the party holding the alimentary right had funds to support himself independent of the aliment, or, if he had no such funds, which appears to be the case here, that the funds advanced by the assignee were actually applied by him to that purpose. On the first supposition, which implies that the arrears were not necessary for the support of the party holding the provision, even an arrestment would in all probability be held to be good; and on the second, the assignee must, in equity, be held to be an alimentary creditor, and the preference of the creditor over the assignee would involve the most obvious and grossest injustice. The last consideration applies with peculiar force to the circumstances of the present case.

urposes. It is said that this view is contradicted by the terms of the deed, which narrates money advanced "to us," and of which "we acknowledge receipt;" and these terms are said necessarily to imply that the husband is debtor. I do not think this the case. The style of the deed appears good and perfectly well with the statement of Mrs Smith or Adam, that the money was advanced for the alimentary purposes of Mrs Waddell and her husband.

**MACKENZIE.**—I am of the same opinion. It would have been more correct had the facts been better cleared up, but I incline to think there is no case to justify us in adhering. I am much moved by the circumstance which has just been adverted to, that there is a considerable period of time, during which there does not appear to be any alimentary creditor existing, unless Peter Adam be viewed in that light; and during which there is no visible subsistence of Mrs Rymer or Waddell, unless the £191, advanced by her husband Peter Adam, was applied for aliment. But, besides this, there was a pretty large sum of aliment due at the date of his advance, and I do not see why that would not be competently assignable to any party who advanced the amount Rymer or Waddell. She could have uplifted and discharged the whole sum supposing it to have been tendered to her; and she could have applied the sum uplifted, in paying debts with it; but if so, I think she might equally

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In consequence of the embarrassments of the common debtor, the payment of alimentary provision has been suspended since the year 1823. In 1826, the respondent herself proves that she received the sum of £191 from the author of the deed, in consideration of transferring to that extent her alimentary provision. In other words, she obtained, at the expense of the respondent's husband, a sum of money, which she might expend on alimentary purposes: and in the absence of any proper alimentary creditors, it must be held that it was so expended. In these circumstances, it is obviously implied in the claim of preference

No. 35. assign the arrear to any party who made an instant advance of money. circumstances of the case, I am for adhering.

Nov. 29, 1836.  
Dykes.

LORD BALGRAY.—I concur. Where an advance is made for the purpose of enabling a party to pay alimentary debts, and such party assigns an alimentary debt in security of the advance, the assignee has as good a right to the fund as the debtor originally had.

THE COURT adhered; and found no expenses due of the discussion in the Inner House.

W. WADDELL, W.S.—FISHER and DUNCAN, S.S.C.—Agents.

No. 36. THOMAS DYKES, Petitioner.—*Sol.-Gen. Cunningham.*

*Factor Loco Tutoris—Pupil.*—Authority granted to the factor loco tutoris to a pupil to make up the pupil's titles to heritage, in respect that both the superior and the pupil's vassals required this to be done.

Nov. 29, 1836.

1st Division.  
D.

THOMAS DYKES, factor loco tutoris to Jean Brown Lamb, presented a petition, stating that the pupil had succeeded to some small heritable subjects in the town of Hamilton, worth about £80 per annum; that the superiors, in some of these were urgent that she should take an entry, and in others she had vassals who threatened her with a tinsel of tinesse of superiority, unless she gave them entry without delay. He therefore prayed the Court “to authorize<sup>1</sup> him to make up the titles of the pupil to heritable subjects belonging to her; and, for that purpose, to purchase briefs from Chancery, for serving the said Jean Brown Lamb with her said father in said subjects;” and to infest the pupil in said subjects “and, upon being entered with the superiors thereof, to authorize the petitioner to grant such entries to the vassals in said subjects as may be required.”

THE COURT granted the petition.

W. WADDELL, W.S.—Agent.

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<sup>1</sup> *Petitioner's Authorities*—A v. B, July 30, 1736; Elch v. Tutor and No 6; Baird, &c., Jan. 30, 1741 (Kilk. 585); Riddell, Nov. 11, 1746 (i. Anstruther, March 3, 1818 (F. C.))



DAVID BEATTIE, Petitioner.—*Monro.*

No. 37.

*Bankruptcy—Adjudication.*—A bankrupt who was in right of certain heritage, without conveying it to his trustee; the trustee onerously became bound to convey the heritage to a third party, and disposed it, but died without obtaining a special adjudication in his favour; the Court thereafter granted a petition for a special adjudication of the heritage, in favour of the succeeding trustee, to enable him effectually to implement the conveyance by the prior trustee.

Nov. 29, 1836.  
Beattie.

DAVID BEATTIE, trustee on the sequestrated estate of the deceased John Balfour, presented a petition, stating that the sequestration had taken place in 1816; that Alexander Watson and George Beattie had been successively elected trustees before the petitioner, and had died; that the bankrupt was also dead; that in 1816, Watson and the creditors, in conjunction of a sum of £50, had become bound to convey to one Shand an indiviso half of certain heritable subjects, belonging to the bankrupt; that, in 1820, a disposition was accordingly executed in favour of and by George Beattie, then the trustee; that the subjects had never been disposed by the bankrupt, nor specially adjudged from him to either the preceding trustees, and that a special adjudication from the bankrupt and the preceding trustees, in favour of the petitioner, was now necessary, to enable him effectually to convey the heritable subjects to him. David Beattie therefore prayed the Court, in reference to the Bankrupt Act, § 31, “to adjudge from the said John Balfour, and his heirs and successors, and the saids Alexander Watson and George Beattie, as successive trustees foresaid, and their heirs and successors, the subjects before described, with the whole writs and title-deeds thereof, and all right, title, and interest, claim of right, property, and possession, real or possessory, which the said John Balfour, his authors or predecessors, or the saids Alexander Watson and George Beattie, as trustees, had, have, or can claim or pretend thereto, and to decern and declare the same to belong to the petitioner, as trustee aforesaid, absolutely and redeemably, and as fully and freely as the same did formerly belong to the said John Balfour, to the end that the same may be disposed and conveyed to the said William Shand, or others in his right, in terms of the foresaid minutes of the creditors, and in implement of the obligations which the creditors came under, by receiving from the said William Shand the foresaid sum of £50 sterling; and further, to declare the said petition, as being of the nature of an adjudication in implement, as well as for payment or security of debt, to be subject to no legal reversal—all in terms of the foresaid statute.”

Nov. 29, 1836.  
1st Division.  
D.

THE COURT, without ordering intimation, granted the prayer of the petition.

J. BURNES, S.S.C.—Agent.

did not state whether the bankrupt had been infest.

No. 38.

Nov. 29, 1836.  
A B v. C D.

A B, Pursuer.—*R. Bell.*  
C D, Defender.—*Whigham.*

*Title to Pursue—Expenses—Bankrupt—Process.*—It was fixed by a interlocutor, that the bankrupt pursuer of a reduction could only insist, on finding caution for expenses ; he found a cautioner and attestor, but the attestor became bankrupt during the preparation of the cause : Held, that the defender might object, before the Lord Ordinary, to farther procedure, until a new attestor should be found ; and that the A. S., 11th July, 1828, § 118, did not apply to the case.

Nov, 29, 1836.

1st Division.  
Ld. Cockburn.

THE pursuer of a reduction, being a bankrupt, was found by interlocutor of the Lord Ordinary not entitled to pursue, except on condition of finding caution for expenses. He procured a cautioner and attestor, but dilatory defences were lodged, which were repelled. The pursuer applied for an order for peremptory defences ; but, as the attestor of the pursuer and the cautioner had become bankrupt in the interim, the defender objected to any order being pronounced at the pursuer's instance, until a new attestor was found, in respect that, by final interlocutor, the pursuer was not entitled to insist on condition of finding caution ; and, therefore, if either the cautioner or attestor became bankrupt, the pursuer could no longer insist until a new cautioner or attestor was found in the room of the bankrupt, otherwise the condition as to caution was rendered nugatory. The pursuer answered, that having once complied with the condition of finding caution, his title to insist was not to be affected by the subsequent bankruptcy of the cautioner :<sup>1</sup> that, even in suspensions of liquid obligations, where a cautioner died or became bankrupt, it was incompetent for the Lord Ordinary to interfere, and it was only the Inner House (A.S. 11th July, 1828, § 118), which could decide whether new caution should be found or not ; and that therefore it was informal, as well as unfounded on the merits, to take an objection before the Lord Ordinary on account of the attestor's bankruptcy.

The Lord Ordinary reported the question.

LORD BALGRAY.—The sole point seems to be this ; was the jus prosecutis allowed to the pursuer, solely on condition of his finding caution for expenses. If so, that condition must be implemented so long as he continues to insist. It was undoubtedly so found by an interlocutor of the Lord Ordinary, which became final. In these circumstances, the bankruptcy of the attestor, or the bankruptcy of the cautioner, seems to be just the case in which the defender is entitled to object that the pursuer is without caution, and cannot insist while he continues in that state. As for the section of the Act of Sederunt, it refers to a different class of cases, and I think the Lord Ordinary had jurisdiction to deal

<sup>1</sup> Govan, Dec. 13, 1795 (15161) ; Dalr. Forms of Process, 295.

this matter, and that it was unnecessary to come here for any authority on the subject. No. 36

LORD GILLIES.—I am of the same opinion. It was a proper question for the Lord Ordinary to dispose of, but it is now regularly before us, under his Lordship's report, and I would dispose of it in the same way with your Lordship. Nov. 29, 1871  
Hunter v. Nicolson.

LORD MACKENZIE.—I am of the same opinion. The bankruptcy of the attester is not distinguishable as to this question, from the bankruptcy of the cautioner. In either case I think the defender may object to go on, until the pursuer finds sufficient caution, as he was obliged to do at first.

LORD PRESIDENT was absent.

THE COURT directed the Lord Ordinary to ordain the pursuer to find a sufficient attester in room of the bankrupt, before insisting farther.

Agents.

ALEXANDER HUNTER and OTHERS (Macalister's Trustees), Raisers and Claimants.—*M'Neill—H. Bruce.* No. 39

MRS ISABELLA NICOLSON or MACALISTER, Claimant.—*Rutherford—J. Anderson.*

*Oath on Reference—Proof—Legacy—Presumed Intention*—1. Circumstances in which a lady, claiming £1000 from her late father's trustees, as a debt due by her father under a verbal promise, whereon her marriage had followed, was allowed to found, as a circumstance of evidence, upon an oath of reference which had been emitted by her father, in an action at her husband's instance against him and his trustees, for payment of the said sum of £1000. 2. Where a father was indebted in the sum of £1000 to his daughter, and left her a legacy of £1000, which was only to be paid in the event of success in a certain claim then pending.—Held, that the legacy, being conditional, was not meant to impute in satisfaction of the debt, but was meant to be paid, in the event of success, over and above the debt.\*

In 1806, John Nicolson married Miss Isabella Macalister, daughter of Alexander Macalister of Strathaird. They were put into possession of two farms belonging to Strathaird, and possessed them until 1817, when the parties separated. Mrs Nicolson continued to occupy one of the farms, called Clachamish, after that event. In 1827, Strathaird, who was eighty-two years of age, executed an irrevocable trust-conveyance of his whole estate, and effects in favour of Alexander Hunter, W.S., and Others, for the purpose of relieving himself of the management of his affairs, and paying his debts and certain legacies. At this time Strathaird was claiming in Court, a share of the succession of a deceased brother, Colonel Norman Macalister, which was the subject of a depending Nov. 29, 1871  
1st Division  
Ld. Fullerton  
D.

When this case was called, the senior counsel of Mrs Nicolson was engaged in another case of the Court; and as the junior counsel was present, the delay the advising.

**No. 39.** competition; and in reference thereto, he directed his trustees, besides other bequests, “in case they shall succeed in recovering the sums of money claimed by me from the succession of my said deceased brother, Norman Macalister, to pay out of the same to the said Jessie Macalister, and her heirs, the further sum of £500; and also, in the same event, to pay to my said daughter, Isabella Nicolson, but excluding the *jus mariti* of her said husband, and failing her, to her children, equally among them, £1000; but these last mentioned legacies to my said two daughters, are only to be payable in case the said property is recovered.” Strathaird also directed that Mrs Nicolson should be allowed to possess the farm of Clachamish, at a rent of £10, during her life.

17. 29, 1836.  
Nicolson v.  
Nicolson.

In 1829, John Nicolson raised an action against Strathaird, libelling that, before his marriage in 1806, there were verbal communings “betwixt the pursuer and his own father, on the one part, and the said Alexander Macalister, for himself and his daughter, on the other part: That one of the stipulations and obligations come under by the said Alexander Macalister was, that he should pay to the pursuer the sum of £1000 sterling, as a tocher or portion with the said Isabella Macalister, the pursuer’s intended spouse, bearing interest from Whitsunday 1806 till paid.”

Strathaird, and also his trustee, lodged defences, and a minute of reference to the oath of Strathaird was then put in,—

“1st, Whether, on the occasion of the marriage of the defender’s daughter to the pursuer, and in the course of the communings with the defender relative to that event, the defender agreed and bound himself to pay to the pursuer the sum of £1000 sterling as a tocher or marriage portion, bearing interest from Whitsunday 1806 until paid?

“2d, Whether, after the pursuer had been put into possession of the defender’s farm of Clachamish, and during that possession, the defender allowed the pursuer to retain from the rent the sum of £50 yearly, as interest of the foresaid portion or tocher of £1000?”

In presence of the agent for himself and his trustees, Strathaird deponed, “that there were communings on the occasion of the marriage. Interrogated, whether, in the course of these communings, he promised to give the pursuer £1000 sterling, in name of tocher with the deponent’s daughter? Depones, that he did not; but that he promised to give £1000 to his daughter, for herself and her children. Interrogated, whether he put the pursuer into possession of the farm of Clachamish after the marriage? Depones, that he did so shortly afterwards, and that a fixed rent was agreed upon, but the deponent does not recollect the exact amount. Interrogated, whether he allowed the pursuer to retain £50 per annum out of said rent, as interest of the foresaid sum of £1000? Depones, that he did so for some years, and until the pursuer separated from his wife, when he gave the farm to his daughter, Mrs Nicolson, and that she has been in possession of the said farm ever since the pursuer left it.” Strathaird further deponed, on the interrogation of the agent for his

e of the question, as to the sum of £1000 and interest, and there-  
viled the defender from that conclusion of the action."

r a separate conclusion of Nicolson's action, the defenders were  
iable in £180, with interest from Whitsunday 1817, "under  
n of the arrears of rent due for the farm, if any, and to the extent  
rents as may be established to be due, found the defenders enti-  
plead compensation; and appointed them, within fourteen days, to  
a specific state thereof."

te was then lodged, making the arrears of rent amount to £1290,  
n abatement which was stated in these terms :—

ation to be given to Mr Nicolson by Strathaird,  
is deposition during his possession of said lands,  
; eleven years, at £50 per annum, . £550 0 0."

is state, Nicolson objected that he had only got credit "for £50  
um, in terms of his deposition, for eleven years, as being the inter-  
Mrs Nicolson's marriage portion," whereas he contended he was  
under the oath to credit for twelve years. The answer made,  
it Nicolson was not entitled to so much as eleven years. There  
objection taken to the allegation of Nicolson that the whole sum  
n stated on account of interest.

action resulted in an absolvitor of the trustees, as they had claims  
ensation to a greater amount, than the sums established against  
y Nicolson.

r the death of Strathaird, which happened in 1832, his trustees  
ood his claim against the succession of his brother Colonel Maca-

No. 39. husband's instance. An annual abatement of £50 of rent had also been allowed to her husband, while she lived with him, in name of interest that sum of £1000; after the separation from her husband she had been allowed to possess the farm, as in lieu of the interest; besides, the existence of such claim of interest on the sum of £1000 had been specially recognised and acted upon by Strathaird's trustees, in fitting their accounts with Nicolson in his action. The existence of this debt was therefore sufficiently proved; for although the oath could not be founded on, having the effect of an oath of reference in this action, it could competently be founded on as a circumstance of evidence, just as any judicial admission, or any extant letter to a third party, might have been. And if the oath could thus be looked at, its import, along with the other facts and circumstances, was sufficient to establish this part of the claim. The legacy of £1000 was due to her, as the claim of Strathaird to Colonel Macalister's succession had been made good; and Strathaird could not have been meant to impute this legacy in satisfaction of the debt of £1000, because the payment of it at all, depended on the uncertain contingency of success in the litigation as to the colonel's succession. As the sum recovered, of that succession, had borne interest from the colonel's death, the legacy of £1000 must bear interest from the death of the testator.

The trustees answered—1st. That it was incompetent to found on an oath of reference, taken between other parties in a different action. It was especially true, as the oath stated the obligation for the £1000 to have been of a conditional sort; and, had the reference been made in this action, it would have been competent to have got the nature of the conditions explained, and whether they were fulfilled or not. Possibly it might have been explained, that the demand of the claimant was already satisfied. The oath, therefore, should not be referred to at all, and without it, there was no evidence of the alleged debt of £1000; as the sum of accounts in the former action was of no import, or avail, when disconnected from the oath. 2d. The legacy of £1000 must have been held to be granted on satisfaction of the obligation for £1000, if any such obligation was held to exist; and both sums, therefore, were not due. And in any event, no interest should be allowed to run on the legacy until it was paid, as the trustees had not till then recovered payment of the share of Colonel Macalister's succession, the fund out of which the legacy was to be paid.

The Lord Ordinary “found that the fund in medio consists, first, of the sum of £1000 sterling, undertaken to be paid by the truster, the late Colonel Macalister, to the claimant, Mrs Nicolson, on the occasion of her marriage, with interest from the 6th day of April 1832, the date of the death of the late Mr Macalister; and secondly, of the sum of £1000 sterling bequeathed by the said late Mr Macalister to the claimant, also with interest from the date of his death, under deduction of the rent of .

sterling per annum for the farm of Clachamish, payable by the claimant for the said farm from the period of her father's death, in terms of the trust-deed; and found the said claimant entitled to her expenses in this discussion." \* No. 39.  
Nov. 29, 18.  
Hunter v.  
Nicolson.

Strathaird's trustees reclaimed.

**LORD GILLIES.**—The first question is, whether the existence of the debt of £1000 is proved or not. In proof of this debt, the oath of reference in the former action between the claimant's husband and her father, Strathaird and his trustees is founded on, as showing, along with other circumstances of real evidence, that Strathaird had given a verbal promise of the sum of £1000, and that marriage had followed on it, so as to make the obligation binding and irrevocable. I think it competent to look at the oath to that effect; certainly it is no oath of reference as in this case, nor can it be so founded on. If it could, the only question left for the Court would simply be, *quid juratum est*? For that is all which is left, after an oath of reference is made. But though not possessing the conclusive force of an oath of reference, it may still be founded on, along with the other evidence in the case, and the question remains for the Court to decide, whether, on the whole evidence, they are satisfied that the existence of the obligation is proved. It would, I think, be unjust and contrary to the rules of evidence to hold that the claimant was absolutely barred from looking at the oath, or founding on it to any effect. Suppose that the claimant and her husband had had a family whose legitimacy was called in question; surely the children could not have been prevented from refer-

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\* "NOTE.—The question between these parties, though raised in the form of a discussion of the fund in medio in a multiplepoinding, truly regards the amount of Mrs Nicolson's claims against her father's trust-estate. The only one of these which appears to be seriously disputed, is that for the debt of £1000, alleged by Mrs Nicolson to have been contracted by her father upon the occasion of her entering into her marriage with Mr Nicolson. Considering the terms of the deposition made by the late Mr Macalister himself, in the former action brought against him by Mr Nicolson, in which action the nominal raisers, the trustees, were the parties; and considering that, in the subsequent accounting in that action, credit was actually given by the nominal raisers for the sum of £50 a-year, as the interest on the debt of £1000, the Lord Ordinary must hold the existence of that debt to be sufficiently established. On the other hand, looking at the terms of Mr Macalister's deposition, and the admissions of the claimant, that interest on the said sum, from the date of the marriage till 1817, was included in the former account, and that from that period she was either entirely supported by her father, or permitted by him to possess the farm of Clachamish without payment of rent, the Lord Ordinary thinks that interest on that sum of £1000 must be allowed only from the date of her father's death.

"Holding this debt to be established, there is no room for the presumption, that the legacy of £1000, which was not absolute but conditional, on the event of a litigation depending relative to General Macalister's succession, was intended by the testator as a payment of that debt. It must be considered as a separate legacy; and as, in consequence of the favourable termination of the litigation respecting General Macalister's succession, the nominal raisers, the trustees, have received full payment with interest, the Lord Ordinary thinks they must be liable to the present claimant in interest on the said legacy from the period of her father's



No. 39.

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 Nov. 29, 1836.  
 Hunter v.  
 Nicolson.

ring to this oath as at least a circumstance of evidence to instruct that their parents had been married. The Court could not have shut their eyes to the oath of the grandfather while deciding on the legitimacy of the grandchildren. Supposing then that the oath may fairly be taken into view along with the other evidence of the case, I think the proof of the debt is satisfactory. It is another question whether the debt may by possibility have been paid. But it is not on mere possibilities that the Court can proceed. So far as appears, the debt is outstanding, and it must be so dealt with. There is a second point regarding the interest which should be allowed on the legacy. I think it ought to run from the death of the testator. The fund out of which the legacy was to be paid, was not indeed recovered for two years afterwards, but it was bearing interest in favour of the testator from a much earlier period, and his estate has got the benefit of all that interest. The general rule therefore that a legacy should bear interest from the death of the testator, should apply here.

LORD MACKENZIE.—I am of the same opinion. As to any mere possibility that the debt of £1000 may have been paid, I cannot listen to that in the face of the oath, as it would have been the first thing which Strathaird would have stated when on oath, if he had ever paid the debt. My only doubt arose from this, that I think there is something on the face of the oath as if Strathaird did not look on this in the light of a simple debt unconditionally due by him, but rather as a sum which he had incurred, a species of qualified, and talis qualis obligation, to make good. Now if he did not hold he was under a full legal obligation for the amount, he might very well consider that the legacy of £1000, though conditional on success in an impending law-suit, should satisfy all claim at Mrs Nicolson's instance; and he might so intend it. But though I feel a certain degree of doubt arising from this circumstance, I incline, on the whole, to adhere to the interlocutor, as being the safest which, on the circumstances, can be pronounced. As to the question of interest I have no doubt whatever, and am clear for adhering.

LORD BALGRAY.—I take precisely the same view with Lord Gillies, and have no doubt of its soundness. The oath may be taken into our consideration, along with the other evidence, and I hold that the debt is sufficiently proved. Indeed nothing can be a stronger proof of the principal sum of £1000, being a debt, than the allowance of £50, per annum, in name of interest, for so many years. As to the question, from what date interest should run on the legacy of £1000, I have no doubt it ought to be from the testator's death.

THE COURT adhered, and found the claimant entitled to additional expenses.

M. N. MACDONALD, W.S.—MACINTOSH and GEMMEL, S.S.C.—Agents.

**FINNIE and OTHERS (Campbell's Trustees), Raisers and Claimants.—*D. F. Hope—More.***

**No. 40.**

**COMMISSIONERS OF THE TREASURY and MANDATARY, Claimants, Advocate Murray—Sol.-Gen. Cunninghame—*A. Murray, jun.***

**Nov. 30, 1836  
Finnie v.  
Lords of the  
Treasury.**

**Succession—*Ultimus Hæres—Trust—Executor.***—A testator who had next of kin, conveyed his whole estate, heritable and moveable, to trustees also named executors; power was given to sell “all or any part” of the estate, which power the trustees were required to exercise; the purposes of the trust were to be declared in a separate writing, and that writing was to contain a variety of legacies to be paid; the debts and legacies more than the value of the moveables left by the testator; after selling the heritage, and paying the legacies, a considerable residue remained unappropriated—Held by the Lords Commissioners of the Treasury, and acquiesced in, that this residue, consisting of the proceeds of the sale, could not be intromitted with by the trustees, qua executors, but was to be paid to the next of kin, as disponees, and that they had no claim on any part of it qua executors, *c. 14*; but that the Lords Commissioners of the Treasury, being now the crown, as *ultimus hæres*, ought to be preferred.

James Mure Campbell of Lochend, was the son of a bastard, born in 1834, without leaving any wife, child, or brother, or sister on his father's side. He had a brother uterine, George Douglas, town-clerk of Glasgow, with whom he lived on affectionate terms, and who attended him in his last illness. He had also sisters uterine. He was possessed of considerable real estate, both heritable and moveable, but chiefly heritable. In September 1834, he executed a conveyance of his whole estate, both heritable and moveable, to William Finnie and others, “but that always in trust, for the uses, and purposes herein after-mentioned and referred to.” He empowered the said trustees to call and pursue for, uplift, receive, and manage the debts, goods, and effects, hereby conveyed and disposed of, particularly, to call and pursue for all sums of money which I had or may still lay out, or may still lay out and invest in heritable or moveable estates, or otherwise.” “But declaring always, that these premises were granted in trust, for the ends, uses, and purposes, to be specified and particularly mentioned, and contained in a deed, paper, or other writing, to be executed by me, having reference hereto.” “And I do hereby give the most full and unlimited powers to my said trustees above named, or to the survivors or survivor of them (who are hereby desired and empowered to exercise such powers), to sell all or any part of my lands and tenements, heritable or moveable, particularly and generally above contained, and that either by public roup, or private bargain, as to my said trustees shall seem proper, with full power to grant all necessary and lawful dispositions.” “And I do hereby nominate and appoint my said trustees, and the survivor of them, to be my sole executors, and to manage my moveable means and estate, and give full powers to them to appoint factors.” The trustees were appointed, *in missions, nor singuli in solidum.*

**Nov. 30, 1836  
1st DIVISION.  
Ed. Corehouse  
D.**

No. 40.  
 Nov. 26, 1836.  
 Finnie v.  
 Lords of the  
 Treasury.

In April 1834, Campbell, whilst in England executed his "last will and testament," and on the narrative, that he had conveyed "to my friend William Finnie," and others, "or the survivor of them, or the executors or administrator of the survivor of them, as trustees, all and singular my real and personal property, whatsoever and wheresoever, upon certain trusts therein mentioned, subject to my further direction. Now I do hereby direct that they, the said William Finnie, and others, shall, within six months after my decease, out of any monies which may come into their hands, by virtue of the aforesaid trust-deed, pay the following legacies, namely, to my sister Isabella Douglas the sum of £2000," &c. Other legacies of specific sums, exceeding in all £16,000, were then stated, and certain articles, such as his watch, &c., were also particularly bequeathed. The testator then directed his "trustees or executors, to pay all his just debts, and funeral or testamentary expenses," and farther, "to do all acts necessary to make this a valid testamentary deed." There was no special legacy in favour of any of the trustees and executors.

Campbell shortly afterwards died, and his trustees accepted the office, and were duly confirmed executors nominate. There were almost no debts; but the legacies were more than enough to exhaust the whole moveable estate, and the trustees sold the heritage.\* The proceeds of the heritable and moveable estate exceeded £25,000; and after paying all the debts and legacies, there remained a residue of above £5000, which was unappropriated. The trustees raised a multiplepinding, in which appearance was made for the Lords Commissioners of the Treasury, in respect that by 5 and 6 W. IV. c. 58, the crown's right of ultimus hæres had been vested in them. Their Lordships appeared by the Lord Advocate as their Mandatary. The only question arose between them and the raisers, regarding their respective rights in the unappropriated residue.

*Pleaded by the Raisers.*

1. As the trust-deed contained directions to sell the heritage, it must be viewed as moveable, in questions of succession, and thus the whole estate of the deceased was of a moveable nature. The whole of it was dead's part; and by 1617, c. 14, the Raisers, being executors nominate, were entitled to one third of what remained after paying debts; or, at least, as the residue, after paying debts and legacies, was less than such third, they were entitled to retain the whole residue.

2. Prior to 1617, c. 14, executors retained the entire dead's part to themselves, even against the claim of the next of kin, and, a fortiori, against the crown. And as that statute only rendered them accountable to the widow or next of kin, they were not rendered accountable to the

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\* It was stated at the bar that the Stamp Office received duty upon the whole estate as if it were proper moveable succession, in respect of there being an alleged direction to sell the heritage, which, according to the opinion and practice of the Stamp office, placed the estate in the same position as if moveable.

any part" of the lands ; the requirement to use these powers  
an injunction to sell the whole heritage ; such heritage, therefore,  
as a moveable character,<sup>2</sup> either in regard to succession or any  
x. But even if it did, there was no part of the proceeds of the  
when sold, which could be introritted with by the raisers qua  
but merely as trust-disponees ; and as the moveables left by  
ed were more than exhausted by the debts and legacies, both  
must be taken into account,<sup>3</sup> there was nothing left to be taken  
stees, qua executors, under 1617, c. 14.

enactment of the statute 1617, c. 14, was intended to render  
universally accountable ; and though the " wife, children, and  
kin" were specified, as being the ordinary cases of accounting,  
of the Crown as ultimus hæres, to call executors to account,  
ly strong, when coming in place of the next of kin, and it could  
been cut off by a special and substantive enactment.<sup>4</sup> And that  
ld be liberally interpreted, because the Crown always ex gratia  
such bona vacantia according to humane considerations on those  
is of the deceased who had the best claim in equity. In the  
stance, it was believed that the brother uterine of the deceased  
een specially mentioned in the will, merely because the decea-  
sposed him entitled to take the unappropriated residue, as he  
re done in England where the will was made ; and accordingly  
bable that his claim to be donatary would be most favourably  
by the Crown.

conveyance being in trust only, the residue, after satisfying  
purposes, was unappropriated, and was just in the situation of  
intestate succession, where there was no heir or next of kin.

No. 40.  
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v. 30, 1833.  
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causury.

those parties were also named his executors : Finds, that on the 26th of April 1834, he executed a last will and testament, containing the purposes above referred to, and consisting of directions to pay his debts, and to pay various legacies there set down : Finds, that neither the trust-deed, nor the last will, contained any appropriation of the residue : Finds, that the said James Mure Campbell, having died on the 21st of May 1834, without leaving heirs or next of kin, the present competition for the residue of his estate has arisen between the above-named competitors in the character of his executors, and the Right Honourable the Lord Advocate, and the Lords Commissioners of the Treasury on the behalf of the Crown : Finds, that the moveable property of the truster is more than exhausted by his debts and legacies, forming a proper burden on such moveable succession : Finds, therefore, that the subject truly in dispute consists of the residue of the heritable estate after payment of the balance of the debt and legacies : Finds, first, that the terms of the trust-deed are not such as to divest that residue of its heritable character in regard to succession : Finds, secondly, and separatim, that even if the trust-deed had contained such absolute and imperative directions to sell, as to produce that effect, the residue must still have been held by the claimants, not as part of the moveable succession of the testator vested in them as executors, but as the proceeds of his heritable estate vested in them as trust-disponees : Finds, that in this last character, being the only character in which, in any view, the claimants hold the residue, those claimants are necessarily bound to account, and cannot found upon their alleged rights qua executors, as saved in a question with the Crown under the act 1617, c. 14. Therefore, Repels the claim of the said trustees ; and finds the said trustees liable to account to the other competitors, the Lord Advocate, and the Lords Commissioners of the Treasury on behalf of the Crown : Prefers the said Lords Commissioners to said residue, and discerns in the preference accordingly : But finds no expenses due.”\*

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\* “ NOTE.—Had there been any thing to claim here properly falling under the description of executry of the testator, there might have been room for the question raised on the part of the trustees, whether the right to call executors to account, declared by the act 1617, c. 14, was confined to the wife, children, and nearest of kin, or was available to the Crown, in cases like that which has occurred here. Considering the professed object, and even the terms of that act, the Lord Ordinary is rather inclined to think that its effect was to declare the general responsibility of executors, and to remove that abuse, according to which they had been previously considered and dealt with, as beneficially interested in the succession. Since that statute, certainly, executors have been uniformly treated as merely holding an office, with the right of claiming a third of the dead's part, in so far as undisposed of, as a consideration for their trouble in discharging it ; and, according to this view, the Crown of course would be entitled to the same advantage as the widow, children, and nearest of kin—the only parties mentioned in the statute, probably because they were the parties with whom the question, in all cases, with a very few exceptions indeed, was likely to occur.

Lord Ordinary thinks that both of those assumptions are erroneous. It is not in all cases that may occur, and have occurred, in which a trustor has so clearly expressed his intention that his heritable property should be converted into money, that the legal conclusion that it was to be treated as moveable in regard to succession. Such seems to have been one of the points which, among others, was decided in the case of *Dick v. Gillies*, 4th July 1828. But the present trust is not of that kind; it is granted for purposes to be named in a separate clause, and it contains a power of sale, from its mode of expression, clearly directed 'to sell all or any part of my lands or estate,' the effect of which does not appear to be taken off by the parenthetical and superfluous expressions, 'who may desire and be required to exercise such powers.' The clause authorizing the trustees to raise up and discharging heritable or personal securities, is in the form of a power, and nothing else. There is no direction to convert his whole property into money, and what is of great importance, there is no appropriation of the residue to any implication that such a conversion was in the trustor's view. No such case has, by his last will, left legacies, which will deeply encroach upon the residue of his estate. But it does not appear to the Lord Ordinary that that circumstance can affect the character of the residue as regards succession. In substance, the present case appears exactly identical with that of a party conveying his land and a trust, with a power of sale for the payment of certain legacies set down in the trust-deed, without any farther direction, a settlement which, though of the effect of creating moveable rights in favour of the legatees, would leave the residue of the estate in regard to the heir; and certainly would not, without some farther and more positive indication of the testator's intention, let in his next of kin. In short, the Lord Ordinary thinks that if the present competition had arisen for the residue of the estate, the heir of the testator and his next of kin, it must have been determined in favour of the former. But 2dly, and even on the supposition that the effect of the trust-deed was necessarily to convert the testator's heritage into moveables, so as to render it descendible to his next of kin in preference to his heir, it does not follow that it would render it executry in the only sense in which it can benefit the trustees. Giving them the full benefit of their construction of the will of 1617, their rights as executors cannot extend beyond that which they took under the will, viz., the proper moveable succession as it stood at the death of the testator. In so far as regards the price of his heritage sold in obedience to his will, they are not executors but trustees, a character necessarily implying a duty of fidelity and the gratuitous discharge of their duty, and which never did.

**No. 40.** ther-uterine of the deceased, or whoever might be the intended donatary of the Crown, from having to bear the expenses of the litigation, which had been occasioned by the raisers of the multiplepoinding, in consequence of their having endeavoured to appropriate the fund in question to themselves.

**Nov. 30, 1836.**  
**Trustees of Mrs F. B. Macalister v. Trustees of General K. Macalister.**

The raisers answered, that the points involved in the discussion had been considered by the Lord Ordinary as new and difficult; that, in the result, they (the raisers) had performed a troublesome office as trustees and executors, without any remuneration, and all for behoof of the Crown-donatary, whoever he might be; and that they had acquiesced in the Lord Ordinary's interlocutor, so as to avoid all unnecessary litigation.

**THE COURT adhered.**

**W. and D. ALLESTER, W.S.—R. MACKENZIE, W.S.—Agents.**

**No. 41. TRUSTEES OF MRS FRANCES BYNG MACALISTER, and OTHERS, Claimants.—M<sup>c</sup>Neill.**

**TRUSTEES OF GENERAL KEITH MACALISTER, Claimants.—Whigham.**

**Testament—Implied Condition.**—A testator, who died abroad, left certain special legacies which were administered by his executors, along with the rest of his estate, as a cumulo fund, during a considerable period which was requisite for extricating the settlement, and realizing the estate: the special legatees claimed and obtained a share of accumulations of interest, and profits accruing on the cumulo fund, proportioned to the amount of their legacies, as compared with the rest of the cumulo fund:—Held, that a share of the expenses of administering the cumulo fund should be laid on them in the same proportion, and that, in the special circumstances, it should not be laid on the residuary legatee.

**Nov. 30, 1836.** **THE** late Colonel Norman Macalister, Governor of Prince of Wales' Island, died abroad in 1810, having executed a holograph settlement, which was ambiguous in various respects, and gave rise to judicial discussions as to its provisions, which were not finally extricated till 1834. There afterwards remained a question between the trustees of certain special legatees, and the trustees of General Keith Macalister the residuary legatee, whether the whole expense of management should fall on the residuary legatee, or whether a rateable proportion thereof should fall on these

**1ST DIVISION.**  
**Ld. Fullerton.**  
**D.**

the residue of the price of heritage, it appears to the Lord Ordinary that they can hold it in no other character than that of trustees, and consequently under a liability to account. It follows that, in the present case, the right of the Crown to call them to account must be sustained."

\* The interlocutor of the Lord Ordinary required to be altered, in point of form, as it had, by a clerical error, preferred the Commissioners of Woods and Forests, in place of the Lords Commissioners of the Treasury.



terest, and of all profits accruing on the cumulo fund, proportionate amount of their legacies, as compared with the amount of the fund.

In the circumstances, the Lord Ordinary, as more fully explained in the note, held that a share of the general expense of administration of the cumulo fund, should be laid on the special legatees, proportionate to the amount of their legacies as compared with the cumulo fund. His Lordship farther found that, as the Court had previously held that the expense of remitting to this country the sums due to the legatees should be laid on the legatees alone, it should also follow that the expense of correspondence relative to these remittances should be borne by them. His Lordship having pronounced an interlocutor \* to that

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NOTE.—Had the present case been that which usually occurs between the administrators of the residuary fund of a testator, the expenses under the heads of the Objection disposed of by the above interlocutor, would have been borne by the residuary fund. According to the usual principle, the legatees must have received their legacies, while the expense of management has fallen on the party whose interests, being residuary, were, agreeably to the presumed intention of the testator, postponed to theirs. But the present case involves specialties, which distinguish it in some essential particulars. By Mr Macalister's will, certain parties were appointed trustees for the special legatees, which trustees were entitled to receive instant payment of the legacies and were directed to accumulate the sums while the trust continued, and to pay for them in a particular manner therein mentioned. The intention of the testator, then, clearly was, that from the beginning the administration of these legacies should be separate and distinct from the general execution of the will. By the terms of instructions, of date subsequent to the will, John Macalister, Esq. and Daniel McInnes, two of the persons who had been named guardians and

**No. 41. The Trustees of Mrs Frances Byng Macalister, and others of the special legacies, reclaimed.**

Nov. 30, 1836.  
Trustees of Mrs  
F. G. Macalister  
v. Trustees  
of General K.  
Macalister.

**THE COURT unanimously adhered.**

**J. W. MACKENZIE, W.S.—M. N. MACDONALD, W.S.—J. BARRAS, W.S.—**

of accounting was here rejected by the special legatees, who contended were entitled, not merely to interest on the legacies, but to the whole tions of interest, as well as of profits, made in the administration of the fund, in the ratio which those special legacies bore to that general fund. As to the accumulation of interest was decided in their favour by the locutor of the Court of 30th June, 1827, and the claim to the share of addition to interest, was determined by the interlocutor of the Lord Ordinary of 12th May, 1835, afterwards affirmed by the Court.

“ In these interlocutors it is evidently assumed, that the two gentlemen happen to be executors, acted not only in that capacity, but in the capacities for the special legatees, and were understood to have held and administered in this last character the amount of the special legacies from the death of the testator. Now the 1st, 2d, and 5th heads of the Objection embrace various of expense incurred by those gentlemen before bringing the present action, for the purpose of informing themselves both as to the extent of the rights of the legatees and as to the particular course of legal proceedings which should be adopted in extricating their complicated interests.

“ In these circumstances, it appears to the Lord Ordinary that the case should be treated as a question not between legatees and a residuary fund, but between two parties interested in a cumulo fund in certain proportions; and that the trustees having taken benefit to a large amount by that construction of the interests of the parties, are not entitled to reject it in regard to the expenses incurred in that cumulo administration. It appears to him, then, that the expenses embraced by these heads of the Objection ought to be borne by the parties proportionally to their respective interests in the amount of the fund, of which the division and appropriation gave occasion to these expenses.

“ The fourth head is attended with less difficulty.

“ It has been finally determined by the interlocutor of Court of the 30th June 1827, that the sums due to the legatees must be remitted at the expense of the legatees; and there seems no good reason for applying a different rule to the expenses of the correspondence relative to such remittances. For by the terms of the payments to the trustees for the legatees were to be made in India, immediately on the testator's death, and the interests of those legatees have been borne by them with on the footing of their being entitled to the full benefit of such payments, though from the circumstance of the executors being also trustees, the payments did not de facto take place. Though the correspondence in question, was the correspondence of the agent of the executors, it must be held as a correspondence on behalf of those gentlemen in their character of trustees for the legatees, and is just the correspondence which would have taken place had the money been actually paid to the trustees for behoof of the legatees immediately on the death, and which in that view must of course have been borne by the trust-fund, and not by the residuary fund of the testator.”

No. 42.

THOMSON, BONAR, and COMPANY, and MANDATARY, Advocators.—*Ivory.* Nov. 30, 1832. Thomson v. Johnstone.

CHARLES JOHNSTONE (Moir's Trustee), Respondent.—*Deas.* Shepherd v. Grant.

*Partnership—Instance.*—Objection to the instance in an action, repelled that the summons was raised in name of a company firm, without mention of the individual partners.

AN action was raised before the Sheriff of Forfarshire, against the respondent Johnstone, and another, trustees of Moir, at the instance of the advocates, "J. Thomson, T. Bonar, and Company, merchants in London, and Christopher Kerr, their mandatary," the names of the individual partners of the firm not being mentioned in the summons. The Sheriff dismissed the action (24th July, 1832), "in respect it had been raised in the name of a company, without specifying the names of the partners." Nov. 30, 1832. 2d Division. Lord Jeffrey F.

In an advocacy, the Lord Ordinary, "in respect of the judgment of the Court in the case of Forsythe, 18th November, 1834,<sup>1</sup> found that the action was sufficiently libelled in the action raised in name of "J. Thomson, T. Bonar and Company," and remitted to the Sheriff to recal his interlocutor and proceed with the process.

Johnstone reclaimed.

THE COURT adhered to the Lord Ordinary's finding as to the instance; but an objection having been raised by the respondent, that certain parties had not been called, they remitted to his Lordship to hear parties farther.

MACLACHLAN and IVORY, W.S.—BROWN and MILLER, W.S.—Agents.

JAMES SHEPHERD, W.S.—*Rutherford—Thomson.*

ROBERT GRANT.—*Keay—Anderson.*

No. 43

*Succession—Clause—Destination.*—A party in an entail of his lands destined them to the "eldest son" of his first, second, and third daughters seriatim, in the order of their seniority; then to the "second son" of each seriatim, and then to the "heirs male" of his "first, second, and third daughters in the same order of succession,"—Held, that, under the last destination, after the first and second sons of the three daughters had failed, the heir-male of the eldest, though a fourth son, took before any heir male of the second daughter posterior to her second son. 2. Observed that, under destinations similar to the first two, the party entitled to the character of first or second son, is the person holding that character when the succession opens to that branch of the destination, though not possessed of it at the date of the granter's death.

<sup>1</sup> Ante, XIII., 42.

No. 43.

Dec. 1, 1836.  
Shepherd v.  
Grant.

THE late John Leith of Blair, of date 13th November, 1761, executed an entail of his estate. He had three daughters but no son. The eldest, Anna, was married to John Grant, younger of Rothmaise, and at the date of the deed had five sons, John, James, Alexander, Robert, and Peter. The second, Janet, was married to the Rev. Thomas Shepherd, minister of Bourty, and had at the date of the deed four sons, John, Alexander, Robert, and Thomas. The youngest daughter, Margaret, was at this time unmarried. The deed of entail set forth as follows: "Forasmuch as I have taken into my serious consideration, that I have no heirs-male of my own body to represent me, and succeed to my lands and estate, and that I have grandchildren and am desirous that my memory and surname of Leith should be preserved in the persons of my grandchildren and their heirs, therefore, and for certain other onerous causes and weighty considerations moving me, witt ye me, the said John Leith, to have sold, alienated, and disponed, likeas I, by the tenor hereof, from me, my heirs, assignees, and successors, sell, annatlie, and dispone, to and in favour of myself in liferent, and to the heirs-male lawfully to be procreate of my own body in fee; whom failing, to the eldest son living at the time of my decease, procreate betwixt John Grant, younger of Rothmaise, and Anna Leith, my eldest daughter, and to the heirs-male of his body, in fee; whom failing, to the eldest son of Thomas Shepherd, minister of Bourty, procreate betwixt him and Janet Leith, my second daughter, and the heirs-male of his body, in fee; whom failing, to the eldest son lawfully to be procreate of Margaret Leith, my third daughter, and the heirs-male of his body, in fee; whom failing, to the second son procreate betwixt the said John Grant and the said Anna Leith, my eldest daughter, and the heirs-male of his body in fee; whom failing, to the second son of the said Thomas Shepherd, procreate betwixt him and Janet Leith, my second daughter, and the heirs-male of his body; whom failing, to the second son lawfully to be procreate of the body of Margaret Leith, my third daughter, and the heirs-male of his body, in fee; whom failing, to the heirs-male of my said first, second, and third daughters, in the same order of succession: All whom failing, to me, my nearest heirs and assignees whomsoever: But with and under the express provisions, restrictions, reservations, clauses irritant, and others after-mentioned, All and Haill, the town and lands of Nether Blair," &c.

This deed contained the usual limitations, in setting forth which, the parties against whom they were directed, were indiscriminately described as "the said John Grant, my grandson, or any of the heirs of tailzie," or as "the eldest son of the said John Grant (his daughter's husband), and the other heirs and members of tailzie;" and in a subsequent deed, executed in 1763, containing provisions to his daughters, Mr Leith, with reference to his landed estate, of which his eldest daughter Anna was to have the liferent, referred to "the fee of the same being some time ago made over to John Grant, her eldest son."

Mr Leith died in the course of the year 1763, and was succeeded by John Grant, eldest son of the eldest daughter. He died without issue in 1769. On this event, John Shepherd, the eldest son of the second daughter, made up titles as heir of tailzie, under the second branch of the destination, and he survived till 1832, when he died, also without issue. The youngest daughter had been married subsequent to the date of the entail, and had had an only son; but he had died in 1794, likewise without issue; so that the first series of destinations in favour of the eldest sons of the three daughters was now exhausted, and the succession opened to the second series, viz. that in favour of their second sons, respectively. Prior to the death of John Shepherd, however, James and Alexander Grant, the second and third sons of the eldest daughter, had died, leaving no children; and Alexander Shepherd, second son of the second daughter, assuming that the estate had now fallen to him, made up titles as nearest heir of tailzie to his brother, and possessed it till his death in February, 1836. He having left no issue, a competition ensued between James Shepherd, W.S., the eldest son of Robert Shepherd, third son of the entailer's second daughter, and Robert Grant, the fourth son of the eldest daughter. These parties accordingly took out competing brieves, which having been brought by advocacy into this Court, a record was made up, and the cause reported by the Lord Ordinary, on cases, to the Court.

No. 43.  
Dec. 1, 1836  
Shepherd v.  
Grant.

*Pleaded for Shepherd—*

1. The deed of entail makes special reference to the “grandchildren” of the entailer, as being in life at its execution; and the true construction of the destinations in favour of the first and second series of heirs (especially when taken in connexion with the mention nominatim of John Grant, the eldest son of the eldest daughter, in the clauses of limitation, and in the deed 1763), is that the first and second sons existing at the date of the deed, (subject to an exception as to the eldest son of the eldest daughter alive at the death of the entailer), were individually, though descriptively called in their order; or, at all events, that the first and second son respectively intended, were such as should hold that character at the date of the entailer's death, and not at the opening of the succession.

2. That the destination posterior to the series of second sons, and in favour of the “heirs male,” of the entailer's “first, second, and third daughters, in the same order of succession,” had reference not merely to the relative seniority of the daughters, but to the order of succession adopted in the previous series as to their first and second sons, so that this destination would carry the estate to a separate series of third sons and then fourth sons, &c., of the several daughters respectively. Then, on this construction of the destination, as the eldest son of the third daughter had failed, and as James and Alexander Grant, the second and third sons of the eldest daughter had survived the entailer, and had now both also

No. 43. failed, and as there was no second son of the third daughter, the succession had opened to the representative of Robert Shepherd, the third of the second daughter, who was entitled to take before Robert Grant, the fourth son of the first daughter.

Dec. 1, 1836.  
Shepherd v.  
Grant.

*Pleaded for Grant.*

1. It is not admitted that Alexander Grant, the third son of the eldest daughter, was alive at the death of the entailer; but, assuming that he was, it is obvious that, in determining who is the person holding the character of eldest, second, or third son, and entitled to succeed in such character, on the succession opening to that series of heirs, that party must be taken to whom the character belongs at the time when the succession so opens. This was expressly decided in the Roxburghe cause, where the heir-male of a fourth daughter was held entitled to take under a destination to the eldest daughter and her heirs-male, as standing in the character of eldest daughter at the time when the succession opened under that destination, and accordingly here, the two intermediate brothers having predeceased before the succession opened to the series of second sons, Robert Grant then held the character of second son of the eldest daughter, and was entitled to the estate in preference even to Alexander Shepherd, who had been improperly served heir without his knowledge, and consequently still more is he now entitled to succeed before the third son of the second daughter, even on the assumption that the destination truly calls for a series of third and posterior sons in the same way as is provided as to a series of first and second sons. But,

2. The concluding destination is not of that nature at all. It is similar to the "heirs-male" of the respective daughters "in the same order of succession," which can mean nothing more than in the order of seniority of the daughters, the heirs-male of the first daughter succeeding after the series of second sons is exhausted, in preference to those of the second daughter, and the heirs-male of the second before the heirs-male of the third. Even assuming, therefore, that the whole series of second sons is exhausted, and that Robert Grant is only to be viewed as holding his original character of fourth son of the eldest daughter, still as her heir-male under the last destination entitled to succeed prior to any heir-male of the second daughter posterior to her first and second sons; consequently he is in this view, equally as in the other, preferable to Shepherd, who represents only the third son of the second daughter.

LORD JUSTICE-CLERK, after reciting the facts, proceeded—The question comes to be, what is the construction of the destination? It appears to me perfectly clear that the testator, by using the words eldest son, second son, &c. contemplate nothing but the character of first or second at the time the succession opened to them. It is a settled point, that when a party leaves an estate to his first, second, third, or other son of a person named, that individual will succeed and enjoys the character when the succession opens, and if ever there was a point liberately decided, that point was so in the Roxburghe cause. There the case

intended to individualize them, it would have been the easiest thing in the world to have specified them. As to the eldest son of the eldest daughter, he arises the one who should be institute as the eldest son living at the time of the decease. That is the commencement of the series, but there are no such words in regard to any other substitute. It is said on the part of Mr Shepherd that we must supply that. We can do nothing of the kind, as that would be a new deed, and, therefore, there is a total want of evidence on the face of the document of any intention to individualize them, and the fact that they were in life tends to prove that he did not mean to do so. I cannot arrive at the conclusion contended for by Mr Shepherd, even taking the most unfavourable view for Mr Grant and considering the case to be under the second branch of the destination. But that is not all. There is a remainder, after providing for the eldest and second sons of the three daughters, in these words, "whom failing, to the eldest son of my said first, second, and third daughters, in the same order of succession." Then under these words it cannot be doubted that Mr Grant, as heir of the body of the eldest daughter, must succeed before the son of the third daughter, the second daughter. I do not need to go back to the case of Linplum, as Mr Grant is heir-male of the body he is certainly heir-male whatsoever, and it is Mr Grant that must be preferred.

D GLENLEE.—I agree with your Lordship. Mr Grant might have reduced the service as erroneous, and the question brought before us really is whether he is heir-male of the eldest daughter. It is plain all the second sons of the daughters Mr Grant are out of the way, and after that it is the heir-male of the eldest daughter that is to succeed, and in that character he is clearly entitled to it. It is too plain for argument.

D MEADOWBANK.—I am of the opinion expressed by Lord Glenlee. It is unnecessary to say what would have been the decision if the question had arisen under the first branch of the destination, though if driven to it I would have agreed with your Lordship that we were to judge of the character of the party claiming under it as at the date of the succession opening. But the question is



No. 43. daughter, and under that destination his right is unquestionable, there being second son of any of the daughters remaining.

Dec. 2, 1836.

M'Gill v.  
Ferrier.

THE COURT accordingly found that Mr Grant was entitled to be served, dismissed the brieve of Mr Shepherd.

JAMES SHEPHERD, W.S.—A. STOBIE, W.S.—Agents.

No. 44.

— M'GILL, Pursuer.—D. F. Hope.

— FERRIER and OTHERS, Defenders.—M'Neill—Anderson.

*Expenses—Haver.*—1. Defenders in a cause, who were professional men having been examined by the pursuer as havers—held not entitled, pendente processu, to claim expenses for time and trouble in searching out documents, &c., their claim reserved till the issue of the cause. 2. Opinion intimated that the result would have been different had the claim been for travelling expenses.

Dec. 2, 1836.

2D DIVISION.  
Lord Jeffrey.

THE defenders in this process, who were professional men, were examined as havers under a diligence at the instance of the pursuer. The examinations having lasted several days, they craved expenses there by incurred on account of time and trouble in going over books, paying clerks, &c., whereupon the Lord Ordinary reported the question, whether, having been called as havers, these parties were entitled, pendente processu, to have their expenses allowed them?

The *Dean of Faculty*, for the Pursuer, resisted the demand, and maintained—This case is attended with specialties. If the defenders have chosen to deny a certain fact, and we recover from them, under a diligence, documents which disprove their allegation as to this fact, they are not entitled to expenses for the time spent in searching out those documents. This claim must abide the issue of the cause, for before it can be entertained, the opposite party and the Court ought to see the depositions which are not before them, and ascertain whether unnecessary depositions had not been caused by the parties under examination.

M'Neill and Anderson, for the Defenders, replied—Having been examined as havers the defenders are entitled to their expenses,<sup>1</sup> more especially as they are professional men. The question is whether the defenders are to bear a part of the expenses of the pursuer, who has called them as havers and ought to pay them as such, his claim for the expenses so far out being reserved entire, in the event of his gaining the cause; having used the defenders' documents, and put them to expense, he is not entitled to refuse this demand.

LORD JUSTICE-CLERK.—It appears to me that ample justice will be done

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<sup>1</sup> Henderson v. Thomson, July 9, 1776, 5 Supp. 437; Darling's Form of Process, p. 236.

ed to come in from the country, and a claim been then put in for travelling  
ms.<sup>1</sup>

THE COURT accordingly instructed the Lord Ordinary to refuse the motion  
for expenses.

—Agents.

JAMES MURISON, Suspender.—*Rutherford—Ivory.*  
CORPORATION OF TAILORS OF DUNDEE, Chargers.—*Keay—Whigham.*

No. 43.

*Exclusive Privilege—Reparation.*—Circumstances which held not to justify an  
l of £50 of damages, alongst with expenses of process, against a party who  
exercised the trade of a tailor in violation of the exclusive privileges of a cor-  
poration, and in contravention of an interdict.

the year 1829, the suspender Murison carried on the business of a  
tailor and tailor in Dundee. In June of that year, the Corporation of  
Dundee, with which he had not entered, presented a petition to the magis-  
trates, praying to have him interdicted from pursuing the tailor branch of  
business, and for damages, as having encroached upon their exclusive  
privileges. Interdict was granted accordingly. In August they present-  
ed a supplementary petition to the same effect, on which interdict was  
granted of new, and the proceedings resulted in a decree (Feb. 25, 1830)  
for £40 of damages and for expenses. This process was subsequently  
satisfied by Murison.

hereafter Murison applied to be admitted a member of the corpora-  
tion, and offered to pay the dues of entrance, agreeing to perform an

Dec. 2, 1836.

2d Division.  
Lord Jeffrey.  
T.

No. 45.

Dec. 2, 1836.  
 Murison v.  
 Tailors of  
 Dundee.

As Murison still continued, notwithstanding the interdict, to carry on trade as a tailor, the corporation, in July following, presented an application to the Sheriff of Forfarshire, praying for interdict of new and damages for encroachment on their privileges from the date of the magistrates' decree. In the course of the proceedings following thereon, without admitting that the former essay-piece had been properly rejected, Murison declared himself willing to enter with the corporation, and offered to perform a new essay, on condition of being allowed "to make a full suit of clothes on his own boards, in presence of neutral essay-masters, besides paying the usual entry money."

Thereafter the corporation presented a supplementary petition to the sheriff (Feb. 13, 1831), with which the former was subsequently conjoined, craving additional damages for further infringement of their rights by Murison, since the date of the application in July. Pending the process, Murison presented a separate summary application to the sheriff, stating, *inter alia*, the offer above mentioned, and praying to be admitted to the privileges of the corporation on his paying the dues of entry, and "complying with any other rules, as he has proposed, or the sheriff shall deem reasonable." The sheriff remitted to the essay-masters of the corporation to take trial of his qualifications under the same conditions as the first essay-piece had been performed. Murison not complying with the remit, the sheriff decided against him with expenses; and of this judgment he brought an advocacy.

Meanwhile a record was made up in the conjoined processes of interdict before the sheriff at the instance of the corporation, Murison averring, *inter alia*, "that he was, at the date of the first essay, and now is able to work with his own hands as a tailor, and that he has cut and made and can cut and make clothes, so as should entitle him to admission." A proof was allowed, but before it was concluded or an interlocutor on the merits pronounced, the process was advocated *ob contingentiam* of those previously mentioned. The Lord Ordinary (Corehouse) repelled the reasons of advocacy in all the processes, with expenses, adding the subjoined note.\* His Lordship's interlocutor was acquiesced in, and the process at the

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\* "There are three advocations with regard to this matter. In the advocacy of the conjoined actions at the instance of the corporation before the Magistrates of Dundee, it is clear from the advocator's admissions, that he has violated the privileges of the corporation *to a great extent, both before and after the interdict*; and the interlocutor of the magistrates brought under review seems well founded in every respect. If indeed the advocator had persisted in the plea maintained in the cases before the sheriff, that the tailors are not a corporation, it might have been necessary to advocate this case, and to have sisted process until the fact was determined; but the advocator abandoned that plea at the bar. In the action at the advocator's instance before the sheriff, the Lord Ordinary thinks that a dress coat is a reasonable essay-piece, and therefore that the sheriff's interlocutor is well founded. In the conjoined actions at the instance of the corporation, no interlocutor upon the merits has been pronounced, having been advocated *ob contingentiam*. It

to make articles or clothing which were worn by customers ; and  
being furnished from his shop, between 25th February 1830,  
1 May 1831.

Sheriff-substitute found (Feb. 11, 1835), that no new interdict was  
y, and in regard to the claim for damages, found it instructed, "that  
ader has all along been willing to enter with the corporation, and  
ie usual entry-money ; as also to give proof of his being apt and  
arry on the tailor trade, by performing, as is customary, an essay-  
work : Finds it proved that the defender is possessed of sufficient  
is trade, to entitle him to an entry with the incorporation ; and  
instructed, that others have been admitted members, who, upon  
ission, have afforded less proof of their qualifications : Finds that  
iers, though allowed, have failed to prove the damage alleged in  
ised condescendence, or to prove that the corporation have sus-  
umage to any extent whatever, by the work alleged to have been  
ed by the defender."

Interlocutor was recalled on appeal by the corporation to the  
pute, who granted interdict of new, and found the corporation  
to £50 of damages, and Murison liable in expenses subject to  
tion.

on had already paid to the corporation £40 of damages, and £160  
ses, under the previous proceedings, and had latterly retired from  
and become a bone-grinder in a country village.

orporation having given a charge on the sheriff's decree, Murison  
mented a bill of suspension, which was passed, and on the expedie  
pleaded :—

e decree charged upon is ill-founded, the complainer having been  
willing to enter with the trade on the usual and customary

No. 45. the damages and expenses awarded against him were, in the circumstances, ruinous and oppressive.

Dec. 2, 1836.  
 Murison v.  
 Tailors of  
 Dundee.

The corporation answered :—

1. No illegal or unwarrantable qualities were adjected by the respondents to the complainer's proposal to become a member of the incorporation ; and, moreover, his aptness or otherwise to exercise the tailor craft, is altogether irrelevant to the only questions raised under the present process.

2. It is *res judicata* that the respondents were entitled to demand performance by the complainer of an essay-piece, and that the conditions they imposed were reasonable and fair ; and the complainer has, in the subsequent proceedings, admitted by implication the insufficiency of his essay in March 1830.

3. Under all the circumstances of the case, and in particular, as the infringement of the exclusive privileges of the corporation by the complainer was continued in violation of an interdict, and in respect also of the great extent to which he carried on the trade of a tailor, the proceedings against him by the respondents were neither nimious nor oppressive, nor the damage awarded excessive, but, on the contrary, much less than his gain by the illegal proceedings.

The Lord Ordinary pronounced the following interlocutor, adding the note subjoined : \*—“ Finds, 1st, That there is nothing in any of the suspender's judicial statements, in his former processes with the chargers, or

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\* “ The chargers made a strong effort to have the proof taken, with their own assent, before the Sheriff, as to the essay-piece in March 1830, thrown aside as irrelevant, upon the pretext that the suspender had substantially admitted the insufficiency of that essay, by afterwards (in March 1831) applying to be allowed to perform another, upon terms and conditions, which have since been found inadmissible. The first, and a conclusive answer to this is, that there is no plea in law to this effect on the record ; a second answer is, that the fact of such application having been made by the suspender, was fully known to the chargers long before the proof in question was taken or allowed, in spite of which they not only allowed it to go on without protest or objection, but took part in it, and argued upon its import, as an important element for the decision of the cause, up to the debate before the Lord Ordinary. But even if it was still open to them to insist in this objection, the Lord Ordinary is of opinion, that it is entirely groundless in itself. The suspender not only never admitted that his essay-piece had been *justly* rejected, but on the contrary, uniformly maintained, that it was perfectly sufficient, and ought to have been so reported by the triers for the incorporation. After this last process was instituted, and when he had offered, and been allowed to prove the sufficiency of that essay, he did indeed, with a view to save the delay and expense of such a proof, offer to perform another, upon certain conditions ; and the Sheriff, and afterwards the Lord Ordinary, found, that he was not entitled to insist on those conditions. But this was merely rejecting a tentative or alternative method of making out his case ; and, when it was rejected, he naturally fell back upon that which he had originally suggested ; and went on with his proof without inconsistency, or objection from the respondents ; and comes now, quite competently, to ask judgment upon its import and legal effect.

“ Upon *that*, the Lord Ordinary will not enlarge. He thinks it sufficiently pro-

of 'the accuracy necessary in measuring the chest' (the neglect of  
ver, is stated on the same authority, 'to lead *infallibly* to a misfit,' a  
in this instance appears *not* to have followed), and that the sewing did  
ery workmanlike. But 3dly, It is completely proved, that the sus-  
ediately after this essay-piece had been executed, began openly to  
trade in his own person; and was in the practice, from that time con-  
the date of the proof, to measure, cut out, and sew up, with his own  
article of dress for his customers; and that in such a sufficient man-  
e them satisfaction, and increase the resort to his establishment; and  
y appear that he worked more slowly, and set about some of the ope-  
clumsily than one bred to the craft from his childhood; yet the mere  
aving so wrought, not once or twice, as a mere strained proof or exhi-  
fitness, but regularly, privately, and *profitably*, in the ordinary course  
me, does appear to the Lord Ordinary the most conclusive of all proofs,  
really that aptness and ability for the trade, which it was the only  
arpose of the essay-piece to put to the test; and those very operations  
e chargers have been found entitled to damages, being performed by  
l applied regularly for admission, tendered his full entry money, and  
formed his essay, afford the most conclusive proof of the injustice of  
und.

ossible, indeed, to look at the history of this case, without a strong  
hat the whole proceedings of the chargers towards the suspender, have  
of a harsh and vindictive character. They have already obtained, and  
actual, an award for no less than L.40 damages, for his working a few  
ions to the essay of March 1830, and have actually recovered a sum of  
L.160 of expenses relative to that period, and to his subsequent offer  
ay. The effect of these litigations, too, has been entirely to break up  
er's business as a clothier and merchant, as well as a tailor, and to drive  
ds of two years ago, from the town of Dundee; he having, during that  
n reduced to 'carry on the trade of a bone-grinder in the village of  
Such was the relative situation of the parties when the learned Sheriff-  
in February 1835, assoilzied the suspender from this (third or fourth)  
of the chargers. But they having craved the judgment of the Sheriff-  
ained an alteration of that judgment, and got the decret now charged  
50 of additional damages, and £40 of expenses. The suspender offered  
evidence if the chargers would pass from the damages. But this being

No. 45.

Dec. 2, 1836.

Curson v.

Mills of

London.

out objection, before the Sheriff, in the case now under suspension, upon the ground of *res judicata*, judicial admission, or otherwise; and also, that

interest, as a corporation, must plainly be one or other of those two; *first*, to increase the consequence and wealth of the corporation, by having the greatest possible number of entrants, paying the highest possible fees of admission; or *second*, to keep out from a share of these advantages, as many as possible of those who are entitled to admission, if qualified, upon very low or merely nominal fees, or without any payment whatever. From *the last* of these classes, they may have an interest to exact as difficult an essay-piece as law and justice will allow; but certainly not from the former; and there is room, therefore, to suspect their motives, when they are particularly scrupulous with one of this description. It is more important, however, to consider how the law deals with their right thus to test the qualification of entrants, in cases where they are under the strongest temptations to assert it with severity; and the case of discharged soldiers or King's freemen, affords an apt illustration. Such persons are entitled, without any fees of admission, to practise any trade, 'for which they are apt and able;' and it is the right accordingly of any corporation, whose functions they assume, to question their ability. The limits of this right, however, are carefully considered, and deliberately settled, in the case of M'Kenna, 13th June 1828, and the other cases there referred to; and, though there is no doubt a difference as to *the form* in which proof of ability or disability may be required in the two cases, it does appear to the Lord Ordinary, that a person coming to the corporation with the full fees of admission as a stranger, in his hands, is *substantially* in the same situation as to the degree of aptness and ability he must possess, with a King's freeman, claiming to exercise the trade without paying any fees whatever.

"As to the claim of *damages*, generally, in cases of this description, there is a plain distinction between those in which they arise from a party working without paying the dues of entry, and those in which the full dues have been tendered, and the objection is merely want of sufficient skill or knowledge. In the former, the damage is manifest, as well as the unfair advantage which an individual would have, if allowed to participate in the profits of a trade, for the right of exercising which every one else had been obliged to pay a price. In the latter, the nature or existence of any thing which can be called *damage*, is far more problematical. The only way in which it is, or can be stated, is that the unskilful party may yet take away a part of the employment which would otherwise come to the better qualified members; and it is upon this principle accordingly, that the damages have been estimated in the present case. But it is obvious, that *this* source of loss would not be diminished, but *increased*, by the improvement of the new worker's skill and knowledge; and yet it is the want of such skill which forms his *only* disqualification. The *public* may *possibly* have an interest to keep back such bungling operators; and the corporation may have a *legal right* to prevent them; but it appears plain, that if the full fees are tendered, they have *less interest* to exclude such persons, than to exclude more formidable rivals—and cannot therefore qualify any actual *damage* by their working; always keeping it in view, that it is wholly owing to themselves that they have not the full fees in their pockets, and that the case would be exactly the same, if they had been consigned, and ready to be uplifted, at their pleasure.

"The Lord Ordinary would have hesitated, therefore, before he could have sanctioned any award for such a sum as £40 damages, even for that period of the suspender's working, which took place, while he refused to submit to any essay whatever, and insisted on being admitted on the bare payment of the fees. That matter, however, has been finally settled; and the case now to be dealt with refers only to his working *after* that essay, and on a reserved tender of the entry-money required; and this again turns entirely on the view which should be taken as to the sufficiency of the proof then given of his fitness for the trade. In the Lord Ordinary's opinion, it is not competent to require, on such an occasion, any



self to be apt and able to exercise and carry on the trade of a  
ought to have been then admitted as a member of the said cor-  
, and was only excluded from a formal admission thereto, by the  
the improper refusal of the said chargers; and therefore, and in  
that the chargers have been already fully paid and satisfied, under  
mer processes, for any damages and expenses they may have  
, by the suspender's working or carrying on the trade of a tailor,  
he burgh of Dundee, prior to his having executed the said essay-  
March 1830, suspends the letters and charge simpliciter, and  
: Finds the suspender entitled to expenses."

Corporation reclaimed.

**JUSTICE-CLERK.**—I have not heard any thing to induce me to alter the  
tor. There has been no disposition shown, since I have sat here, to re-  
be rights of corporations; but with reference to the proceedings in the  
case, the evidence satisfies me that this corporation have acted in regard  
explainer with a much greater degree of rigidity than they have in re-  
other individuals. Looking to Lord Corehouse's interlocutor and the  
proceedings, especially to the acquiescence of this man in the interlocutor  
February, 1830, and his paying £40 of damages, although there was no

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great skill or superior expertness; or, in short, of more knowledge of the  
than is necessary to carry it on, with a reasonable chance of employment  
cess. Now, there is no doubt that the suspender did measure, and cut,  
in a coat in March, 1830; and for a year after that time, did habitually  
, and cut, and finish many coats, waistcoats, and trowsers, to the perfect  
ion of his customers; probably thus putting through his own hands an  
f the work which went from his shop, as any *one* master tailor in the cor-

No. 45.

Dec. 2, 1836.  
 Murison v.  
 Tailors of  
 Dundee.

distinct proof of specific damage, even admitting the evasion of privilege of which he was guilty, this was a higher amount of damages than I ever remember to have been given in such a case ; nor can I recollect, even in cases where an evasion of privilege was proved, that we ever did more than find that the evasion had taken place, and award merely nominal damages. But not satisfied with the corporation go on with the process, and get an interlocutor from the sheriff-substitute, which most accurately subsumes the facts, as well as the real justice of the case. I think that the corporation have had complete and ample satisfaction by the finding in their favour of £40 damages—a finding in which I should have acquiesced, but would have required them to qualify their damage. I agree with the Lord Ordinary that, while corporations exist, they are entitled to retain their privileges ; but they are not entitled to conduct themselves oppressively and rigidly, and to act differently in the case of one from what they do in the case of other candidates for admission to their body.

LORD GLENLEE.—This man states distinctly that he had ceased to work a business of a tailor, in violation of the interdict of the magistrates. It is admitted that he has left Dundee and given up his trade. This brings the interlocutor to one point, and the sole question before us is as to the damages. I am deeply pressed with the truth of the brocard—*summum jus summa injuria*, and that the conduct of the corporation, in refusing to admit this man, was unjust and oppressive. I say nothing as to the essay-piece, but I agree with the chair and sheriff-substitute, that the complainer ought to have been admitted a member of the tailor's corporation. The respondents, when they bring this claim, are entitled to more than they have already got. How £50 more should be due for the transgressions the complainer has been guilty of since the first finding of damages, it would be difficult to say. There is no evidence of damage incurred in the interim.

LORD MEADOWBANK.—I am of the same opinion. The whole conduct of the corporation in regard to this man has been most vindictive, tyrannical, and malicious. It is one of the instances that occur of oppression in a public body, showing that while individuals, as such, will act with perfect fairness, yet where the interests of a corporation of which they are members is concerned, their conduct will be quite different.

LORD MEDWYN.—I have some difficulty in concurring. It might be difficult if I could agree with Lord Glenlee that there is no evidence of damage having been incurred. But such evidence is extracted from the books of the complainer which show the profit on the clothes made by him between February, 1830, and March, 1831. This is additional profit accruing to him in the face of the interdict by the magistrates. There could be no reason for preventing him going to the sheriff for interdict of new, which it was necessary and competent for him to obtain. Looking to the proceedings in this process, it is manifest the complainer did not mean to found on the essay of March, 1830 ; and indeed he offers to make a new essay-piece. At that time he was held not to be qualified ; he acquiesced in this, and in the present process brings a proof of his qualifications, which applies principally to the year 1831. I cannot therefore agree with the Lord Ordinary.

THE COURT adhered, finding additional expenses due.

WILLIAM MILLER, S.S.C.—JOHN MACANDREW, S.S.C.—Agents.

**BY GORDON and CURATOR, Suspenders.—*Rutherford*.  
T KEMP (Napier's Trustee), Respondent.—*D. F. Hope*.**

**No. 46.**

**Dec. 3, 1836.**

**Gordon v.**

**Kemp.**

***Ranking and Sale—Heritable Creditor.***—A party purchased a ranking and sale, and obtained a charter of sale and was infeft : after a considerable number of years, he became bankrupt without paying and his estates were sequestrated : a heritable creditor, who was entitled to one-third of the proceeds of the ranking and sale, presented a Bill of Suspension of Interdict to prevent the bankrupt from conveying the lands to his creditors, craving that they should be resold under the ranking and sale which was in dependence ; the trustee stated that he kept the accounts of these lands in the general estate of the bankrupt, and that he was willing to accept of a charter which should declare the conveyance to be “ under the burden of the heritable preferences legally constituted over them : ” —Bill refused, with expenses, in exercise of the statutory right of the trustee to exact a conveyance which could not be given to him the bankrupt's right, tantum et tale as it was in the bankrupt.

The late Mr Glendonwyn sold his estate of Parton and others to his son-in-law, William Scott, by minute of sale. The price of Parton was £1000, which was declared a real burden on the lands. He died without executing any conveyance to Scott, but his three daughters, as co-heiresses, executed a disposition of Parton in favour of Scott, for the full value of the price. Scott took infeftment, and, in 1814, sold a portion of the lands, called Barquhillanty, to John Napier of Mollance, by charter of sale, containing disposition and precept, under which Napier lawfully took infeftment. He also entered into actual possession of the lands.

**Dec. 3, 1836**

**1ST DIVISION**

**Bill-Chamberlain**

**Lds. Mackenzie and Jeffrey**

**D.**

The price of Barquhillanty was to be fixed by valuers, and, in 1815, Napier raised an action of implement, &c. against Scott, under which the price was judicially fixed at £14,830, and, in 1821, decree was given, declaring the lands sold under burden of that price, and in favour of the Martinmas 1813. In 1817, a ranking and sale of Scott's estates was brought, and Napier, after the price of Barquhillanty was fixed, raised a process of multiplepoinding, to enable him to pay the price in safety. This process was conjoined with the ranking and sale. Another part of the estate of Parton, called Craichie, had been included in the ranking and sale by Napier at a price of £5850 ; and cause was found by him accordingly. He also entered into possession of these lands. In 1822, he obtained a Crown charter of ranking and sale of the lands of Barquhillanty and Craichie.

While the ranking and sale was still in dependence, the estates were sequestrated, and Robert Kemp, writer in Dumfries, the trustee, was directed to execute a disposition of the lands of Barquhillanty in favour of the daughters and heirs-portioners of the late Mr

No. 46.

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ec. 3, 1836.  
ordon v.  
emp.

Glendonwyn, presented a bill of suspension and interdict, craving an order to prevent Napier from executing such conveyance ; or at least to prevent Kemp from retaining possession of the lands, except under the condition of keeping an account of their rents and produce separately from the other funds of Napier, and consigning their amount in the ranking and sale. Lady Gordon and her curator ad litem alleged that Barquhillanty as well as Craichie had been sold under the ranking, and contended that, as the price of neither estate had yet been paid, it was impossible for Napier or his trustee to resell the lands effectually, as they could not give a good title to a purchaser until the price, in the ranking and sale, had been paid :<sup>1</sup> And farther, that as even a full price would fall short of the price and interest due under the ranking, the trustee and the general creditors of Napier had no interest in making up a title to the lands ; whereas Lady Gordon, who was largely interested as one of the heirs-portioners of Glendonwyn, and entitled to a third share of the proceeds realized under the ranking and sale of Scott's estates, had a title to prevent the conveyance to the trustee of Napier, and to insist that the lands should be resold under the ranking. The trustee who alleged that both of the estates had been much ameliorated while in Napier's possession, and that considerable payments to account of the price had been made, answered that it was impossible for Lady Gordon to sustain any prejudice by the proposed conveyance, as it could only transfer to him the heritable estate of Napier tantum et tale as it stood in Napier ; that he had a statutory right<sup>2</sup> to compel the conveyance, and had also an interest to do so, both in order to prevent the risk of any individual creditors completing real securities to his prejudice, and also because a considerable reversion was expected by him to arise from the sale of the lands, which, after paying the price and interest due on the respective estates, would be a fund available to the general creditors. Besides this, the trustee alleged that the lands of Barquhillanty had not been bought under the ranking, but by a private transaction between Napier and Scott ; and that they stood on the same footing as any heritage held by a bankrupt, but affected with real burdens, which the trustee could nevertheless compel the bankrupt to convey to him if he chose, whether the heritable creditor opposed or not.

The trustee also stated, that he kept his accounts, as to these estates, distinct from the other accounts under the sequestration, and that he was willing to accept of a disposition from Napier, specially “ declaring the lands to be conveyed under the burden of the existing preferences legally constituted over them.”

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<sup>1</sup> 1685, c. 17. 1690, c. 20. 1695, c. 6.

<sup>2</sup> 54 Geo. III. c. 137. § 29. A. S. Dec. 14, 1805, § 8.

ord Ordinary (Jeffrey), on 29th August 1836, “refused the  
found expenses due.” \* No. 46.

Gordon and her curator presented a second bill of suspension,  
Lord Ordinary (Fullarton) ordered answers, and “meantime  
he interdict as craved.” † Dec. 3, 1836.  
Gordon v.  
Kemp.

answers were put in, the Lord Ordinary (Mackenzie), on 10th  
“recalled the interdict, ‡ refused this bill, and found the com-  
able to the respondent in expenses.”

Gordon reclaimed.

**JILLIES.**—I think this a very clear case. The conveyance to the trustee  
sequestration, cannot injure the right of Lady Gordon in the least de-  
whatever estate is truly in the bankrupt, will thereby be conveyed to his  
it ought to be; and nothing else can fall under the conveyance.

**TR.**—The trustee’s right (and duty) to obtain a conveyance and title to  
that belonged to the bankrupt, is statutory and absolute, and cannot  
or interfered with on any surmise of prejudice to other interests. In  
there is nothing but a proposal to revive the proceedings in the ranking  
and have one lot exposed anew at a distance of sixteen years. But the  
answer is, that the completion of the trustee’s title (he being already in  
and exclusive administration of the property) will be no bar to such a  
otherwise advisable. The trustee has already stated that he keeps the  
of this subject distinct from those of the rest of the estate, and has pledged  
continue to do so. It would be absurd, therefore, to pass the bill to  
is observance, and if the title is to be completed, there is truly nothing  
d for.”

**TR.**—The Lord Ordinary thinks it likely that the respondent may be  
found entitled to take the steps necessary for exposing the lands for  
he considers it desirable for all parties, that the respondent should ex-  
precisely than is done in the former answers, the nature and extent of  
ability under which he proposes to take these measures.

Does he maintain his right to enter into possession, to take the convey-  
the bankrupt, and thus to adopt the still unfulfilled contract of sale,  
either paying the price or binding himself and the creditors for that pay-  
coming under any further obligation, than merely accounting to the he-  
editors for the price which may be got for it on the resale by him?

**adly,** How does he propose to sell the lands? While the price due by  
the bankrupt, under the ranking and sale, is unpaid;—while no charter  
has been obtained, or can be obtained till that price is paid;—and while,  
tly, the possibility of any new purchaser, obtaining an unencumbered  
depend on the full payment of that price.”

**TR.**—The ratio of Lord Jeffrey, seems to the present Lord Ordinary to  
be. He cannot see how the complainer can have either right or interest  
of the bankrupt from conveying over to his trustee the right *tantum et*  
the bankrupt himself. Such conveyance over, can make that right  
against the complainer, or prejudice the complainer in any way. Whe-  
such right, the trustee, in case it should turn out that the bankrupt’s  
right under an incomplete contract of sale, may or may not give rise  
himself, or the creditors he represents, for the full price, is a  
operation, but in no view could warrant this bill by the com-

No. 46.

LORD BALGRAY.—I am entirely of the same opinion. The conveyance to the trustee cannot prejudice any of the lawful rights of Lady Gordon.

Dec. 3, 1836.  
Hamilton.

LORD MACKENZIE remained of the same opinion expressed in his note to the interlocutor under review.

LORD PRESIDENT was absent.

THE COURT unanimously adhered, and awarded additional expenses against the reclamer.

D. FISHER, S.S.C.—BRODIES and KENNEDY, W.S.—Agents.

No. 47.

JAMES HAMILTON, Petitioner.—*Wilson.*

*Cessio Bonorum—Process—Diligence.*—A party raised a summons of cessio and published the requisite notices in the Edinburgh Gazette, and sent circulars through the post-office to his creditors, besides executing edictal citation against such creditors as resided forth of Scotland: he produced the requisite evidence of this, along with a petition for personal protection which he presented within two days after raising his summons: the Court ordered intimation in the minute-book, and also to a creditor named in the petition who had given him a charge of horning, and thereafter, although no opposition was made, and caution, to the amount of the whole debts was offered, their Lordships superseded the petition, in the mean time, in respect of a doubt as to their jurisdiction to entertain a petition presented before the statutory period of 30 days' notice had expired—and because that question was now pending in a similar application, on minutes ordered for the whole Court.

Dec. 3, 1836.

1ST DIVISION.  
D.

JAMES HAMILTON, agent, Glasgow, presented a petition stating that in October, 1836, he had received a charge of horning on a bill of exchange, and that on 22d November he had raised a summons of cessio bonorum under 6 and 7 Will. IV. c. 56; that he had made the requisite intimation in the Gazette and by circulars to his creditors, sent through the post-office, and that he now produced a copy of the Gazette, with certificates as to the transmission of letters, and also executions of citation against such creditors as resided forth of Scotland. He prayed the Court “to grant warrant for his personal protection against the execution of diligence at the instance of any of the foresaid creditors, till the 4th day of February next, or for such space of time as your Lordships shall deem proper—the petitioner always finding caution, before extract, for such penalty as shall be deemed reasonable—all in terms of the statute.”

On November 24th the Court ordered intimation in the minute-book, and special intimation to the creditor who had given the charge of horning. After the period of intimation was elapsed, Hamilton prayed the Court to grant his petition, especially as no opposition was offered.

LORD BALGRAY.—The notice of thirty days required by the statute to be given to creditors before compearing to answer to the summons of cessio, does not elapse before the 22d December. I rather think this petition should be superseded till



e 23d. There is another case, that of Kippen, where a similar application was made, and an objection was taken to the competency of it, on which minutes of debate have been ordered to be laid before the whole Court. In these circumstances, as the competency of such an application as this is doubtful at present, it should be superseded in the mean time, as the Court cannot grant a petition, even when unopposed, if it be incompetent. No. 47.  
Dec. 3, 1836  
Nicolson v. Scott.

LORD GILLIES.—I do not see how this petition can be granted without affording full time to the creditors to come forward. It is only to be granted on “sufficient caution” being found to attend all diets of Court. But how is it possible to determine what is sufficient caution unless an opportunity be afforded to hear both sides.

*Wilson, for Petitioner.*—It has been understood to be the opinion of the Lords Ordinary who had to consider similar applications in vacation, and also of the clerks who attend to the subject of caution in the Bill-Chamber, that caution to the amount of 10 per cent on the whole debts would be a safe general rule to adopt, wherever there were no special circumstances stated to alter this proportion.

LORD MACKENZIE.—I can only say, that, in so far as I had occasion to consider this subject in vacation, I was of a totally different opinion. I did not think myself warranted to take the strong step of granting a protection against all diligence, unless security was found to the amount of the whole debts, that the debtor should attend all diets of Court when required.

*Wilson.*—The debts of the petitioner are about £500, and he is ready to find security to the amount of the whole, if necessary.

LORD MACKENZIE.—But there is a doubt as to our jurisdiction to entertain a petition like this, at this stage, upon any caution. That is a question which is now pending in the case of Kippen, and I apprehend that this petition must in the mean time be superseded. And I am afraid that 60 days may have to run in this case, as there are creditors resident in England.

LORDS BALGRAY and GILLIES concurred in the propriety of superseding the petition in the mean time ; and

It was accordingly superseded till the third sederunt day in January.

J. JOHNSTONE, S.S.C.—Agent.

MALCOLM NICOLSON, Petitioner.—*Sol.-Gen. Cunninghame.*

RALPH ERSKINE SCOTT, Respondent.—*Deas.*

No. 48.

*Bankruptcy—Sequestration.*—A petition for approval of composition was presented to the Court with the requisite concurrence, as the ranking of the creditors stood ; a creditor afterwards was ranked, and opposed the petition, which was, in consequence, refused by the Lord Ordinary, in the time of session, acting under a writ from the Court ; before the reclaiming days expired, other creditors were ranked, and the concurrence restored the requisite proportion of consents in favour of the petitioner, who presented a reclaiming note against the Lord Ordinary's judgment : *1st*, That the whole of the creditors, including those who ranked after the Lord Ordinary's judgment, must be computed in estimating the proportion of creditors ; *2d*, That no new petition was necessary, as presentation of



**No. 48.** the petition was warranted by the state of the concurrence at its date; and, 2d, That it was competent to the Lord Ordinary to pronounce a judgment refusing the petition, but that such judgment was liable to review like any other judgment of a Lord Ordinary.

Dec. 3, 1836.  
1st Division.  
d. Cockburn.

B.

Nicolson v.  
sett.

THE estates of Malcolm Nicolson, cattle-dealer in Skye, were sequestrated, and Martin Martin was appointed trustee. After the usual procedure, a composition of 5s. per pound was offered, and unanimously agreed to by the creditors present at the meeting for deciding on. Nicolson then presented a petition to the Court, with concurrence of the trustee, for approval of the composition and discharge. The trustee's report bore that he possessed the requisite concurrence, in number and value of the whole creditors ranked on the estate. After the petition was ordered to be intimated, Ralph Erskine Scott, accountant in Edinburgh, judicial factor on the sequestrated estate of Alexander Macdonald of Valay, was ranked on Nicolson's estate as a creditor for £281, 1s. 8d., and he opposed the petition, stating various grounds of objection, but contending that, as there was no longer the requisite concurrence in number and value, even assuming the accuracy of the trustee's report, as at the date when it was framed, the petition must be refused. The alleged deficiency in number was  $\frac{1}{10}$  of one creditor. The alleged deficiency in value was about £100.

The application was remitted to the Lord Ordinary on the bills, who pronounced a judgment, refusing the petition. This was done during the time of session, but the ordinary reclaiming days ran to the first box-day. Subsequently to this, other creditors came forward and were ranked on the estate, who gave their concurrence to the petition, and whose votes if computed, restored the requisite statutory proportion of concurrence. A supplementary report to that effect was made by the trustee.

Nicolson then reclaimed against the Lord Ordinary's judgment before the lapse of the reclaiming days. When his note came to be advised, he pleaded—

1st, That if Scott was entitled to come forward, for the first time, after the petition was in Court, and to insist on his vote being counted so as to affect the statutory proportion of concurring creditors, the petitioner was equally entitled to have the votes computed of those creditors who came forward after the judgment of the Lord Ordinary.

2d, That the judgment of the Lord Ordinary was incompetently pronounced, as he ought to have merely reported the cause; but, if competent, it was not of a more final nature than any other judgment by a Lord Ordinary, and was equally liable to be reclaimed against; and,

3d, That no new petition was necessary on his part, as the original petition was duly warranted by the state of the concurrence, when presented, and nothing more than a supplementary report by the trustee was requisite, to entitle the Court to grant the prayer of that petition.

answered—

Nb. 48.

That any creditor who came forward during the currency of the  
on of the petition, was entitled to be ranked and to have his vote  
ed. But after the petition had been carried the length of a judg-  
the Lord Ordinary, no new creditors could be allowed to ap-  
that judgment, if liable to review, must be reviewed on the same  
as those on which it was pronounced.

Dec. 3, 1836.  
Nicolson v.  
Scott.

That it was expressly made competent by Act of Sederunt, 11th  
28, § 93, for the Lord Ordinary in such cases “either to give  
t, or take the cause to report as he shall see fit;” and such  
t was final and not reviewable;’ and,

That the original petition having been presented at a period, after  
Nicolson was, at least for a time, without the requisite concur-  
was incompetent to proceed with it, and a new petition must be  
d.

also insisted, that, in any event, he was entitled to be heard  
e Lord Ordinary on his objections to the votes of the creditors  
e alleged to concur, and also on the merits of the petition, and  
r in answer to the supplementary report by the trustee, as he  
yet been heard on these points, and the judgment of the Lord  
r was pronounced merely in reference to the state of the concur-  
the time of pronouncing it.

GILLIES.—I have no doubt that it was competent to the Lord Ordinary  
nce his own judgment; as the words of the Act of Sederunt expressly  
him the power to do so. But I am as clearly of opinion that his judg-  
esses no peculiar finality, and may be reclaimed against, like any other  
. In regard to the computation of the concurrence of those creditors  
ed after the Lord Ordinary’s judgment, I think the petitioner is as well  
o insist for it, as the respondent is to insist on counting his own debt,  
as not ranked till after the petition was presented to the Court. The  
quires the concurrence of “nine-tenths of all the creditors who have  
grounds of debt or interests, and oaths of verity,” without any limitation,  
ak therefore that all who are ranked, prior to a final judgment approving  
mposition, are entitled to be computed in estimating the statutory con-

There is no need of any new petition, however, as this was warrant-  
ented according to the state of the ranking and concurrence at its date.  
e respondent has objections to state to the supplementary report of the  
ed has not yet had any opportunity of doing so, a remit should be made  
d Ordinary to hear parties farther.

BALGRAY and MACKENZIE concurred.

RENDENT was absent.

No. 48.

The interlocutor of the Lord Ordinary, refusing the petition, was theref recalled, and a remit was made to his Lordship to hear parties.

Dec. 3, 1836.  
Plaine v.  
Thomson.

M. N. MACDONALD, W.S.—J. ARNOTT, W.S.—Agents.

Union Canal  
Company v.  
Davidson.

No. 49.

MISS R. M. PLAINE, Pursuer.—*H. J. Robertson—Shand.*  
DAVID THOMSON, W.S., Defender.—*Anderson.*

Dec. 3, 1836.

2<sup>D</sup> DIVISION.  
Ld. Cockburn.  
R.

*Interest—Accounting.*—The pursuer, a legatee under a settlement conveying the testator's property to trustees, and ordering dividends to be made among the parties interested as often as circumstances would permit, was allowed by the factor on the estate to overdraw her share of the proceeds thereof, while dividends were made only at distant intervals. On the trust being wound up, the pursuer was charged by the factor at the rate of 5 per cent on all advances so made, with annual accumulations. In an action against the surviving trustee, she objected to the mode of stating the accounts, insisting that an account should have been annually balanced between herself as debtor in the advances made, and as creditor in her share of the produce of the estate during the year.

The Lord Ordinary repelled the objection, and

THE COURT adhered.

JOHN SHAND, W.S.—THOMSON and ELDER, W.S.—Agents.

No. 50.

UNION CANAL COMPANY, Complainers.—*Keay—Syme.*  
WILLIAM DAVIDSON, Respondent.—*D. F. Hope—G. G. Bell.*

Dec. 3, 1836.

2<sup>D</sup> DIVISION.  
Bill-Chamber.  
Ld. Medwyn.

*Decreet-Arbitral.*—This was a suspension of a charge on a decree arbitral, chiefly on the ground of disregard by the arbiter of an offer of proof by the complainer. The Lord Ordinary having reported the bill on answers,

THE COURT unanimously remitted to refuse the bill.

DAVIDSON and SYME, W.S.—J. and W. DYMCK, W.S.—Agents.

MRS MARION COLLIER and HUSBAND, Pursuers.—*Sandford*.  
HENRY WILSON and THOMAS BEATH, Defenders.—*Paterson*.

No. 51.

Dec. 6, 1836  
Collier v.  
Beath.

*Relief—Cautioner—Messenger.*—A party caused a summons to be executed, inhibition to be used on the dependence; a preliminary defence was stated the execution of the summons was irregular, and, after considerable discussion, that defence was sustained, and the party was subjected in expenses; the party had intimated by letter to the messenger as soon as the objection was taken to execution, and the messenger had answered, maintaining his execution to be objectionable; the party had also, in the middle of the discussion, intimated to the cautioners of the messenger, who took no notice of it:—Held both the messenger and his cautioners were liable to relieve the party of expenses of the discussion, and of the expense of the inhibition on the dependence.

MRS COLLIER and husband raised a summons against one Paterson, Dec. 6, 1836, which they employed George Coll, messenger at Falkland, to execute. Coll returned an execution which did not design the parties, and was wholly written upon a sheet of paper at the end of the summons, which contained no portion of the summons engrossed on it. Paterson pleaded a preliminary defence that there was no process, in respect of the irregularity of the execution of citation. In the mean time, the pursuers used inhibition on the dependence. Minutes of debate were ordered on this defence, and the Court (First Division), after advising with Judges of the Second Division, sustained the preliminary defence, and assoilzied with expenses.<sup>1</sup>

1st Division  
Ld. Fullerton  
D.

During these proceedings, Coll had received intimation by letter from pursuers' agent, as soon as the preliminary defence was stated by Paterson; and he was regularly certiorated by that agent of the steps of procedure, and made aware that he and his cautioners would be looked to for relief. Coll repeatedly wrote in answer, maintaining that the objection to his execution was unfounded, and advising how it might best be overcome, in the discussions before the Court. Intimation was also sent to the agent of Mrs Collier to the cautioners of Coll, in June, 1833, and they took no notice of it.

Mrs Collier and husband, having paid the expenses of Paterson, raised an action against Coll and his cautioners to recover payment of their amount, and also of the expenses of inhibition, and of their own expenses incurred in the question with Paterson.

Coll lodged no defences; but the cautioners denied that intimation had been duly made to them,\* and pleaded, that Mrs Collier was bound to

\* 1834 (ante, XII. 674).

Coll lodged all intimation, but the Court considered it sufficiently established that intimation had been made in June, 1833.

No. 51.  
Dec. 6, 1836.  
Collier v.  
Smith.

have given notice to them, as well as to Coll, as soon as the objection to the citation was stated; that they could then have come forward and taken on themselves, at very little loss, any expense incurred up to that date, and would have done so, as the inhibition in reality had secured nothing even if unchallengeable; and that, at least, they should have been afforded the earliest notice, so that they might judge for themselves whether they would take such a step, or run the risk of litigating the question with Paterson.<sup>1</sup>

Mrs Collier answered, that, by giving timeful notice to Coll, the messenger, she had done all that was incumbent on her. It was his business to give notice to his cautioners, and if he neglected this, they, and not any third party, must suffer for his omission. But, separately, as the cautioners had received intimation in June, 1833, and had not notified any disapproval of the litigation so far as it had then gone, nor intimated a desire that it should be discontinued, and that they would undertake whatever consequences might legally attach to them, on account of the blundered execution, they could not now be permitted to object to the want of earlier intimation. They had waited to take the full benefit of the litigation if it proved successful, and they must take the consequences, after it had proved the reverse, just as if they had adopted it from the first.

The Lord Ordinary "repelled the defences, and found the defenders liable in expenses." His Lordship also found that the liability, for the account incurred by Mrs Collier to her own agent, in the question with Paterson, was for that account as it should be taxed, as between agent and client.

The defenders reclaimed.

LORD BALGRAY.—I think the interlocutor quite right. Had the defenders immediately on receiving intimation as to the litigation, come forward and acknowledged that the execution was wrong and could not be successfully defended, their plea as to the expenses of that discussion would have been in a very different position. But they did nothing of this sort. They allowed the litigation to go on without objection, and would have taken the full benefit of it all, had it proved successful. I see no ground, in these circumstances, for limiting their liability to that portion of the expenses which was incurred subsequently to June, 1833; even supposing that the other ground of due notification having been given to the messenger, was insufficient, as to which it is not necessary now to decide.

LORD PRESIDENT.—I am of the same opinion; and I rather incline to think that due notice to the messenger was all that was required. But it is unnecessary to go into that.

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<sup>1</sup> M'Pherson, May 19, 1825 (ante, IV. 21; or New Ed. 22).

GILLIES and MACKENZIE concurred.

No. 51.

THE COURT unanimously adhered.

Dec. 6, 1834  
Darlington v  
Gray.

J. KNOX, S.S.C.—J. YOUNG, S.S.C.—Agents.

HENRY DARLINGTON, Pursuer.—*Penney*.  
STEPHEN GRAY, Defender.—*M<sup>c</sup>Neill—W. Bell*.

No. 52.

*i in Solidum*.—Obligation in which the co-obligants were held liable *solidum*.

ly, 1834, the defender, Gray, alongst with Francis Hamilton, Dec. 6, 1834  
ranted to the pursuer, Darlington, cabinet-maker in Edinburgh, 2d Division  
ation in the following terms :—" Sir—We hereby become bound, Ld. Moncreif  
f of Mrs Stewart, residing at Whalebank House, near New-  
hat she will return the furniture which you may put into her  
hire, by Whitsunday next, 1835, (if not previously purchased  
in as good condition as at the time you delivered it to her, with  
ption only of the ordinary tear and wear ; it being expressly un-  
that our liability is not to extend to furniture of greater value  
sum of greater amount than £60 sterling. We are, Sir, your  
edient servants. (Signed) FRANCIS HAMILTON, Edinburgh,  
y, 1834. STEPHEN GRAY, Lanark, 26th July, 1834.—To Mr  
ington, cabinet-maker, Queen Street, Edinburgh."

after Darlington supplied Mrs Stewart with household furniture,  
ie failed to restore. Darlington then raised action against Gray  
on, the other obligant, having become bankrupt) for implement  
um of the obligation, maintaining in point of law that it was an  
m ad factum præstandum, and inferred a conjunct and several

Gray pleaded in defence, that this was not a simple obligation  
m a fact, but was an alternative engagement to return the furni-  
question, or pay £60, and, as such, inferred against him only  
pro rata.

Lord Ordinary repelled the defence, and decerned ; adding 'tō  
regulator the subjoined note :—"

III. 3, 74 ; Dennistoun, July 16, 1669 ; Morr. 14630.

There is no doubt that the obligation in this case is simply a joint obli-  
gation without specification of any several liability : and the doctrine of Mr Er-  
skine is far to justify a distressed obligant in a letter of guarantee, in main-  
tenance here stated. But the Lord Ordinary, on full consideration of all  
the facts referred to, cannot think that it is sound in law, or truly  
his statement of the law. The obligation in this case is

No. 52. Gray reclaimed.

2. 6, 1836.  
Hillington v.  
17.

LORD GLENLEE.—I think the interlocutor right. It is clear that this is a pure obligation *ad factum præstandum*. There is no alternative obligation to pay a certain sum of money. Suppose a single article of furniture, such as a mirror, worth £60, had to be restored to the pursuer, he could have demanded its restoration by any one of those joint obligants.

The other Judges having concurred,—

THE COURT adhered, finding additional expenses due.

Agents.

plainly a cautionary obligation, that the lady *shall deliver in good condition the furniture* hired to her, at the term of Whitsunday 1835. No one can doubt that this, as an obligation *ad factum præstandum*, is indivisible, which, if it stood without qualification, could never be satisfied by either of the obligants, without *delivery* of the *ipsa corpora* of the subjects, or otherwise by payment of the full value of them. The right of the party is, to demand *delivery of the goods*; and as he has *this* right against *each* of the obligants *without any division*, according to the express terms of the contract, and the admitted rule of law generally, it is a very hard proposition to the common sense of mankind, as well as to the ear of every lawyer who thinks that law is based on plain justice and common sense, to say that, in *the very case*, and the *only* case, in which it becomes necessary to consider the surety's obligation, viz. that of the principal failing, and rendering it impossible to fulfil the obligation in *specie*, by redelivery of the articles, the engagement shall be *changed* by that fact into something different from what it was at first, and be resolved into precisely *one half* of its proper amount. There are certainly some words in the passage quoted from Erskine—3. 3. 74.—which apparently give some encouragement to the idea. But they do not reach this case. Whatever might be the sort of cases contemplated, such as that of Dennistoun referred to, it never could be intended to be said by so very accurate a lawyer, that the obligation would *change its nature and value* by the *failure* to give *specific implement* of it. Yet this is what the defender must draw out of it.

“The obligation in the present case is a specific guarantee that *the furniture* hired shall be restored at a fixed date. That is not altered by the arrival of the term. It is not an *optional* or *alternative* engagement to restore the furniture or pay £60. The pursuer had an absolute right to restoration of his furniture, if it were extant. The only limitation is, that the defender and Mr Hamilton should not be liable for furniture beyond *the value* of £60. Still their obligation was to *deliver* it; and they would have had no right to keep it, or any part of it, on offering payment of £60. Their privilege of *limitation* in the *value* comes into force by the inability to deliver without their own fault. But is the nature of *their* guarantee changed by this? The Lord Ordinary cannot think it, and is fully convinced that it never entered into the mind of either, when he gave the obligation, that he was not fully bound to make good to the pursuer the redelivery or replacement of furniture to the full value of £60.

“This matter may be made to assume an appearance of subtlety and niceness on the refinements of the Roman Law, and some of the difficulties raised in what were really nice cases in our own law; but on the plain meaning of the obligation now before the Lord Ordinary, he really thinks there can be no reasonable doubt.”



JAMES ROBERTSON, Pursuer.—*Rutherford—Pyper.*  
DAVID BROWN, W.S., Defender.—*D. F. Hope—Wilson.*

No. 53.

Dec. 6, 1836.  
Robertson v.  
Brown.

*Arbitration.*—An arbiter has power to award expenses, without any special reference to that effect in the submission.

THE pursuer, Robertson, and the defender, Brown, entered into a contract of reference, whereby they submitted "all demands, claims, disputes, questions, and differences depending and subsisting between us," to the decision of Mr James Lang, W.S. The minute contained a clause empowering the referee to award expenses. Lang pronounced decree in favour of Robertson, and thereafter found him entitled to expenses in the reference.

Dec. 6, 1836

2d Division  
Lord Jeffrey  
F.

Robertson having raised action for the sum of expenses so awarded, Brown pleaded in defence, *inter alia*, that the finding of expenses by the referee was incompetent and *ultra vires compromissi*.

The Lord Ordinary having "repelled the objection insisted in by the defender, as to the incompetency of the award of expenses by the arbiter," Brown reclaimed.

The Court ordered minutes of debate on the general question of the power of arbiters to award expenses, where no such power is specially conferred by the deed of submission.

*Decided for Robertson.*—

According to the law of Scotland, as founded on the Roman law, an arbiter holds the character of a private judge, selected by the parties litigant, and, in regard to the matters referred, has the same powers of jurisdiction as any ordinary judge before whom the same matters might competently have been brought for decision;<sup>1</sup> but a judge has the power of finding expenses due in an ordinary action, although not expressly demanded or concluded for;<sup>2</sup> and, by parity of reason, an arbiter must be understood to have the power in question of awarding expenses, the point having been moreover already ruled by the Court.<sup>3</sup>

*Answered for Brown.*—

Arbitration is a process, in which the powers of the arbiters result solely from convention, their measure being the contract of reference; to justify an award of expenses, therefore, it ought to appear, *ex facie* of the submission, that a power over the costs was conferred on the arbiter;

<sup>1</sup> *Macnair*, IV. 6, 4 (ed. 1761); *Stair*, IV. 3, 1; *Erskine*, I. 2, 2.

<sup>2</sup> *Macnair*, IV. 16, 3; *Voet*, XLII. 1, 21; *Heggie v. Stark*, March 1, 1826 (ante, IV. 510; new ed. 518); *Scott v. Wilson*, March 10, 1829 (ante, VII.

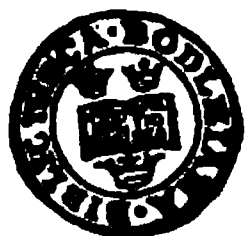
*Robertson v. Brown*, Dec. 15, 1827 (ante, VI. 256); *Fairley v. McGown*, Dec. 14, 1827 (ante, XIV. 470).

**No. 53.** besides, submission is in its nature, a friendly process, resorted to for the very purpose of escaping the charges of judicial proceedings, and the presumption is, that the parties themselves appear and contribute their trouble and attention to the extrication of their own disputes; the circumstance of special clauses on the subject of expenses being generally inserted in deeds of submission is evidence that, without such clauses, the award of costs would be incompetent; and the question is settled in England in favour of this view.

Dec. 6, 1836.

Bakers' Society of Paisley v. Stentmasters and Magistrates of Paisley.

THE COURT referring to the decisions in *Berry v. Sanderson*, and *Fairley v. M'Gown*, adhered "on the general point," and remitted to the Lord Ordinary to hear parties farther as to any alleged special agreement between the parties.



KERR and DICKSON,, W.S.—D. BROWN, W.S.—Agents.

**No. 54.** BAKERS' SOCIETY OF PAISLEY, Pursuers.—*D. F. Hope—A. Dunlop.*  
STENTMASTERS and MAGISTRATES OF PAISLEY, Defenders.—*Rutherford—Shaw.*

*Poor.*—A society, consisting of the members of the bakers' trade in a burgh and established chiefly for providing for the support of poor members who by the regulations were entitled to certain specified rates of allowance, having erected mills for grinding flour to themselves and the public, at which they took their members bound to grind all their grain, and the profits of which were, in the first place, appropriated to the support of the poor members, any surplus being declared applicable "to the use of the society"—Held not to be "a purely charitable institution, the funds of which were in no respect liable to contribution for the poor" of the burgh under an assessment for that object, but that they were only assessable "in so far as there were rents or profits accruing from the mill, or other property or trade belonging to the society, over and above the usual allowances granted to poor and aged members, and divisible among the members, or applicable to the purposes of the society generally." Question, whether an assessment may validly be imposed on a society or company as such, or only upon individual persons.

Dec. 6, 1836.

2d Division.  
J. Cockburn.  
T.

IN the year 1777, the bakers in Paisley having entered into a mutual agreement for forming an association of the members of the trade, obtained from the Magistrates a charter, in which the objects of the formation of the society are thus set forth:—"That is to say, the said persons subscribing, bakers, burgesses, and inhabitants within the said burgh, considering that in all incorporations there are indigent and necessitous persons, that are without means wherewith to supply their outward necessity; and considering that the most proper and effectual means for supplying such indigent persons, and preventing the increase of their number, is by persons of one craft entering into one society and collecting a common purse, whereby poor and indigent children of any person

into subscribing may be brought up to service or trade, as their sex, age, or inclination shall lead them, and as shall be most proper and advantageous for them, by the representatives of said craft, and the aged, poor, and indigent persons may be supplied as their need shall require, and therefore, and for preventing several abuses in the said trade, conform to the several laudable acts made or to be made by the said Magistrates and Council in their favours, entered and bound themselves, and thereby enter and bind themselves in one society."

No. 54.  
Dec. 6, 1836  
Bakers' Society  
of Paisley v.  
Stentmasters  
and Magistrates  
of Paisley.

The members of this society were by the charter taken bound to make certain quarterly payments "for the common use and relief of the poor of the said trade, and other necessary uses thereto belonging;" and certain entry-moneys and fines were also authorized, which were likewise appropriated to "the uses foresaid."

In 1808, the society resolved to build a mill for grinding flour, and with this view (as narrated in regulations afterwards adopted) "a large majority of the members, by a minute dated the 8th day of January in that year, bound themselves to grind at the proposed mill the whole of the wheat they had to grind, as soon as the mill should be erected, and to pay a rate per boll for manufacturing the same into flour; such rate being to cover the expense of upholding the mill, and all charges thereon, and also the interest of money advanced to the society, and of any debt that might be contracted in the Society's name; and whatever profit might appear at the yearly balance, after supporting the poor members, were, by the said minute, appointed to be applied to the use of the society."

Accordingly ground was purchased within the bounds of the burgh of Paisley, and a mill erected, for which purpose, in addition to the funds then belonging to the society, a considerable sum of money was required to be borrowed. For some years subsequent to this it continued optional on intrants whether to come under the obligation to grind at the society's mill or not; but, in 1825, a new set of regulations was agreed to, which narrated in the preamble, "that the Bakers' Society of Paisley was formed in the year 1777, by a number of bakers then carrying on said trade in the place, the design of which was to assist such of their decayed brethren, and their widows, and children, as might be reduced to poverty and distress through various causes incident to human life." By these regulations, it was provided that each intrant, before payment of the prescribed entry-money, should "sign an obligation to grind all his wheat at the society's mill," and that "any member contravening the above regulation, shall be obliged to pay to the funds of the society the same rate for whatever number of bolls he may send past the society's mill as if it had been manufactured thereat." These regulations further prescribed certain specific rates of allowance to poor members who were in distress or unable to work, and to the widows and children

**No. 54.** of members deceased, a lower rate being provided to the previously entered members who should refuse to come under the obligation to grind at the society's mill, than to those who were subject to that regulation. The regulations were confirmed by the Justices of Peace of the county of Renfrew, but without setting forth that they were proceeding under the Friendly Society Acts, or describing the association as a friendly society. The mills were managed by a committee of the society, who employed a considerable number of servants and workpeople, and the business of grinding was carried on extensively both for the members of the society and the public.

Dec. 6, 1836.

Bakers' Society

Palaley v.

Stentmasters

and Magistrates

Palaley.

From 1810 to 1822, the assessment for the poor (which in Paisley was laid on, in respect of means and substance, according to the rules applicable to royal burghs), was imposed on the Bakers' Society. In 1822 they were relieved, and no assessment was imposed on them till 1831, when a demand was made on them for £6, as the share of the assessment for the year 1831-2, allocated on the society in respect of their trade carried on at the mill. The individual members of the society who resided within the burgh were likewise assessed individually, on their respective means and substance, amongst with the rest of the inhabitants. This demand having been resisted, the collector of the assessment raised an action for payment against the treasurer of the society before the Sheriff's Small Debt Court. The collector having obtained decree from the Sheriff, the assessment was paid, but under protest; and a similar assessment having been demanded for the year 1832-3, the Bakers' Society raised an action in this Court, concluding to have it declared that an assessment could not be imposed on the society as such; and, further, that the society being a friendly society, or at least that the funds being by legal obligation devoted to the support of poor members, their property could not form the subject of assessment, and also concluding on that plea, and on other grounds which it is unnecessary here to mention, to have the assessments and stent-rolls for the years above-mentioned and the Sheriff's decree, reduced and set aside, and for repetition of the amount paid under it.

Parties having differed in their statements of fact as to the extent to which the profits of the mill were appropriated to the support of poor members, &c., the Lord Ordinary remitted to an accountant "to examine the books of the Bakers' Society, and to report the purpose to which the profits realized by the said society are applied, and the annual extent of business carried on by them." A report was accordingly given in by the accountant, from which it appeared that the gross sums paid for grinding averaged about £1000 per annum, but that after paying all expenses and the interest of borrowed money, the clear profits, together with the entrymonies and fines, while they sometimes exceeded the annual amount of allowances (which ran from between £30 to £35), leaving a surplus to be add-

to the capital, at other times fell short of it; that from 1824 to 1832 the profits had in all fallen short of the allowances by the sum of £64, which was supplied from the capital stock; but that, on the other hand, from 1809, when the mills were built, to 1824, there appeared, as on the books of the society, making no deduction, however, from the original cost value of the buildings, machinery, &c., an increase of capital stock in all of between £1500 and £1600; and, finally, the accountant reported, that no division of profits or funds among the members had ever taken place other than the distribution of the allowances to poor members, their widows, and children.

No. 54.  
Dec. 6, 1836.  
Bakers' Society  
of Paisley v.  
Stentmasters  
and Magistrates  
of Paisley.

On this report being given in, the Lord Ordinary ordered cases to the Court. In these the whole cause was argued, including the special grounds of reduction applicable to the stent-rolls and the Sheriff's decree, but as the Court only decided upon the declaratory conclusions, it is unnecessary to advert to the argument further than as it regarded these.

*Pleaded for the Society—*

1. The assessment here is imposed according to the rules for Royal burghs, and so there is no rate on heritors as such, as in landward parishes, but simply on inhabitants according to means and substance. In authorizing, however, an assessment on inhabitants, the statutes had regard only to individual persons, who were to be assessed according to their personal wealth, and there are no words sanctioning the imposition of a rate upon societies as distinct from the members. This also is the less admissible, as the individual members being themselves separately assessed, their income, if any, derived from societies of which they are members, must necessarily be taken into view in forming the general estimate of their means and substance on which to assess them. Thus, although it is not unusual for mercantile companies to submit to be assessed as companies, yet the case of *Buchanan and Parker*<sup>1</sup> shews, that whenever that mode is objected to, it is held that it must be abandoned, because the question so anxiously argued there, as to whether Mr Parker was to be considered an inhabitant of Glasgow, to the effect of being assessed in respect of his share of the profits of the business carried on there by the firm of which he was a partner, could never have been raised had it been deemed competent to assess the company as such.

2. The society here in question is substantially a Friendly Society, or, at all events, it is an association, the whole funds of which are legally appropriated to the support of the poor members, their widows and children. It is not, however, to warrant an assessment in respect of any property, necessary not merely that there should be such property existing, but that it should constitute wealth in the persons of parties liable to be rated.<sup>2</sup>

<sup>1</sup> 1827 (ante, V. 300).

<sup>2</sup> *MacKenzie*, Ordinary, and acquiesced in.—*Heritors and Kirk-Session v. Magistrates of Edinburgh*. November 12, 1833. As this

**No. 54.** Now, here the property of the society does not constitute wealth in the persons, not being held for their use and behoof, but being held for, a

Dec. 6, 1836.  
Bakers' Society  
of Paisley v.  
Stentmasters  
and Magistrates  
of Paisley.

case is the only Scotch decision on the point, and is important, the following statement of it is subjoined :—

HERITORS AND KIRK-SESSION OF SOUTH LEITH, Pursuers.—*G. G. Bell.*  
MAGISTRATES OF EDINBURGH, Defenders.—*A. Dunlop.*  
LEITH HARBOUR COMMISSIONERS, Defenders.—*Marshall.*

*Poor—Harbour—Feu-Duties.*—1. The granters of a public harbour not liable in 'poors' rates on the duties and profits thereof, customary or statutory, in so far as they were applied to the maintaining and improving the harbour. 2. A duty on goods imported for the support of the clergy not subject to assessment. The rents of buildings erected by money borrowed under statutory authority which rents were appropriated by the statute exclusively to the purposes of the harbour, not liable to be rated, but a rate submitted to as on an estimated rent of a solum distinct from the buildings. 4. Feu-duties not a subject of assessment.

THE Magistrates of Edinburgh, in virtue of ancient royal charters, confirmed by Parliament, granting to them the port and harbour of Leith, and of immemorial usage following thereon, are entitled to levy certain dues from all vessels coming into the roadstead or harbour; and by special statute, further duty, called the merk per ton, is leviable for behoof of the ministers of the city. By a series of acts of Parliament, the magistrates were from time to time empowered to borrow money for the improvement of the harbour, in forming piers, docks, &c., they being nominated in the several statutes the trustees for that purpose, and various additional duties were, by the same statutes, imposed on all vessels coming into the harbour. These duties, it was declared, should be appropriated "solely" to the keeping of the docks, &c., in repair, paying the interest and repaying the principal of the money borrowed, and forming a sinking fund for emergencies, and to no other purpose whatsoever; and in general they were to cease and determine on the debt being paid off. The Magistrates were further authorized to acquire property adjacent to the harbour; and it was provided that the rents and feu-duties of such adjacent property so acquired, or previously belonging to the magistrates, should be appropriated to the purposes of the statutes, in the same way and to same objects with the statutory dues. Under authority of these acts of Parliament, the Magistrates at various periods borrowed large sums, amounting in all to £265,000, which they employed in the formation of piers and docks, in acquiring adjacent property and erecting thereon, or on ground previously belonging to them, buildings necessary for the purposes of the harbour. Ultimately the Treasury became the sole creditor on the harbour, obtaining security over the docks &c., and the dues, rents, and profits, which, including the ordinary harbour dues leviable under the charter, were not denied to be entirely appropriated to the purposes of the harbour, leaving no surplus applicable to the common good of the city. The Magistrates had been in use to pay poor's rates in the parish of North Leith, in which the harbour partly lay, in respect of certain property adjacent to the harbour, which they considered themselves to hold, unfettered by the provisions of the harbour statutes; but, in 1828, the heritors and kirk-session imposed on the Magistrates of Edinburgh, as heritors, in respect of the harbour, so far as situated in that parish, a share of the assessment effecting to the whole gross proceeds of the harbour, including (1.) the merk per ton duties, payable to the ministers of Edinburgh; (2.) the ordinary harbour dues, leviable by the magistrates, in virtue of their charters and immemorial usage; (3.) the statutory dues, &c., dues; and (4.) the rents and feu-duties of the adjacent grounds and buildings thereon, whether acquired under the acts, or previously belonging to the magistrates. The magistrates, while they were willing to submit to an assessment in



to the use of poor persons, who could not possibly be sub-  
 assessment themselves; and on this principle it has been decided

No. 54.

Dec. 6, 1836.  
 Bakers' Society  
 of Paisley v.  
 Stentmasters  
 and Magistrates  
 of Paisley.

rent of certain of the buildings belonging to them in absolute pro-  
 that which had been imposed in respect of the proceeds of the har-  
 heritors and kirk-session accordingly raised an action for payment  
 gistrates, which came to depend before Lord Mackenzie, as Ordinary.  
 as in limine, contended, that the ministers of Edinburgh, as the pro-  
 erested in the merk per ton duty, and the harbour commissioners,  
 ntrolling power, in regard to the administration and revenues of the  
 to have been made parties, and Lord Mackenzie having so found,  
 ordingly called. The ministers were at the first debate assoilzied  
 in respect of the merk per ton duty; and as to the other revenues,  
 linary (12th November 1833), on advising cases, pronounced this

at the dues or other profits, which are received by the defenders, in  
 f the right which the town of Edinburgh has to the port of Leith and  
 s, which dues or profits are regulated by law, and are leviable on  
 use of the said port and its pertinences by the public are not liable,  
 part, to be taxed for relief of the poor of the parish of North Leith,  
 e same have been applied or made applicable to payment of the  
 eping up or improving the said port and its pertinences: Finds, that  
 n the record and statutes referred to, that the whole of the dues or  
 the years libelled, have been so applied or made applicable, and must  
 ble for a long time, to which at present no limit can be assigned:  
 e feu-duties, to which the defenders have right, for subjects situated  
 d parish are not liable to be taxed for relief of the said poor, in respect  
 ects themselves are liable to be, and are taxed for the same fully,  
 ction, on account of the said feu-duties, sustains the defences, and  
 defenders, and decerns; but finds, that in case, and in so far as the  
 of Edinburgh have right to heritable subjects situated within the said  
 th Leith, in free and ordinary property, the tax for relief of the poor  
 d on account of the said subjects; and that, notwithstanding any  
 hereof, or of the profits thereof, to the Lords of the Treasury, in se-  
 ts payable by the town: Therefore, appoints the defenders, the Ma-  
 Edinburgh, to give in a precise state of such subjects, if any, and of  
 n, and rents, or annual profits of the same, during the years libelled,  
 ntly, and that within fourteen days."

hip at the same time stated his views in the following note.

rd Ordinary does not hold that the corporation of a burgh, holding  
 perty as a mere non-resident heritor, in a parish situated out of the  
 mpted from the payment of poor tax, on account of these subjects,  
 here there is some difficulty; for the corporation of Edinburgh, by  
 ates, have rights, and powers, and duties within the parish of North  
 i. e. supposing the port to be partly situated in that parish, and can  
 iewed as a mere non-resident heritor. Nor does the Lord Ordinary  
 of feudal grantee of a port situated in a parish may not be liable to pay  
 that parish, for the free and clear profits which he annually puts into  
 ut for his own personal use. But in so far as he bona fide lays out  
 e these dues or profits to the maintenance and improvement of the  
 rd Ordinary cannot see any ground why they should be taxed for the  
 h. It may be, in strict law, such a grantee cannot be compelled to  
 to keep up (though that is a proposition which the Lord Ordinary  
 be maintained, and in its full extent, when the trade increases  
 of the harbour); but, at any rate, the Lord Ordinary thinks  
 is natural justice and propriety, to improve the harbour, so  
 public, as far at least as the harbour-dues will go; and that



**No. 54.** in England, that property devoted to such objects of charity, except in so far as it may be the subject of beneficial occupation by third parties liable to be rated, cannot be assessed.<sup>1</sup>

**Dec. 6, 1836.**  
**Bakers' Society of Paisley v. Stentmasters and Magistrates of Paisley.**

3. Even if it should be held that the whole property of the society is not so absolutely devoted to the support of poor members, &c., as not to be to any extent applicable to the benefit of the members themselves, still in point of fact at the present time, and for some years past, the whole profits have been entirely absorbed by the allowances, so that a part has even been appropriated to the liquidation of the debt.

*Pleaded for the Stentmasters, &c.*

1. There is nothing in the statutes which excludes the imposing of an assessment on societies, as distinct persons, on the means of the society, and although if the members are also inhabitants, they will be assessed individually, yet justice can always be done by allowing a deduction proportionate to their interest in the profits of the society separately assessed. Accordingly, practice has sanctioned this construction of the statute, and it is the universal custom in all the burghs of Scotland

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when such grantee does so apply the profits of it bona fide, he ought not to be taxed for these as if they had been appropriated to his private emolument. Now this seems to be what the town of Edinburgh, to the full extent of all the harbour dues and profits, at least for a time of which no termination is in view, and therefore the Lord Ordinary sees no termini habiles for this action, in reference to the dues and profits at present."

Thereafter a state was given in for the magistrates, in terms of the Lord Ordinary's appointment, in which certain premises were admitted to be held in free and ordinary property, while in regard to the yards and dry docks formed, and some buildings erected with the money borrowed under the authority of the statutes, and for the purposes of the harbour, and the rents and profits of which were applicable to the harbour, along with the dock-dues, they contended that they could not be liable till these became part of the free and ordinary property of the city by the harbour debt being paid off, though they agreed, on the principle of the decision in the Leith Fort case, to pay on a certain estimated rent, as in the original solum, with reference to the embankments or buildings formed or erected with the statutory funds. On this the Lord Ordinary pronounced an interlocutor (4th June, 1834), finding certain of the property liable and certain portions of it not liable, and proceeding thus:—"But in respect the defenders appear willing, for peace sake, to consent to pay a certain amount of poors' rate on certain of these subjects, upon the principle of the decision in the case of Leith Fort, allows them to give in a minute, stating for what subjects, and to what amount, they are so willing to pay poors' rate."

In consequence of this recommendation, the magistrates and commissioners agreed to submit to an assessment as on a certain rental, being considerably under what they had been in use to pay before the action was raised, and this being accepted by the parish, the Lord Ordinary's judgment was acquiesced in without the cause being brought before the Inner-House.

A. ROSS, S.S.C.—GRAHAM and ANDERSON, W.S.—PHIN and PITCAIRN, W.S.—Agents—

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<sup>1</sup> Rex v. Occupiers of St Luke's Hospital (2 Burr. 1053). Rex v. Warr (Cald. 358).

the assessment for the poor directly on mercantile companies, and No. 54.  
e societies.

3. The Bakers' Society is not a regularly constituted Friendly  
, nor are its funds absolutely appropriated to the use of the poor

Dec. 6, 1836.  
Bakers' Society  
of Paisley v.  
Stentmasters  
and Magistrates  
of Paisley.

4. On the contrary, the minute under which the mill of the so-  
as built expressly stipulates, that whatever profit might appear at  
ly balance, after supporting the poor members, &c., should be  
to the "use of the society." Accordingly, since the mill was  
e capital stock of the society has been greatly increased from the  
f their business, and if the society were dissolved, it would form a  
division among the individual members. There is thus no ground  
allegation that the society's property is legally appropriated to the  
of the poor, and the circumstance that in point of fact a portion of  
its are so applied yearly, cannot support the conclusion of exemp-  
t can only at most give rise to a plea for modifying the amount of  
assessment imposed, which is not the question here raised, nor is the  
a matter with which this Court will interfere without some alle-  
of corruption in the allocation of the rate. Besides, even if the  
were applicable to the support of the poor members, that would  
ite no ground of exemption. All property is liable in poors'-rate,  
e single exception of property belonging to the King; and even  
o, may be assessed, if beneficially occupied by a third party. The  
re is occupied by the society, who carry on therein an extensive  
or their own accommodation, employing many work-people, who,  
rty, would have a title to be supported by the parish; and the so-  
hus occupying the premises for their own advantage, must be lia-  
in assessment for the poor, just as a tenant would have been, had  
t them, on the same principle on which it has been held in Eng-  
at hospital lands, beneficially occupied, are the proper subjects of  
f-rate.

: cases having been put out for advising, the Court (February 16,  
delivered the following opinions :—

JUSTICE CLERK.—This is a case rather out of the common line, though  
points it is not necessary to decide. I don't think the objections founded  
Small Debt Act of much consequence, and the main question regards the  
to assessment. After attending to the constitution of the society, I can't  
be a purely charitable society, or a Friendly Society, in terms of the  
Parliament. It has other objects in view than the support of poor mem-  
is for the benefit of themselves and the public, as well as the poor mem-  
their widows and children. Though care is taken to provide for these  
the surplus profits are subject to be accumulated and added to the capital  
stock has accordingly been so accumulated; and if they chose the members  
involve and draw shares of the stock pro rata. A great deal of the argument,  
is not applicable. There would no doubt be a great deal in it, and I

No. 54.

Dec. 6, 1836.  
Bakers' Society  
of Paisley v.  
Rentmasters  
and Magistrates  
of Paisley.

would have great difficulty in allowing any assessment if it were purely a tax for support of the poor ; but I don't think this society comes under that description. There is, however, another point, whether, under the statute regarding assessments in burghs—for that is the rule here—it is competent to lay an assessment on a society as on individuals. The Act 1579 says the “haill inhabitants,” means individuals, and I think the pursuers completely meet the defenders' argument on the case of Parker, which makes against the defenders, as if it had held competent to assess companies it would have put an end to that case at once. On this point I think we must, before deciding, have more information as to the averred practice, and if the defenders' statement as to the practice be correct the question will still remain if it be sufficient to warrant the deviation from the statute.

**LORD GLENLEE.**—It is stated on both sides, that for time immemorial the assessment in Paisley has been the same as in Royal burghs, and it is admitted many societies are assessed without objection, and that the same practice is followed in Royal burghs generally to assess companies as well as individuals, to take care not to lay on a double assessment. Then if the pursuers are wrong on merits, where would be the use of setting aside the Sheriff's decree on object in form ?

**LORD MEADOWBANK.**—I understood it was the custom of the burgh of Paisley to assess societies ; but I cannot believe that it is the general practice of all burghs. But even if this were made out in Paisley, unless it were the general practice of the country, I would doubt the relevancy of the statement.

**LORD MEDWYN.**—I differ on the general point. I do not hold this a friendly society, nor do I think that of any consequence ; but I look to the object of the society. Now this is nothing but a charitable society. The origin of the fund, whether from termly contributions or the profits of a mill, can make no difference. If the society had remained on the footing on which it stood from 1701 to 1808, it would have been impossible to hold it other than a mere charitable society, and it could not have been assessed. In 1808, the parties thought it a better way to raise the sum required by the erection of a mill, at which they came bound to grind their grain ; but the revenue of the society was still always to be applied to the same object of relief of poor members, and while so applied do not think it assessable. Now it is clear that since 1824, not one sixpence has been applied to any object but the support of the poor ; and so far from augmenting the capital, £64 has since then been taken from the stock. It is, therefore, purely charitable society, raising funds perhaps in the most equal way, though the mode of raising them makes no difference on the question. If ever the business came to yield more, so as to make profit to themselves, then each individual would be obliged to add that to his means and substance, and would become assessable to a proportionately larger extent as an individual ; but in the meantime at least no part of profits are received by the ordinary members. Then it is admitted by the defenders that this is the only instance of a charitable society in Paisley being assessed, and the ground alleged for doing so is, that money is raised by grinding &c. I cannot see how that makes any difference, it being clear that no profit made to individuals so as to warrant its being an exception. On the other ground, if the town of Paisley have adopted the rule of royal burghs in other matters than this, as in sasines, there would come the other question, whether, under the

panies can be assessed as such at all; but on the first point I think it most unreasonable to alter the practice of the burgh as to charitable

No. 54.

Dec. 6, 1836.  
Bakers' Society  
of Paisley v.  
Stentmasters  
and Magistrates  
of Paisley.

**GLENLEE**.—What Lord Medwyn has stated might be of consequence to view in inquiring into the practice. I do not think that by the constitution of the society the profits are entirely set apart for the poor. After supporting them, they are to be set apart for the use of the society; and in point of fact, the amount paid to the poor is taken out of the whole revenue, and any surplus is added to the stock account, and the consequence is that this society now have considerable property, and have paid off debt.

**MEDWYN**.—I did not mean to say they might not some time be assessed, at present.

Court accordingly appointed the parties "to state in minutes their views as to the practice within burgh of assessing mercantile companies, as also societies of the kind here in question, for the support of the poor." Minutes were thereafter lodged, in which the statements of the parties agreed as to the practice being general in burghs, of assessing mercantile companies. As to associations like that here in question, the Bakers' Society stated that there were no instances of their being assessed, at least in Paisley in particular, although there were a variety of societies for similar objects, possessed some of them of very extensive property in heritable subjects, as well as money, no rate was laid on any of them. On the other hand, the Stentmasters, while they admitted that a rate was laid on various societies possessed of property, whose funds were appropriated to the support of their poor members, contended that there was a material distinction between these and the Bakers' Society, inasmuch as they did not carry on any trade or business, such as was done on by that society.

The cause being again put out for advising, December 6th,—

**MR JUSTICE-CLERK**.—We have not got much light from the minutes, and the question comes back upon us—Is this a purely charitable society? I cannot say it is a purely charitable society, and it is not a Friendly society under the Act. We see them laying out funds—purchasing a mill and manufacturing—making profits so as to discharge debts, and they might divide the funds among the members; and I cannot affirm that it is a purely charitable society within the statute. Then how is the question to be dealt with. It is said the law is in favour of assessing societies. I would have much difficulty notwithstanding the practice, in determining that these are to be assessed as individuals. The case of Parker would not have been raised, if the principle had been to lay a rate on societies as individuals, and I am not prepared to go that length.

**GLENLEE**.—In the very articles of the society it is said, that any surplus supporting the poor is to go to "the use of the society." Is not that a plain intimation that they looked to the probability of there being a profit, and that after paying for the poor, it was to be applied for the use of the society? All in all,

No. 54.  
—  
ss. 6, 1836.  
Bakers' Society  
Paisley v.  
Justices of  
the Peace  
Paisley.

they have made a profit, and have applied it to extinguish the debt contracted in building, and I think the society assessable. As to the rate, that is not properly before us. The only question is, whether they are liable to be assessed at all. It may be that, if the funds are exhausted for a particular year, they should not be assessed for that year, but in the ordinary case there is no ground to hold that they are taxed beyond a reasonable rate.

LORD MCDWYN.—If this were originally a mercantile establishment for making profit, and a charity engrafted on it, I could concur with these observations. But looking to the origin and nature of the society, I take a different view. It was instituted in 1777, and it is not alleged to be different from the Weavers' and other societies that are not assessed. Whether it be a Friendly society or not, it is a charitable one, and there are at present no divisible funds after devoting to charities. Before the mill was erected, it is clear that the society could not have been assessed. But if they substitute custom for contributions, does that alter the true nature of the society, and make it a trading company for gain? Paisley partakes of the character of a royal burgh, and the assessment is on the hable inhabitants according to their means and substance. The whole members are assessed, and if they derived any benefit from the society, it would be taken into view in assessing them individually; and I see no reason for assessing the corporation, because the members contribute by custom instead of annual sums. But besides, it cannot be called a profit where they have been paying off debt only. I cannot view it as an ordinary mercantile company. In Parker's case, the partner lived in the Barony parish, but the company was in Glasgow; and the question could not have been raised, if the principle had been to assess companies. Considering that Friendly societies and other corporations are not taxed, and the reasonableness of the thing, when all the profits go to support their own poor, I think that they should be exempted.

LORD JUSTICE-CLERK.—The individuals are liable for any profit they may make; but I am not prepared to assess the society.

LORD MEADOWBANK.—I think the society should not be assessed, except on any surplus after supporting the poor; but the question, whether the rate on the surplus is to be imposed on the individual members is not properly before us.

The cause having stood over that an interlocutor might be framed, the Court found that they could not agree as to the question of the competency of imposing an assessment on a society at all, being equally divided on that point. On this, the Society agreed to waive a decision regarding it, and the following interlocutor was accordingly pronounced.

“THE LORDS having considered the revised cases for the parties as taken to report by the Lord Ordinary, with the minutes signed and ordered, Find that it has not been sufficiently established, that the Bakers' Society of Paisley can be viewed either as a regular friendly society or a purely charitable institution, the funds of which are in no respect liable to contribution for the maintenance of the poor; Find that in so far as there are rents or profits accruing from the mill or other property or trade belonging to the society

society over and above the usual allowances granted to poor and aged members, and divisible among the members or applicable to the purposes of the society generally, such rents and profits are liable to be taken into computation and assessed for the maintenance of the poor of Paisley, in terms of law: Find no expenses due; and with these findings remit to the Lord Ordinary to proceed accordingly.”

No. 54.

Dec. 6, 1836.

Earl of Airlie

v. Ogilvie.

M'LEAN and GIFFEN, W.S.—A. NAIRNE, S.S.C.—Agents.

EARL OF AIRLIE and HONOURABLE DONALD OGILVY, Pursuers.—*Keay* No. 55.  
—*Miller*.

REVEREND WILLIAM OGILVIE, Defender.—*D. F. Hope*—*Buchanan*.

*Teinds—Valuation.*—Circumstances in which the Court pronounced a judgment, finding that a certain document, if not affected by a plea of dereliction, might be proved of as a valuation of the teinds, led before the sub-commissioners in the shire of Forfar, of as early a date as 4th and 12th June 1627.

At the earlier period of the reign of Charles I. his Majesty executed a general revocation of grants by his predecessors to the prejudice of the Crown; and in August 1626, a summons of reduction was raised in his Majesty's name, setting forth his “good and undoubted right to all kirks within this kingdom, by act of annexation, as being universal patron of all abbacies, priories, and all other ecclesiastical benefices, by the right of the Crown;” that his majesty was under an obligation, enforced by statute, and by the sanction of the oath to be taken at the coronation, to maintain the bail lands and rents pertaining to the Crown and Kirk in the said kingdom;” and accordingly was entitled to pursue this action “to the effect the patrimony of the Crown may be restored, the lands sufficiently planted, colleges, schools, and hospitals sufficiently maintained, and the gentry of our kingdom relieved of the heavy burdens laid against them in leading of their teinds, which are the uses contained in our late revocation, declaration, and proclamations made thereanent; also, by our said revocation, having good right to annul and reduce heritable offices and regalities granted in prejudice of our Crown and royal prerogative.” The defenders were required to bring with them charters, &c. “of all and sundry lands and baronies, kirks, teinds, patronages, pertaining to whatsoever abbacy, priory, or other benefice whatsoever;” “together with all infeftments of heritable offices or lands,” and to see the same reduced, &c. It was stated among the grounds of reduction, that “the said lands, kirks, teinds, and patronages were unlawfully taken from the Kirk” in a wrongful manner, and that the Kirk had been enormously hurt by the erections which had been made

Dec. 7, 1836.

1ST DIVISION.

Ld. Cockburn.

Teinds.



No. 55.  
 Dec. 7, 1836.  
 Earl of Airlie  
 v. Ogilvie.

In January 1627, the King appointed the Primate, Chancellor, and Treasurer, and a number of peers, prelates, freeholders, and burgesse his commissioners, “to deal, treat, compone, transact, and agree wi such persons as shall, at any time hereafter, before the expiry of th commission, be content to treat, agree, and modify such reasonable sati faction for the said erections, and temporalities, and benefices, feu-dutie and other certain rents of silver or victual of the said temporalities, teind and patronages of the said benefices, mortified lands and rents, heritabl offices and regalities, changed tenures or holdings, and taxed wards, pr properties, or casualties of the crown or principality, unlawfully acquired ( possessed by any of them, and yet fitting to be secured to the person unto the present possessors of the said property, upon reasonable cond tions.”

The Commission was to begin to sit on March 1st, and to continue till August 1st, and thereafter during the King’s pleasure. Power wa given to the Commissioners, or any twelve of them, to appoint meeting &c.; and “by commissions, or any lawful ways or means, to require th just rentals and valuations of the premises, &c.,” and to treat and agr what should be given to the parties for their pretended rights “to an parts or pertinents of the particulars above written;” “and how lawfi dispositions may be made thereof to others, who are willing to buy the tythes or premises; and how the superiorities, and feu-duties, and her table offices may be resigned unto his Majesty, and restored to the Crow again, therewith to remain for ever.” Power was given to disjoin unite parishes, or divide such extensive parishes as required division; “and t provide for sufficient building and repairing of churches thereof, the teind shall be reserved and dispoed as aforesaid, if the said churches be n already sufficiently provided, and for providing their ministers with suff cient lawful stipends;” also to make agreements as to other pious use and establishing schools in remote parts of the kingdom; and also wit power to them to call and convene before them the immediate heriton tacksmen, and possessors of all such lands, out of which the teinds be r ceived by the parties, or led, or otherwise paid, and to advise for the such other lawful rights and sentences for the said teinds as they sha think fit; and for such compositions and yearly duties to be reserved t his Majesty, as the said Commissioners and the parties shall agree upon.

In the commission the King promised “in verbo principis, to ratifi and approve such rights of the teinds, lands, or premises as shall be mad or advised by the saids Commissioners, &c.” Publication of the com mission was ordered to be made, “that the parties interested may hav due warning to provide themselves for the better buying of their ow teinds, and selling the securities of their lands, &c,” with certification, “proprietors or tacksmen and rentallers of land did not come in ar agree with the saids commissioners before the expiry of this commissio for all their teinds to be secured to them, that then his Majesty sha



farther secure the same unto the parties having no title thereto, for such a reasonable yearly rent as the commissioners shall appoint and think expedient according to the nature of their saids pretended rights, excepting always the teind of his Majesty's property and principality, &c." No. 55.  
Dec. 7, 1836.  
Earl of Airlie  
v. Ogilvie.

The Commission also declared the King's pleasure to be, that the changed tenures and holdings should be restored to their ancient state, unless "a reasonable increase of yearly rent to the Crown" was paid. The royal pleasure was farther declared to be, that the commissioners should agree "upon the establishing a certain patrimony to the Crown, therewith to remain in all time coming." The Commissioners were empowered to act in furtherance of the objects intended by the Commission, even though not expressly mentioned in it; and, in cases of doubt, to consult the King, whose answer should be as valid as if it formed part of the commission itself. In the event of an agreement being effected "as to the haill premises," the action of reduction, and all legal procedure on the revocation was to be given up. The commissioners were directed, however, to conclude nothing finally until the King should approve; especially as none of the lieges were bound to treat and agree with the commissioners "farther than upon their own voluntary agreement or approbation."

One of the earliest minutes of the Lords Commissioners had special reference to the extent of their powers in regard to teinds. It was in these terms :—

"Anent what teinds falleth under the Commission.

"4th April, 1627. The Lords of Commission have full power of his Majesty to treat of the haill teinds within the kingdom of Scotland."

Another minute, on 6th April, 1627, was in these words :—

"Anent discussion of valuation and plantation of churches.

"The King's Majesty grants warrant to the said Lords for discussing all valuations within the kingdom, and to plant the haill churches to be provided with victual and money."

Another minute, of the same date, bears, that the Marquis of Hamilton submitted his teinds and feu-maills to the saidis Lordis." On 29th May 1627, a minute was made, declaring what proportion "forth of the teinds" should belong to his Majesty, in name of annuity. On 13th June, the following minute was made :—

"Anent what payment of free-rent should be teind, the Lords finds the fourth part of the free-rent to be teind."

In February 1628, there is a minute extant, that "old rentals should be put for valuation, if the parties made no opposition." And in November following, "The Lords found that appellations from sub-commissioners should be before themselves."

Some of the submissions (all of which were made in 1628), by the Lords of Erection as to their superiorities, and by the bishops, burghs, and barons as to their teinds, it was specially narrated, that between

No. 55. the months of January and June 1627, "there was a great progress made by the Commissioners in the said business committed to their care." I  
 Dec. 7, 1836. the statute 1633, c. 15, "Anent his Majesty's annuity of teinds," and i  
 Earl of Airlie 1633, c. 19, containing a new Commission relative to completing the v  
 v. Ogilvie. luations of teinds, the Commission, 1627, is described as "the General Commission of Teinds and Surrenders."

There are many valuations extant, which were made in 1629, and several in 1628, but none appear to have been discovered so early as 1627 before the date when the Earl of Airlie, patron of the united parishes of Cortachy and Clova, in Forfarshire, and the Hon. Donald Ogilvy of Clova, heritable proprietor of the barony of Cortachy, raised an action against the Rev. William Ogilvy, minister of the united parish, to have an alleged report of valuation of stock and teind by the sub-commissioners in the Presbytery of Forfar, dated 4th and 12th June, 1627, ratified and approved. The document was said to have fallen aside for a period of about two centuries, and to have been accidentally discovered among the family papers of Lord Airlie. It was in these terms :

"Jaj vi th 27 zeires.

"At Rottnall the 4 and 12 June resp. conveyed Allexr. Ogilvy of Clonkala, Andrew Ogilvy of Colloe, John Ogilvy of Gala, John Lindsay at ye Miln of Clovay, elected and chosen be ye Moderator and Pbie of Forfar, and sworn according to ye comission directed to yam, convened with ye minister of ye parochie of Cortaquhie and Clovay, and after due tryall and examination for satisfaction and answering to ye particulars committed to them, Be the Lords of his Maies commission, sett down the rentall of ye said paroches and particulars, as follows :—

"The paroches of Cortaquhie and Clovay being hiylan, payes silver dutie, and the roomes are sett in stok, teind and vicarage, In cumulo.

"The mayns of Cortaquhie laboured continually In mansing adjacent to ye kirk of Cortaquhie, estimat to pay sax hundreth markes in stok, teind and vicarage.

"Artuthol, within a quarter a myl to ye kirk, payed of old three score markes, pays pntly, in respect of ye multitud of ye people and houses twelf score markes, may pay nyn score markes in stok, teind, and vicarage

"Callimce, &c."

After enumerating various lands, there was a distinct title, "Clovay," prefixed to another enumeration of lands, at the close of which, various statements were given, respecting the causes of uniting the parishes; the troublesome duties of the cure; the number of communicants in each parish; the want of an additional church; and the want of a parish school and also of a "hospitall," &c. It also stated, "At ye union is ordaine be ye platt foresaid, In stipend for Cortag. fyve hundred markes to be payed for parsonage and vicarage, Be tham who are Taxm., who is now my lord Ogilvey of ye whole Rooms except of ye lands of Colloe, quyre ye laird of Clovay remains taxman, and pays for the same proportionally

"The Kirk of Cortaquhie is a kirk of ye commons of old. The Bishop of Brechen is patron, and presents ye minister to ye whol parsonage and vicarage."

No. 55.

Dec. 7, 1836.

Earl of Airlie

v. Ogilvie.

In regard to the parish of Clovay, "distinct from Cortachy," it was stated, "Thair is ordaned now, be ye platt foresaid, a hundred markes to be payed out of ye teind scheaves by my Lord Marquis of Hamilton, and payed by ye laird of Clovay, as taxman for him; and the whol vicarage of ye paroch of Clovay whilk was and is now sett to ye laird of Clovay for fourtie lib. It is a kirk of ye abbacie of Aberbk., and comptat a paroch of Glamiss."

The document was indorsed on the back in these terms:—"The valuation of ye lands of ye paroch of Cortochy, be ye minister and elders, writers, be ordinance off ye grytt Comissione at Edr. Being choysin also by ordinance of ye Moderator of ye Presbetrie of Forfar."

Parties were at issue whether or not Cortachy was a parsonage: The pursuer averred it to be so, and the defender disputed this on the record.

The defender alleged that the above document was not a valuation by any sub-commissioners duly authorized, 1st, Because the Royal Commission of 1627 did not contain authority to value teinds, and no such authority existed prior to the surrenders of teinds under the submissions in 1628; and accordingly no valuation had yet been produced of earlier date than 1628,<sup>1</sup> and very few anterior to 1629. 2d, It was not a proper report of a subvaluation of teinds, but embraced a variety of heterogeneous statistics; and in particular, it could not be intended as such valuation, because it only gave the cumulo rental of stock and teind together, and there was no law at that time enacted fixing any definite proportions for ascertaining the amount of teinds upon a given amount of rental; and even, if the teinds could have been valued, there was then no law to compel the heritor to accept that value as a surrogatum for the drawn teind. 3d, Assuming Cortachy to have been a parsonage, it would follow that the teinds, being possessed by a beneficed clergyman, were exempted from the submission by the clergy,<sup>2</sup> which provided, "that we, and every one of us, enjoy the fruit and rent of our several benefices as they are possessed by us at the present time, and that the same be not hurt nor diminished neither in quantity nor quality, whether the same be paid to us in rental bolls or by gathering of the teind sheaves." The decree of the Court, in 1629, made a corresponding exemption. And 4th, That there was no sufficient evidence that the parties who professed to make the valuation, held any legitimate authority to act as sub-commissioners, especially as there was no recorded notice of any sub-commissioners earlier than November 1628; or that they acted under the Commission 1627, in

<sup>1</sup> See Connell on Tithes, 317 and 235.

<sup>2</sup> See Connell on Tithes, 329; 1662, c. 9.

No. 55.  
 Dec. 7, 1836.  
 Earl of Airlie  
 v. Ogilvie.

place of acting under one of the commissioners of 1617 or 1621, having some analogous objects, but possessing no power to value teinds. Neither did it appear that all parties were duly before them.

The pursuers answered, 1st, Power to lead a valuation of teinds was undoubtedly possessed by the commissioners appointed in 1627. The terms of the Commission, and the minutes of the commissioners, proved this; and it was so stated by both Erskine<sup>1</sup> and Connell<sup>2</sup> on tithes. The power to value, extended, before the submissions of 1628, to all who chose voluntarily to appear before the Commission.<sup>3</sup> And the Court had recently approved the report of a subvaluation \* made under authority of that Commission, though dated as late as 1635. 2d. The report embraced

<sup>1</sup> 2 Ersk. 10, 26, and 34.

<sup>2</sup> 1 Conn. 218, 219, 232, 234; 1633, c. 19.

<sup>3</sup> 1 Conn. 238.

\* This case, having been accidentally omitted formerly, is now subjoined:

ROBERT SMYTHE, Pursuer.—*Smythe*.  
 REV. WILLIAM LISTON and OTHERS, Defenders.—*Rutherford*.

*Teinds—Valuation—Process.*—Circumstances in which the Court approved a valuation of teinds led before the sub-commissioners in the Presbytery of Perth, who were appointed under the High Commission of 1627;—Holding (1.) that, though dated as late as 1635, the report was not objectionable either on account of the certification in the proclamation by the High Commission, dated March 15, 1633, or the issuing of the new Commission of 1633, but might competently there-after be signed and approved of; (2.) that there was reasonable evidence of the valuation having been actually led prior to August 1631, though the report was not signed till 1635; and (3.) that the failure to cite the minister was no irregularity in respect that he was merely stipendiary, and the titular was duly cited.

Feb. 5, 1833.  
 Teind Court.  
 L. Moncreiff.

THE report of a valuation by the sub-commissioners of the Presbytery of Perth, bore to be signed on 25th August 1635, and that the sub-commission had been expedite on February 2, 1629. It appeared from the report, that there had been various diets of probation, before the report was signed, but the precise dates of these were not given. In the parish of Tippermuir, the minister of which was stipendiary, a part of the lands, valued, was described as belonging to “Mungo, Master of Stormont,” who became Viscount Stormont<sup>1</sup> on 27th August, 1631. The miln-lands of Pitcairn were among the lands of the Master of Stormont so valued. These lands are now and have long been part of the parish of Redgorton. The report bore, that the Bishop of Dunkeld was titular of the teinds of the parish of Tippermuir. It stated that the sub-commissioners had appointed a Procurator-Fiscal, and other requisite officers, and that they had duly cited all persons having interest, and “the said haill persounes, heritors, and titulars particularly above-named, within the foresaid haill parochines within the Presbytery of Perth;” and that “the said persons, heritors, and titulars,” had appeared and led a proof before them.

On March 15, 1633, the High Commission issued a proclamation, directing sub-commissioners to lodge their reports by the first day of June 1633, with certification “to them that sall neglect,” that the sub-commissioners should be fined, and “the heritors and titulars sall be debarred fra all valuation and benefit of probation before the sub-commissioners, and sall be conveyened at the instance of his Majes-

<sup>1</sup> 2 Wood's Peerage, 531.

s matters, because the object of the commission referred to various  
ts of political statistics ; but it was also, expressly a report of sub-

No. 55.

Dec. 7, 183  
Earl of Alri  
v. Ogilvie.

lvocate, before the Lords and others of the Great Commission, at Halyrud  
there to hear and see their valuations and probation thereof led, &c." On  
th, 1633, in respect of the reports not returned, the Lord-Advocate, in the  
of High Commission, " protested that the certification (contained in the  
ation) might pass against the sub-commissioners, titulars and heritors." By  
c. 19, a new Commission was appointed " for the finishing and full perfec-  
the glorious worke anent the teinds, maintenance of ministers, and others  
l." The commissioners were directed to " prosecute and follow forth the  
an of whatsoever teinds, parsonage or vicarage, within the kingdom, which  
yet unvalued : And also to receive the reports from the sub-commissioners  
ted within ilke presbyterie, of the valuation of whatsoever teinds led and  
d before them, according to the tenor of the sub-commissioners direct to  
fect." They were also empowered " to appoint committees or sub-com-  
of their own number, to receive the reports of the said valuations made or  
nade ;" and likewise to appoint " sub-commissioners, not being of their own  
r, within any parochine or presbyterie of the countrie, for leading and dedu-  
the said valuations, and to receive the reports thereof, &c."

ert Smythe of Methven, proprietor of the miln-lands of Pitcairn, in the pa-  
Redgorton, raised a process of approbation of the report of sub-valuation  
mentioned, to which the minister of Redgorton gave in defences, embracing  
f a special nature as to an alleged res judicata and dereliction, and also as to  
t whether the lands of Pitcairn formed part of the parish of Tippermuir at  
e of the valuation. Besides these, he separately pleaded, that as the report  
ated as late as 1635, and proceeded from commissioners named under the  
ission 1627, which wholly fell by the issuing of the new Commission in  
it was made without authority by parties who were functi. And in addition  
, the protestation of the Lord Advocate, on 5th June 1633, and the relative  
ation of the previous proclamation of the high commission struck at all valua-  
by sub-commissioners, acting under that commission, and not previously  
ed. This report, therefore, could not have been approved by the commission  
3, even if presented to them as soon as it was signed, and it could not be  
ed by the teind court now. Separately, there was not sufficient evidence  
l parties had been cited, especially the minister ; and if the lands were not  
part of the parish of Tippermuir, that alone was sufficient to set aside the  
lure in a question with the defender. The pursuer in answer, pleaded, that  
the report was signed as late as August 1635, there had evidently been various  
of probation, all of which were of an earlier date ; that in particular the lands  
airn, along with others, were described when valued, as belonging to " Mungo,  
r of Stormont," which must have been anterior to August 1631, when he  
e Viscount Stormont ; and that, if the sub-valuation of these lands was led and  
ed before the protestation in 1633, and the new commission of that year, it  
ompetent to make a report of such subvaluation at any after period, as it was  
f the objects of the new commission to receive reports of such valuations and  
re them, if regular. The pursuer pleaded, separately, that this same report  
was repeatedly approved,<sup>1</sup> as to other lands, by judgments of this Court ; and  
any subvaluations under the commission 1627, though not dated till after  
had been approved by the teind court, and it was now too late to object to  
otherwise regular. In regard to the citation of parties, this was stated ex  
the report and must be presumed post tantum temporis ; and it was not  
to cite the minister at all, as he was merely stipendiary, and the titular

<sup>1</sup> Earl of Kinnoull, June 7, 1826.



**No. 55.** valuation of stock and teind, and should be approved as such. Dec  
 Dec. 7, 1836. arbitral fixing the proportion of teind to rent, to be one-fifth, was  
 Earl of Airlie  
 Ogilvie.

was duly cited.<sup>1</sup> It was unnecessary to enquire into the effect of the lands having belonged, at the date of the valuation, to any other parish than Tippermuir, as evidence was adduced sufficient to establish this.

The Lord Ordinary ordered cases and reported them to the Court of Teinds. His Lordship issued this note of his opinion. "The Lord Ordinary is clearly of opinion that the plea of the defender, founded on the circumstance of the subvaluation not having been reported till 1635, is altogether untenable. The evidence derived from the fact that the Master of Stormont, in whose name the valuation was made, had ceased to bear that designation on 27th August 1631, appears to be as satisfactory as can reasonably be expected, post tantum temporis, that the valuation had been made before that date. And without going into the particular points of the argument, the Lord Ordinary thinks that it is a great deal too late to maintain now, that no subvaluation by the commissioners, under the commission 1633, can be approved of unless it was reported in conformity to the order of the commissioners on the 15th March 1633, or before the statute 1633. Many subvaluations so situated have been approved of. This very report has been approved of in various cases; and very lately in the case of Mr M'Donald of St Martin's. The Court cannot give one law to one heritor, and another to another, on the same deed. But the pursuer's argument is also quite satisfactory to the Lord Ordinary on the principle of the question."

His Lordship then considered the question of evidence, whether the defender had shown that the lands were no part of the parish of Tippermuir at the date of the valuation, in which his Lordship considered the defender to have failed. His note then proceeded: "If it were to be held that the lands were not part of the parish of Tippermuir at the time of the valuation, the Lord Ordinary would have great doubts as to its legality. The absence of the minister is not a good objection, as he was clearly stipendiary, if the titular was properly called, and the proceedings were regular. But though there is a difference between this case and that of Kilmaly, the principle is not altogether inapplicable; for there might be reason for dealing differently with the valuation, with reference to the lands being in one parish or in the other; and if the titular or his agents, believed these lands to be in Redgorton parish, they might not find occasion to give any attention to the proceedings as to Tippermuir, notwithstanding his general right of titularity. Besides, would it not be such a misdescription, as to annul the valuation in question with the minister, independent of any defect of appearance? Whether it was necessary to call the minister or not, he had a title to appear. The Lord Ordinary must confess, however, that the act or decree of the commissioners, dated 23d March 1631, as given by Sir John Connell (Law of Par. 33), bearing that the teinds of land annexed should still belong to the original parish, if it really did take the force of law at that time, would go a great way at once to obviate the objection and to explain how the lands came to be valued as in Tippermuir, if they had been previously annexed to Redgorton. But he would require more authority for that before he could decide on it. The Lord Ordinary is of opinion that the explanations in the case for the pursuer are sufficient to obviate the pleas of res judicata and dereliction."

On considering the report,

THE COURT "adhered to his Lordship's opinion, as expressed in his note, approved of the report of the sub-commissioners libelled, and decerned the approbation accordingly."

J. GIBSON, JUN. W.S.—A. MURRAY, W.S.—LOW and RUTHERFORD, W.S.—Agents.

<sup>1</sup> Macneil, June 3, 1801, F. C. (App. Feb. 20, 1809); 1 Conn. on Tithes, 432.

ced sooner than September 1629, yet there were undoubtedly No. 55.  
 is valuations of stock and teind, estimated in cumulo, before the Dec. 7, 183  
 proportion of teind was so fixed;¹ and as it was all along in Earl of Air  
 v. Ogilvie.  
 relation to fix a certain proportion between teinds and rent, as  
 d from the minute of the Lords Commissioners of June 13th,  
 was equally available for that end, whether the valuation was  
 ore or after the decree arbitral. 3d. The teinds of Cortachy  
 old in tack, as appeared from the tenor of the report itself, and  
 inds, though belonging to a beneficed clergyman, were equally  
 valuation, with any other.² And 4th. It was not necessary, post  
 temporis, to produce the acts and warrants under which the sub-  
 ioners acted, or to prove the citation³ of all parties having inter-  
 he power to grant sub-commissions for valuing the tithes, and the  
 such subvaluations, were equally certain.⁴ And the presumption  
 a rite et solenniter acta, was sufficient, to elide all objections on the  
 of deficient evidence of formal procedure.

des the questions above stated, a plea of dereliction was argued by  
 ties.

s were ordered, and reported to the Court.

JUSTICE-CLERK.—I think it is attended with some difficulty, to decide  
 rue character and effect of the document founded on by the pursuers; but,  
 oking with some care into the authorities, I have come to be of the opinion  
 s a subvaluation to which the Court must give effect in this process of pro-  
 There is some difference between the scope of the royal commission in  
 id the subsequent commission, but I do not at all agree with the defender  
 ing that the former of these commissions was not intended and empowered  
 valuations of stock and teind. On the contrary I am satisfied that the  
 sioners were to lead such valuations, and the authority both of Erskine and  
 l is express in stating that valuations, to a great extent, were led under it.  
 re that the subvaluation, now under discussion, appears to be the earliest in  
 f date which has yet been discovered, but there are many extant which were  
 1628. All these must have been led by the commissioners appointed in  
 and there were no others before whom they could have been led. Upon this  
 concur entirely in the opinion expressed by Lord Moncreiff in the case of  
 ton, decided February 5, 1834, where his Lordship states “it is a great deal  
 to maintain now that no subvaluation of the sub-commissioners, under the  
 mion 1627, can be approved of unless it was reported in conformity to the  
 f the High Commission on 15th March 1633, or before the statute 1633.”  
 that case, the Court concurred in the opinion of the Lord Ordinary, and

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on Tithes, App. No. 63.

2, c. 9; 2 Ersk. 10, 36; 2 St. 8, 35; 1 Conn. 503; and Stewart, ib.  
 Conn. 492 to 510; Conn. App. No. 17.

March 7, 1798 (15772); Thomson, July 20, 1763 (15754); Pringle,  
 (15754); D. of Roxburgh, Dec. 12, 1744 (15741).

26, 28, and 34.



No. 55.

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 cc. 8, 1836.  
 Earl of Airlie  
 Ogilvie.

approved of the report of the sub-commissioners, which was of a subvaluation made under the authority of the commission of 1627. The note of the Lord Ordinary in that case is very important, and I hold it to be sound law. In the present case I consider, that effect must be given to the subvaluation. The document produced seems to be not only a careful, but very accurate document, considering the date at which it was framed. And although there is a certain amount of statistical information contained in it, beyond what was necessary for a mere subvaluation of teinds, it must be remembered that the commission of 1627 had various other important objects in view, and the minuteness of the report only shows that the sub-commissioners were the more assiduous in the discharge of their duty. In regard to the plea of dereliction I think the cause should, before answer, be remitted to the Lord Ordinary to be farther prepared.

LORD PRESIDENT.—I concur very much in the opinion which has just been delivered. I am satisfied that this report was not prepared by sub-commissioners appointed either under the commission 1617, or 1621, or any other than the commission 1627. It is true that it is of a rather peculiar tenor, and embraces a variety of particulars which I never saw in any valuation before. But it must be remembered that the commission 1627 had various important objects in view, besides that of the valuations, and the object of the whole enquiry was to form the basis of a friendly arrangement of the conflicting interests of the crown and various important classes of the community. In order to attain this end, it was necessary to have full information on other subjects besides the teinds, and it is on that account I conceive that this report embraces a variety of topics. But I am satisfied not the less that it is the report of a subvaluation of stock and teind, such as we must now approve of, unless the plea of dereliction be well founded. In regard to that plea I think the cause should, before answer, be remitted to the Lord Ordinary, to prepare it.

LORD BALGRAY.—I entertained some doubts at first, but I came finally to be of the opinion which has been expressed by your Lordship and the Lord Justice-Clerk.

The other Judges concurred, and

THE COURT pronounced this interlocutor :—“ Find that the writing founded on as a valuation by the sub-commission, is a document which might, if not barred by dereliction, be approven of by the Court as a valuation of the teinds ; but before answer, remit to the Lord Ordinary to hear parties on the subject of dereliction, and to proceed, &c.”

As there was a question of alleged dereliction of the sub-valuation still to be disposed of, their Lordships quoad ultra remitted to the Lord Ordinary.

J. YULE, W.S.—J. BURNES, S.S.C.—Agents.

narrative of the bond having been granted, but the bond did not make any  
in gremio, to the letter :—Held that, in these circumstances, the septen-  
scription of 1695, c. 5, did not apply to the letter, though it was *para*  
*negotii* with the bond, because that statute is limited to cautionary obli-  
which are contained in the same writing with the principal obligation. 2.  
whether, if the bond had referred in gremio to the letter, as well as the  
the bond, the statute would have applied.

20th October, 1836, the trustees and managers of the Brighton Dec. 8, 1836.  
Relief Chapel granted a bond for £2000, with a disposition of the 1st Division.  
in security, in favour of William Moffat, apothecary, Edinburgh, B.  
rent, and Miss Moffat, afterwards Mrs Tait, in fee. Robert Wil-  
riter in Edinburgh, the law-agent of the chapel trustees, granted,  
e same day, the following obligatory letter addressed to Moffat :—  
,—The trustees and managers of the Brighton Street Relief Chapel  
g granted bond and disposition in security for £2000 sterling to  
n liferent, and Miss Moffat and her heirs and assignees in fee, dated  
lay, over the church and other ground feued by them in Brighton  
t, I hereby guarantee to you, and the said Miss Moffat, and her  
sids, payment of the foresaid sum of £2000 sterling, interest, penal-  
and expenses, contained in the said bond and disposition in security,  
ever the same shall be demanded, in terms of the stipulations of  
aid bond and disposition in security, and that in addition to the  
nal and heritable security contained in the said deed, I being en-  
to an assignation at my expense, when required. In witness  
cof," &c.

offat having afterwards agreed to restrict the security to a portion  
of the subjects covered by it, Wilson, on 20th December, 1831,  
read a letter to Mrs Tait and him in which after narrating the

No. 56. Wilson pleaded in defence, that the letter was merely cautionary and had suffered the septennial prescription.

act 8, 1836.

Wilson.

In making up a record, the pursuers averred that they had “declined to complete the transaction unless additional or corroborative security should be granted for the money ;” and that the defender “offered to agree to grant the obligation quoted in the libel. Under this arrangement the bond and disposition in security libelled, bearing date October, 1826, was granted to Mr and Miss Moffat. The foregoing corroborative obligation, granted by the defender in terms of the arrangement betwixt the parties, is dated the same day with the bond, to which it makes reference, as having been previously executed.”

The defender denied this, under reference to his own statement, that, after the bond was extended, and the borrowers had signed it, the lender’s agent refused to go on with the transaction, and the defender, “on or about the date thereof,” signed the obligatory bond and that he was understood by all concerned to be a mere cautioner. The statement did not, in express terms, say whether the signature on the letter was agreed to, before the loan was definitively assented to and proceeded with ; but this appeared to be the necessary result of the statement made.

In these circumstances the pursuer pleaded, that the act 1695, c. 1, did not apply to the case. Its whole conception limited it to such obligations, of a cautionary nature, as were inserted within the same deed which contained the obligation of the principal. It referred to one who was not only bound himself for, but also “with another, conjunctly and severally, in any bond or contracts for sums of money :” and the prescription was to run in seven years “after the date of the bond,” and not from a separate cautionary letter. The whole structure of the provision in the act, showed that it was only the case, where the cautioner was in the same deed with the principal, that was contemplated by the act. And it had been so construed by a series of decisions,<sup>1</sup> in one of which (Howieson) the cautionary obligation was of even date with the principal, and was obviously *pars ejusdem negotii*.

The defender answered, that the statute, being remedial, should be construed so as to advance the remedy. The evil was stated, in the preamble, to be men’s over facility in engaging as cautioners : and the enactment was, that any one binding himself for and with another in a bond “or contracts for sums of money,” should be bound no longer than seven years after the date of the bond. Under the expression

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<sup>1</sup> Scott, Feb. 8, 1715 (11012) ; Blair, Jan. 20, 1747 (11025) ; Gordon, Jan. 16, 1748 (11025) ; Hog and Co. July 9, 1765 (11029) ; Howieson, Dec. 7, 1765 (11030).

action if expressed in separate writings. In all the decided  
pt Howieson, the cautionary obligation was executed some  
the principal bond, and the act could apply to none of  
e prescription expressly ran from the date of the bond alone.  
to the single case of Howieson, the party was not bound as  
cautioner," though in reality he might be so : and therefore he  
ictly within the provisions of the act. But here, the letter of  
er was expressly a letter of "guarantee," which was the same  
l effects, as "caution," and therefore the defender was an  
cautioner" in the words of the statute.

rd Ordinary "repelled the defences, and decerned against the  
terms of the conclusions of the libel ; and found the defender  
xpenses." \*  
ender reclaimed.

ELGRAY.—I think it clear that the act does not apply to a case of this

The letter written by Wilson himself, on 20th December, 1831, ex-  
ribes the letter in question as "a collateral obligation." He was a  
man, and that shows his own understanding of the nature of his obli-

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E.—It has been repeatedly decided, that obligations of the nature of  
to be made good in the present action do not fall under the act 1695,  
very specialty mainly rested on here, viz. that the obligation is of the  
s the original obligation, to which it refers, and which it is intended to  
, occurred in the case of Howieson against Howieson, 7th Dec. 1784,  
, and was disregarded.

does not appear to the Lord Ordinary that the obligation is properly  
and of such a kind as to warrant the defender's demand, that the obli-

**No: 56.** gation all along. I look upon it as a collateral and corroborative obligation, to which the statute does not reach.

ec. 8, 1836.

ait v. Wilson.

**LORD PRESIDENT.**—I take the same view, and I am also influenced in doing so, by the terms of the letter which has been just referred to. The obligatory letter of 20th October, 1826, was plainly granted after the date of the bond, as it bears, in gremio, to be given in respect of the bond having been granted. And although it were but a few minutes which elapsed between the granting of the bond, and the granting of the defender's obligatory letter, that is enough to exclude the operation of the statute. It may create a case of great hardship to parties, and in this instance I think it has done so; but in point of principle it is quite immaterial how long or how short is the interval between executing the principal obligation, and the collateral obligation. If parties will execute their contracts according to such a form, as to be without the reach of the statute, they cannot afterwards ask the benefit of the statute from the Court.

**LORD GILLIES.**—This is a very narrow case indeed, but I am not prepared to alter the interlocutor. If the obligatory letter, which refers to the bond, had, itself, been referred to in gremio of the bond, I think the statute must have applied to the case. On the other hand, if the obligatory letter had been dated but one day after the bond, it is clear that the statute could not have reached it. Between these narrow limits the point comes to be, whether the obligatory letter, dated on the same day with the bond, and referring to it, and being beyond doubt, *pars ejusdem negotii*, is within the reach of the statute or not. In the case of *Howison*, the cautioner's obligation was granted on the same day with that of the principal, and I think it clear enough that the collateral obligation in that case was treated just as a cautionary obligation, and nothing else; and also as being *pars ejusdem negotii*. That is therefore a direct precedent, on this important feature in the present case. And I observe, from the tenor of the defender's letter, that it narrates the bond and disposition to have been already granted, and states this as the cause why the defender executes the obligatory letter: so that the principal obligation was, in point of fact, first executed. It is true that at least a whole day did not intervene between them, but some interval there must have been: and the lapse of a day, or part of a day, is often decisive either in such a question as this, or in other questions in human affairs. In less than one day, the battle of *Pharsalia* was fought and won, and Pompey, who in the morning was lord of a large portion of the globe, was, before night, a fugitive and a wanderer on the face of the earth. In the present instance I think the interlocutor of the Lord Ordinary should be affirmed.

**LORD MACKENZIE.**—This is certainly a case which is narrow in the extreme, and even more so, I apprehend, than has just been stated by my Lord Gillies. Besides the clear evidence that the obligatory letter was *pars ejusdem negotii* with the granting of the bond, to which bond the letter refers, it will be observed, that, by the averments of the pursuers themselves, they positively say on the record that they declined to lend the money until it was agreed by Wilson to grant the obligatory letter in question. That is clearly a letter of express "guarantee," or caution; which of course I consider to be equivalent terms; and it is evident on looking to the circumstances, and to this statement on the record, that the granting of this cautionary letter was part of the original contract. As I hold it certain therefore that the granting of this letter was, from the first, part and parcel of the contract for this loan of money, and as the letter bears the same date with the

No. 56.

Dec. 8, 1836.  
Tait v. Wilson

question comes to be whether it is not equally within the intention and meaning of the statute? It may be that the letter, in point of time, was a later period of the day than the bond; but, in the whole circumstances, considering the statement of the pursuers themselves, I cannot see how this affects the decision. It remains equally true, that the letter was just a part of the original contract for the loan: the bond and the letter were parts of one and the same contract. The question therefore comes to be narrowed to this fine point, whether the statute which would undoubtedly have reached Wilson's share of the contract, supposing it to have been embodied in one and the same deed, is prevented from reaching it, by the circumstance that the contract is expressed in two deeds, in place of one. The letter refers to the bond, and if a counter reference in the bond, back to the letter, be essential, it is to be seen how this is not supplied, to all intents, by the statements of the pursuers themselves on record, who are in right of the bond. No words, which have been inserted in the bond, could more clearly have made it refer to the letter, than it is proved by that statement, to have had reference to the letter, executed, and when the loan was finally assented to, and completed. I feel some difficulty in disposing of this question in a satisfactory manner. In the case of Howieson the cautionary obligation was not expressly of a cautionary nature, however clearly it may have been understood by all parties to be so; and the circumstance is a specialty which, to a certain degree, renders that case an authority on the present, in claiming the protection of the statute. Still that obligation was of the same date with the principal obligation, and was clearly *par negotii*, and I rather think it must be regarded as a precedent to this effect, that parties may evade the statute by merely adopting two separate writings, in place of inserting the principal and the cautionary obligation in one. But the point to be so very narrow, in holding that one and the same contract does not fall under the statute if executed in one deed, but does not fall under it, if executed by means of two deeds, that, but for the precedent of Howieson I should have doubted very much whether a remedial statute should be so restricted in its operation. And were it not for the opinions already expressed to-day, it would have been satisfactory to my mind to have had more time for consideration before this case.

GILLIES.—The averments of the pursuer, now referred to by my Lord, are so far from being founded on by the defender, that he meets them with an absolute denial.

COURT adhered on the merits, but altered as to expenses, and found the pursuer due, in respect of the narrowness and hardship of the case.

J. ANDERSON.—C. and D. STEWART, S.S.C.—Agents.

No. 57.  
Dec. 8, 1836.  
1st Division.  
Ld. Cockburn.

MRS JANE CAMPBELL OF STEWART, and JAMES STEWART, Pursuers.  
*Forsyth—Robertson.*

MISS MARGARET STEWART, Defender.—*Rutherford.*

Stewart v.  
Stewart.

Davidson v.  
Murray's  
Trustees.

*Jury Trial—Process.*—This was a question of a special nature. At the jury trial a verdict was found for the defender, but subject to the effect of a judicial minute, signed at the trial by the counsel on both sides. The minute bore, that notwithstanding the verdict, it should be competent for the pursuer to prove that a certain sum of £500, referred to in the minute, was the money of the late Mrs Stewart. In order to attain this end, the pursuers raised a supplementary action, which the Lord Ordinary considered to be irregular, and from which he assoilzied, reserving to the pursuers to bring any separate and original action which might be competent. But the Court, on a reclaiming note, considering that the power of bringing the supplementary action fell within the terms of the reservation in the judicial minute, recalled the interlocutor, and remitted the case to the Lord Ordinary to proceed.

C. and D. STEWART, S.S.C.—WOTHERSPOON and MACK, W.S.—Agents.

No. 58.

WALTER DAVIDSON, Suspender.—*G. G. Bell.*

MAGISTRATES OF BURNTISLAND, Respondents.—*Patton.*

*Process—Suspension—Amendment of the Libel.*—A bill of suspension had been objected to as informal, on the ground of there being no conclusion for suspension; and the suspender having applied to the Lord Ordinary on the bill to allow an amendment supplying this defect: Held, that such amendment was competent.

Dec. 8, 1836.  
—  
2d Division.  
Bill-Chamber.  
Ld. Cockburn.

DAVIDSON presented a bill of suspension and interdict against the Magistrates of Burntisland, to prevent them carrying into effect a certain resolution. The bill contained no conclusion for suspension, but only a narrative, and then a prayer for letters of suspension in common form. The bill was served on the Magistrates, who, in their answers, objected to its formality on the score of there being no conclusion. In order to obviate this objection, an application was made by Davidson to the Lord Ordinary on the bills to allow an amendment of the bill by introducing conclusions.

The Lord Ordinary having reported the matter to the Court.

THEIR LORDSHIPS unanimously held that such amendment was competent.

WILLIAM FRASER—ALEXANDER HUTCHESON—Agents.



the year 1819, the advocate, Martin, granted a trust-deed for Dec. 8, 1836.  
of his creditors in favour of the respondent Thoms and two other  
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2d Division.  
Lord Jeffrey.  
T.

trustees thereafter entered into possession of the trust-property  
proceeded to administer, the body of creditors homologating the trust  
ending meetings, claiming, and drawing partial dividends.  
1829, some disputes having arisen between the creditors and the  
trustees, a meeting of creditors was held, at which it was unanimously  
resolved that the whole questions and differences regarding the trust  
should be submitted to an arbiter. A regular submission was  
accordingly entered into, whereby both parties referred to the arbiter's  
decision on all disputes subsisting between them "upon any account, occa-  
sion, or transaction whatever in relation to the trust affairs and the claims  
upon the estate,"—"with power to him to fix and ascertain the  
proportions of division among the creditors, and make up a scheme of division  
thereof, and to decide and determine generally as to every matter that may  
be necessary for the final winding up of the estate."  
Thereafter the creditors lodged their claims of every description, and  
submitted their whole accounts and intromissions with the arbiter, who  
made a state of the trustees' intromissions, ascertained the workings

No. 59. approving thereof, having been previously informed that his subscript  
 Dec. 8, 1836. was required to enable the creditors to receive the final dividend. Bef  
 Martin v. the decret-arbitral, however, was pronounced, though after the arbi  
 Thoms. had intimated an opinion adverse to the creditors, in certain questi  
 between them and the trustees, he raised action before the Magistra  
 of Dundee against the trustees, libelling on the trust-deed, and allegi  
 that the trustees had acted illegally and improperly in the trust affairs,  
 which he set forth particular instances, and subsuming that he was ei  
 tled to have a count and reckoning with them, failing which to h  
 payment from them of £2000, less or more, “ to enable him to extingui  
 all or any of the debts which might have been due at the time of the tr  
 and may still be due, and to retain the balance for his own use ;” conc  
 ding, first, for count and reckoning, and for payment, for the purp  
 already mentioned, of £2000, less or more, or at least that the defend  
 should relieve him of all his debts due at the time of the trust, and p  
 him £500 as the balance over ; and secondly, in the event of the defer  
 ers failing to count and reckon, for payment of the sum of £2000, w  
 interest.

Martin stated on the record the amount of trust-property to be accoun  
 ed for, at £3472, of which upwards of £800 had been distributed amon  
 the creditors, the balance of debts unpaid exceeding £4000 of princip  
 with interest from 1829. He averred in the eighth article of his co  
 descendence, “ that a number of claims made on the estate were not du  
 and yet were allowed by the defenders without proof or constitution  
 and he specified several of these claims.\*

The trustees pleaded in defence ; 1st, In respect of the trust-conve  
 ance, and especially of the submission entered into in terms of the powe  
 therein conferred, and the proceedings following thereon, the action  
 incompetent. 2d, The pursuer has no interest, in respect the funds  
 belong to his creditors, for whom there will not be full payment.

After various steps of procedure, the magistrates sustained the defenc  
 founded on the submission and decret-arbitral, and assoilzied the defens  
 ers.

Martin thereupon brought an advocacy, in which he pleaded, int  
 alia ; 1st, In every case of a private trust for payment of debts, it is im  
 plied in the nature of the trust, that the trustee shall be accountable t  
 the truster as well as to the creditors, for his intromissions and manage  
 ment, and that he shall be bound to pay over to the truster, the overplu  
 of the trust-funds, after satisfying debts. 2d, No decret-arbitral pr  
 nounced in a submission to which the truster is not a party, can bar th

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\* The answer to this article was as follows :—“ Denied. No claim was allow  
 ed on the estate without affidavit to its verity, and the defender being satisfied i  
 the ordinary way that it was due and proper. Admitted that the persons particu  
 larly named were ranked on the estate ; but denied that the sums stated by th  
 pursuer are correct. The claims have been all scrutinized.”

his right of otherwise bringing the trustee to account. 3d. No. 59. tor had an obvious interest to pursue, as on a judicial investment amount of the trust-property might be found to be greater, sum of debts falling to be ranked less than on the showing of , and thus a balance remain for the advocator.

Dec. 8, 1836.  
Martin v.  
Thomson.

tees pleaded, generally, that, in the circumstances of the case, no grounds for any of the conclusions of the libel.

d Ordinary pronounced the following interlocutor, adding the ned :—"The Lord Ordinary having resumed consideration

first conclusion is, no doubt, that the defenders shall pay £2000, 'or sum, less or more, as may be found due.' But as the next conclusion is event of their *not* accounting, they shall merely pay the said sum ith interest, it is plain that this was the *maximum* of their liability, pursuer's own estimation, being undoubtedly a sum, by the tender of ould have demanded a discharge of the action. But it is much more t in the pursuer's revised condescendence (art. 3d) he sets down in hole of the properties which he says belonged to him at the date of ed, and for which (or their proceeds) he contends that the defenders stable; many of those items are evidently set down at random, and gerated; one article being a slump sum of £1000, for outstanding ledger, and another for £500, for bills not specified or described, said n taken possession of by the trustees; yet, even by this account, the estate only comes to £3472. Now of this, £812 have been actually reditors (their whole dividends being only 3s. 2d. per pound), and the management and of the submission, and the litigations which led to it have come to less than £400 or £500; which, even assuming the estimates of the pursuer as true, would bring the balance still to be r, down nearly to the £2000 mentioned in the summons. But the unpaid of the debts finally ranked, is £4133 of principal, which with a the time of the submission (1829), must now considerably exceed is therefore manifest, *that even on the pursuer's own showing*, there reversion, and that he has truly *no interest*, but as an agent or inter- n for the creditors. The *real* state of the funds, as instructed before exhibits a very different aspect.

rd Ordinary thinks he is correct in saying, that the whole points is action were discussed, under the same legal advice, by the parties en *and now* the *sole* interest in them, in that submission. In order to is, he has looked carefully through the record in this action, and into arbitral; but more especially, into the very ample and detailed notes n arbiter in 1831, and the observations upon these notes, given in and of Mr Flowerdew, extending to no less than 218 pages, and eighty-eight several heads. Indeed, it is not directly denied on the all these points were there discussed and decided; the averments of to this effect being generally evaded by the iteration of the pursuer's position, that he has no concern with, and can be no way affected by it was done in the submission.

city of the agent for the creditors in the submission, and for the action, is a very striking accompaniment of the identity of the used by this same agent, in both actions, and of the fact that *the only* was, and is truly in his original clients, the creditors. And, when the action was raised is considered, it would seem that no serious as to its true object and character. It was raised after the decided opinion against the claims maintained by the agent who was then maintaining these claims, and who,

No. 59.  
 Dec. 8, 1836.  
 Martin v.  
 Thoms.

of the debate, with the closed record, productions and whole process, vocates the cause; and, Primo, In respect that the summons in the inferior court does not substantially conclude for more than the sum of £2 and that the whole funds, as specified in detail on the record, for which it is alleged that the defenders were bound to account, amount only to £3472, of which £800 and upwards have confessedly been distributed among the creditors, while the balance of the pursuer's debts still remaining unpaid, considerably exceeds £4000 of principal, with interest from 1829, or a still earlier period: Finds that, even upon his own statement there can be no *surplus* or reversion for the pursuer, after paying his debts; and that, having stated distinctly in his summons, that whatever he may recover in the present action must be applied, in the *first* place, for the full payment of his said debts, he has no interest to insist in the action, except for behoof and on account of his said creditors: Finds, 2do, That none of the said creditors concur, or have made appearance in the action, or been in any way made parties thereto by the pursuer; that it is not denied that they are bound and concluded by the decreet-arbitral, which none of them have attempted to challenge, and in which they have taken payment of final dividends, and discharged and exonerated the defenders: Finds, 3tio, That the trust-deed, which is evidently framed on the assumption that the granter was utterly in

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in fact, went on for some considerable time thereafter, insisting to the effect in the two separate processes. In these circumstances, it does seem manifest to the Lord Ordinary, that the pursuer is merely a name, by the use of which the creditors (or their agent) are endeavouring to get the better of a decreet-arbitral, which they have no ground to impeach; and of which, in both they and the trustees have already taken and received the advantage and execution. The pursuer is made, indeed, to say that he is *not* a mere name; by his own admission, *his interest* is entirely nominal; and the parties who professes to benefit by his success, have no claim that can be maintained against the defenders, either in law or equity, in their own persons, or by an intermediary person.

“The Lord Ordinary is far from thinking it clear that the decreet-arbitral might not be held directly binding on the pursuer, as a proper *res judicata*, much as it fixes the fund for division among the creditors, which necessarily prehends *the whole property* of the bankrupt, and consequently, ascertains the most amount for which the trustees can be accountable to any party. If the fund so ascertained was more than sufficient to pay the debts, then the pursuer would, no doubt, be entitled to the reversion, and could not be prevented from claiming it in a separate action by any discharge or exoneration granted to the trustees by the creditors. But if it was ascertained to be far short of paying the debts, there seems good ground for maintaining that this should be concluded against the pursuer, and that all claim on his part was finally cut off; more especially, as, by the terms of the trust-deed, the trustees are expressly declared to be answerable for *omissions*, but each for his own *intromissions* only. It seemed reason to think also, that, on a farther investigation, it might appear that the pursuer had taken such part in the proceedings before the arbiter as to render the decreet binding on him, as a proper party. But it was thought better to rest the judgment on any questionable view of law, or on facts not distinctly established.”

*intent and purposes whatsoever?* Finds, 4to, That it is not denied the pursuer was fully aware of his trustees having entered into this action, and generally of the proceedings under it, and that it is admitted (condescendence, art. 12), that when applied to by the creditors, first, he gave what information was required, with a view to those proceedings, and after a state had been prepared by the arbiter, in order to the dividend, he did attest and approve of the said state, by affixing his signature to a docket thereto, on the 21st of September, 1833,—and has been previously informed that his subscription was required to enable the creditors to receive such dividend: Finds, 5to, That it appears from the documents and proceedings in process, and is not denied, that the petition for submission was framed by Mr W. Allen Flowerdew, who acted for the creditors throughout the proceedings before the arbiter, and maintained for their behoof, the very same claims and objections, which are now insisted on by the pursuer in this action; and that this action was instituted by the said W. Allen Flowerdew, as agent for the creditors, before the decret-arbitral was pronounced, but after the arbiter had pronounced his opinion; and that the said action was managed and conducted till its final issue in the inferior court entirely by the said person: Finds, 6to, That it is not specifically denied on the record of this action, and is clearly proved by the states and proceedings in the action, as compared with that record, that the whole of the points raised in this action were fully discussed and considered in these proceedings, and finally disposed of by the arbiter after very anxious and vigorous pleadings prepared by the said W. Allen Flowerdew in behalf of the creditors: Finds, 7mo, That though one of the leading grounds of complaint by the pursuer in this action is (cond. art. 8), that the de-

No. 59.  
Dec. 8, 1836.  
Martin v.  
Thoms.

it is yet not competent for him, who has no personal interest in the success of these claims, and professes to maintain them only in order to obtain full (or better) payment for his creditors, thus to obtain a rehearing and a new trial for the said creditors, after their interests have been fully discussed in their own names in the submission, and finally disposed of by a decret-arbitral, under which they have settled with and discharged their defenders, and which they do not seek to impugn: *9no*, Finds that the said decret-arbitral having been thus acquiesced in by all the parties to the submission, and carried into complete execution by payment to the creditors of their final dividends from the estate, and by the discharge and exoneration of the trustees, cannot now be disregarded or held nullity by the pursuer on the ground of any want of timeous prorogation or any other informality; the presumption being, that any such informalities as may have existed were passed from, and the ultimate proceedings homologated by the only parties entitled to object; and therefore and on the whole matter, sustains the defences maintained by the respondents in the advocacy, assoilzies them from all the conclusions of the complainer's original action, and decerns: Finds the said respondents entitled to their expenses."

Martin reclaimed.

LORD GLENLEE.—I am for adhering to the interlocutor. Let the pursuer bring a reduction of the whole proceedings under the trust deed, and call the creditors acceding; but under the present libel, which only concludes for an accounting and for payment of a certain sum, he cannot go into the enquiries he points out as to collusion. The sole question is, whether he is entitled to any further accounting. If the creditors choose to acquiesce in the decret-arbitral and relative settlement of division, it is surely not the worse, that it has been pronounced in a regular submission. But it is not necessary that there should have been such submission; the Lord Ordinary says, is, that this pursuer has no pecuniary interest.

LORD JUSTICE-CLERK.—I do not differ, generally, but I have difficulty in acceding to the interlocutor, as it stands, looking to the eighth article of the pursuer's condescendence, with the answer. His allegation is, that the trustees were persons ranked who were not entitled to be ranked. Now has he not an interest to ascertain whether persons have not been ranked without a just ground of defence?

LORD MEADOWBANK.—I agree with Lord Glenlee.

LORD MEDWYN.—From the beginning to the end of these proceedings, it is clear that this man had no expectation of a reversion. He has no patrimonial interest to pursue the action. I admit in general the rights of the grantor in the trust-conveyance, but I am not sure whether this pursuer was not to be considered as a party to the submission. If the creditors, who are alleged not to have entered into the submission, yet show themselves to have been really creditors, and upon it, this is the same as if they had submitted. These creditors, who are the only parties entitled to object, do not object, but have accepted the sums which the arbiter has found due.

THE COURT accordingly adhered, finding additional expenses due.

GREGG and MORTON, W.S.—M'LACHLAN and IVORY, W.S.—Agents.

ANDREW GAMMELL and DUNCAN DAVIDSON, Advocators.—*Keay—  
Hunter.*

No. 60.

DAVID and WILLIAM ANDERSONS, Respondents.—*D. F. Hope—  
Dunbar.*

Dec. 9, 1836.  
Gammell v.  
Andersons.

*Lease—Clause—Process.*—1. Terms of a clause in articles of lease drawn up by the landlord's agent, under which it was held that a tenant was entitled to the value of certain ameliorations of a permanent nature on the farm, dwelling-house, and offices, as instructed by a valuation made at his entry, and another valuation, provided to be made by the articles of lease, at his removal. 2. Competent to award the expenses of the inferior court to the respondent in an advocacy, though he has not only brought no counter-advocation, but has lodged no note of additional plea, in the advocacy brought by his opponent.

In 1804, James Burnett, then proprietor of Countesswells, let the farm of Dalhibity, which was part of that estate, to James Anderson, for a term of nineteen years, at a rent of £25, payable half yearly. No lease was formally extended at the time, but "articles for a lease" were drawn up by Burnett's agent, which stated, in a very abridged form, the substance or purport of the contract, and, it was agreed, that these were "to be reduced into a regular form of a lease with all conveniency." Among the other items of these articles, the following occurred:—"Tenant allowed £5 out of first rent towards assisting putting up dwelling-house, and some timber from wood, to be valued and added to lying inventory, and walls of eleven or ten feet in height, of sufficient mason-work, to be valued at his removal, as well as timber." The "lying inventory," or, as it was sometimes termed, the heritor's inventory, here referred to, was a valuation, specifying the houses and offices, with their doors, couples, windows, &c. which was made at the date of Anderson's entry. It amounted to £4, 8s. In 1818 Andrew Gammell, who had now acquired the estate of Countesswells, agreed, by written minute, to add a term of eight years to the lease, for an additional rent of £5, during that extended term, and it was declared in the minute "that the value of the timber to be added to the lying inventory is £6, 2s. sterling, making the total inventory to be £11, 2s. sterling." This sum of £11, 2s. was composed of the £5 allowed out of the first rent, and the £6, 2s., being the value of the timber above specified.

At the end of the lease, a valuation of the house and offices was made by the sight of parties appointed by Gammell and Anderson, and the incoming tenant, estimating them at £35, 2s. 2d. Deducting from this, the amount of the lying inventory, which was £11, 2s., Anderson claimed the right of retaining the balance of £24, out of his last year's rent, as an allowance for the ameliorations for which the landlord was liable, under the articles of lease in 1804. Gammell and his commissioner refused to allow these and brought an action for payment of the rent, before the

Dec. 9, 1836.  
1st DIVISION.  
Ld. Corehouse  
B.



No. 60.  
Dec. 9, 1898.  
James v.  
Anderson.

sheriff of Aberdeenshire. They pleaded that there was no obligation in the articles of lease, that the landlord should pay the amount of valuation to be made at the end of the lease; that it was merely to be a check against deterioration by the tenant; and that a landlord, especially a singular successor, could not be bound for such meliorations except by an express clause. The tenant answered, that the purpose in valuing the lying inventory at his entry was, that it should form the data in estimating ameliorations during his occupancy; that the erection of a dwelling-house was contemplated in the articles of lease, and was to be allowed £5 out of his first rent, besides certain timber, towards it; that this timber was to be valued and added to the inventory, which accordingly had been done, and no part of its value was now claimed; and that there was no object in providing for a valuation at the end of the lease, except, that both parties had understood and intended, that the value of the ameliorations should be allowed to the tenant. If the clause in the articles of lease was ambiguous, it should not be interpreted unfavourably for the tenant, as it was drawn by the agent of the landlord.

The sheriff found "that the defender was entitled to the value of the house and barn in question, exceeding the heritor's inventory;" the heritor's inventory consisted of the sum of £11, 2s., as specified in the minute extending the tack, and the farther sum of £4, 8s., being the estimated valuation made at the tenant's entry, which was distinct from the items composing the sum of £11, 2s.: and that, under deduction of these sums, the excess of ameliorations, being £19, 12s. 2d., should be deducted from the rent of £30, and the balance paid to the landlord. The sheriff found no expenses due to the tenant. After some further procedure, the sheriff adhered, and found the tenant entitled to the expenses of that portion of the procedure.

The pursuers brought an advocacy and lodged a note of additional pleas. No note of additional pleas was lodged by Anderson, the defender.

The Lord Ordinary "allowed the respondent a proof, with the object of ascertaining, whether, according to the general practice in the county of Aberdeen, when a tenant on his entry to a farm receives the inventory belonging to the landlord on said farm, at a valuation fixed by a written inventory, and under a written agreement with the landlord, allows the tenant to make meliorations upon these subjects, and agrees that the said subjects to be valued at the expiry of the lease, he, the tenant makes extensive meliorations, it is customary for the landlord to allow the incoming tenant to allow the outgoing tenant the value of the meliorations."

A proof was led, in which it was found that no cases had occurred exactly similar to the present, in regard to the terms of the articles of lease founded on by the tenant. The Lord Ordinary thereon "referred the cause simpliciter to the sheriff, and decerned, and found the a

——— THOMSON, Pursuer.—*Pattison.*  
MRS BULLOCK OR THOMSON, Defender.—*J. Anderson.*

No. 61.

*Consistorial—Proof.*—Circumstances in which in an action of divorce  
not remitted to the sheriff of the county where certain witnesses resided to  
give evidence.

It was an action for divorce on the ground of adultery at the instance Dec. 9, 1836.  
Thomson against his wife. Pending the proceedings, the defender  
applied to the Court for aliment, interim decree therefor was <sup>2d Division.</sup> ~~was~~ <sup>Ld. Moncreiff.</sup>  
granted against the pursuer, upon which, on failure to provide aliment, he  
was imprisoned, and thereafter granted a disposition omnium bonorum.  
The pursuer, after having led a proof before the commissaries, moved the  
Court to have the defender ordained to proceed with her proof.  
This motion was met by an application on the part of the defender, to  
have a sum of expenses allowed her for the purpose of bringing certain  
witnesses from Glasgow, to enable her to prove her case.

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**NOTE.**—It is an established rule in the general case, that a tenant, who  
repairs the houses on his farm, is not entitled to payment from his land-  
lord for those meliorations, unless there is a stipulation to that effect in his lease  
or agreement. The present, however, is a special case. The respondent possessed  
a lease, prepared by the landlord's agent, by which the land-  
lord was bound to allow £5 to assist the tenant in putting up a dwelling-house, toge-  
ther with some timber, to be valued and added to the lying inventory. Then  
came the material clause:—'And walls of eleven or ten feet of height, of suffi-  
cient mason work, to be valued, as well as the timber, at his removal.' The  
effect of this clause is somewhat obscure for it is not said that the landlord

**No. 61.** The Lord Ordinary having reported the matter to the Court, the Lordships, having regard to the circumstances of the pursuer, instructed him to pronounce an interlocutor to the following effect:—"The Lord Ordinary, having advised with the Court, remits to the Sheriff of Lanarkshire, as commissary, to take the evidence of the witnesses in question."

JOHN PATTISON, Jun. W.S.—JOHN LEVINGSTON, W.S.—Agents.

**No. 62.** CHARLES MACLEAN, Suspendee.—*M'Neill—Baillie.*  
JAMES ROSE, Charger.—*Thomson.*

*Partnership—Diligence—Cash Credit Bond.*—The individual partners of a company with a descriptive denomination, granted a cash credit bond to a bank containing a clause of registration, whereby they bound themselves nominatim, company, and all future partners, for the drafts to be made by the manager of the bank, who subsequently became a partner, was charged individually by an assignee of the bank, for payment of a balance due on the credit, the letters of horning noting the terms of the bond, and directing the messenger to charge the individuals therein named, and any other partners of the company,—Held that the charge was competent, though the partner was not named in the letters.

**No. 9, 1836.** In the year 1824, certain individuals, ten in number, entered into a joint-stock company for the purpose of distilling, under the denomination of the "Portsoy Distillery Company." It was stipulated by the contract of co-partnery, that "to enable the company to extend their business as distillers, the whole partners shall as soon as possible apply to the Commercial Bank of Scotland, or any other banking company, for a cash credit to the extent of £1000 sterling, less or more, as may be agreed, and to grant bond therefor, and each partner shall be liable for said cash credit, to the extent and in proportion to the share or shares he holds in the company." In regard to the transference of shares, it was stipulated that "the assignee, or heir, or executor to such selling, assigning, or deceasing partner, shall take the precise place of his author or cestor."

Thereafter the company and the individual partners granted bond to the Commercial Bank of Scotland, for a cash credit, to the extent of £1000, the clause of obligation being in the following terms:—"The undersigned, we, the said John Taylor, John M'Lean, William Morrison, James Jack, John Shepherd, James Ross, James Greig, George Grant, James Smith, and Robert Webster, hereby bind and oblige, not only ourselves conjunctly and severally, as individuals, and our heirs, executors, and successors whomsoever, but also the said Portsoy Distillery Company and whole other persons who may in future become partners thereof, and their heirs, executors, and successors, and the whole stock and funds of the Portsoy Distillery Company, all conjunctly and severally, to content and pay to the managers and directors of the said Banking Company,

r persons authorized as aforesaid, shall stand as drawers." By it was farther declared, "that all orders, drafts, bills, credits, antees, subscribed as aforesaid, shall fall under the obligations of l, and be binding on all the obligants, although one or more of aers of the said Distillery Company may die or retire from the r, or one or more new partners may be assumed." The bond d a clause of registration in common form.

27, the suspender Maclean, who previously had no concern with pany, purchased the shares of two of the original partners, Mac-oming bound to free and relieve both sellers of their liability un-cash credit bond. No change was made in the names of the : appearing on the bond.

eafter the company's affairs became embarrassed, and after a up of the concern, the balance due under the bond amounted to 9s. This balance was paid by the respondent Rose, on an assign- o the bond from the bank.

ugust, 1833, Rose raised letters of horning against the parties im, who had signed the bond, and against the "Portsoy Distil-mpany." The letters narrated the terms of the bond, and the ected the messengers to charge the individuals therein named, ny other individual partners of the said Portsoy Distillery Com-ersonally or at their respective dwelling-places, and the said Port-illery Company at their place of business, jointly and severally, payment to the complainers of the foresaid sum of £571, 10s. 6d.' urant of arrestment was nearly in the same terms. The letters ecuted against the parties to the bond individually, and likewise Maclean, as "one of the individual partners of the Portsoy Dis-

No. 62.  
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 re. 9, 1836.  
 Nelson v.  
 use.

joined the company and took up its existing liabilities, and the suspender, by becoming a partner, has placed himself, *sciens et prudens*, in that class of persons who were to be liable according to the express terms of the bond, and has thus laid himself open to the summary diligence competent under it. It is settled law, that letters of horning against a company, and the individual partners generally, are a sufficient warrant to the messenger to charge any particular person as a partner, leaving it to him, if he is not a partner, to seek his remedy by suspension;<sup>1</sup> it has been also decided in various cases that a citation, or even a charge against a company under a descriptive name, and against certain specified individual partners, equally as against all the individual partners of a company generally, is effectual;<sup>2</sup> following up the principle of those decisions, the charge, in the present case, must be held to have been competent.

*Pleaded for the Suspender—*

As the bond to the bank is not signed by the suspender, and contains otherwise no warrant for summary diligence against him at the instance of the bank, the present charge is incompetent, and it might as well be maintained that summary diligence could issue against the heirs and executors of the original partners, without any constitution, as against persons in the situation of the suspender. The charge is moreover irregular and defective, inasmuch as the letters of horning set forth no warrant for raising the same against the suspender, and the will of the letters contains no warrant to charge him thereon, and this doctrine is supported by the case of the Culcreuch Cotton Company,<sup>3</sup> and the opinions of the Court in that of the Sea Insurance Company.

On advising the cases the Lord Ordinary made *avizandum* with the cause to the Court, and at the same time issued the subjoined note.\*

<sup>1</sup> Anderson v. Bolton and Barker, Jan. 26, 1802 (F.C.); Thomson v. Liddle, July 2, 1812 (F.C.); Forsyth v. Hare and Company, Nov. 18, 1830 (*ante*, XIII. 42).

<sup>2</sup> Sea Insurance Company v. Gavin, Feb. 17, 1827 (*ante*, V. 375, new ed. 348); Pollock's Trustees v. Commercial Bank, July 28, 1828 (3 W. & S. 365); Cheyne v. Little, Dec. 2, 1828 (*ante*, VII. 110).

<sup>3</sup> Nov. 27, 1822 (*ante*, II. 47, new ed. 41).

\* "The question here discussed may be reduced to a very short point. By the cases of Thomson v. Liddel and Company, July 2, 1812, and Forsyth v. Hare and Company, November 18, 1834, it may be considered as fully settled, that, where a mercantile company is constituted by a *proper firm*, by which it grants obligations, action and diligence, directed either against the company by the firm, and against *the partners thereof generally*, or against the company generally, without mention of the partners, must be sustained. By the case of the Culcreuch Cotton Company v. Mathie, November 27, 1822, it was decided, that a company constituted merely by a descriptive firm, never used for creating obligations, cannot sue simply by that firm, without any of the individual partners; and it seems to be implied in the decision of the House of Lords, in the case of Pollock v. the Commercial Bank, and other cases, that neither can a company trading under such

*iptive, viz. the Portsoy Distillery Company.* The obligation charged on  
ml of credit, with a clause of registration, effectually granted by all the  
who existed at the time, by which they bind themselves, the company,  
*future partners*, for the drafts to be made by Mr Morrison, the manager,  
future manager. It is to be assumed in this question, that the debt  
on was legally constituted under the bond, and that the suspender is a  
of the company, who acquired his shares posterior to the date of the bond ;  
Lord Ordinary presumes it must also be taken for granted, that, in a pro-  
on, he must be liable for the company's obligations. The letters of horn-  
ect the messenger to charge the individuals named in the bond, ' and *any*  
*partners* of the said Portsoy Distillery Company, personally, or at their  
ve dwelling-places, and the said Portsoy Distillery Company at their place  
ness, jointly and severally.' The question is, whether a charge given to  
spender individually, as an admitted partner of the company, though not  
in the letters, is a good charge.

ie Lord Ordinary is, on the whole, of opinion that the charge is sufficient.

he still thinks that the case of the Culrench Cotton Company was well  
t, and that the distinction there recognised is well founded, he is sensible  
e present case comes to a point, which is not *precisely* ruled by any of the  
as which have been pronounced since that distinction came to be judicially  
riedged. If the individuals named in the letters of horning were thrown  
e question would be, whether a warrant to charge ' the Portsoy Distillery  
ny,' and the *partners*, or ' the other partners' of that company, would be  
l warrant for charging the *suspender individually*, he not being named  
in the bond or in the horning. There is a great deal of argument in the  
which does not come to the point. There can be no doubt upon the cases  
del, and Hare and Company, that it is no good objection that the messen-  
ust find out the partners, if the company itself is such that *alone* it could be  
ally charged. But the nicety lies in this question, whether a company can  
arged by such a *descriptive* firm, to the effect of warranting a charge of an  
mal partner *not named*, under the cover and *protection* of the warrant  
: *the firm*. This is the point of difficulty, and he does not see that it is at  
oved by going back to the nature of the bond, and of the drafts made under  
e being no doubt, that, on the assumption of the argument, the suspender  
is for the debt.

ie is, however, of opinion that the charge should be held sufficient, on the

No. 62.

Dec. 9, 1836.

Laidman v.

and

would be a different question. The warrant for the charge must be found on the bond. Now the clause in the bond bears, that the individuals therein named and no others, bound and obliged themselves, the Distillery Company, and its partners, to the extent of the credit to be operated on by the manager. I say that persons, afterwards becoming partners, may not be liable under the obligation, but the question is whether it is sufficient to admit of summary proceedings against the individual charged. The clause of registration bears "consent to the registration hereof," &c. Now who consent? The parties consent for any persons not members of the company; it is only these ten individuals, then, partners of the company, who consent for themselves. Rose has no consent. The decree which is to pass can proceed solely on the consent by the parties in the bond. I doubt whether, if a cautioner in one of those credit bonds should die, the bank could charge his heir, for whom the cautioner does not consent to registration of the bond. I apprehend this could not be at least without precise and clear words affecting the heir as well as his predecessor. The Lord Ordinary goes on the cases of Pollock and the Sea-Insurance Company. But these were not cases of a charge. The parties there were brought into Court not in virtue of their consent; but in this case we must go back to the bond and to the consent given. I never could see the distinction between a company with a descriptive denomination, such as the Culdrench Cotton Company and a company firm such as Bell, Rennie, and Co., in which no individual might bear any of the names in the firm. My views on that question were those of the rest of the Court; and neither can I here agree with the opinion of the Lord Ordinary.

LORD JUSTICE CLERK.—On looking back to the decided cases, I have concluded to think that the Lord Ordinary's view is the correct one. It is now settled that merely descriptive companies cannot be charged; but it is also settled that such companies are called, amongst with the individual partners, that will be a sufficient citation. I agree that the validity of the charge in this case depends on the contents of the bond. The individuals named in the bond do not say they are the members of the company; they bind themselves and future partners, and the question subsequently comes to be, who are the partners? The bank's right is in Mr Rose, and on the principle of the decision in Thomson v. Liddle, he is entitled to charge this suspender, who, by stepping into the shoes of a former partner, has now become a partner of the company. I allow that this is a matter of novelty, yet, on the principles laid down in the note of the Lord Ordinary, I think it is not pushing the doctrine too far to extend it to the present case.

LORD GLENLEE.—I do not think it necessary to enter upon the subject of descriptive firms, but such a firm as Bell, Rennie, and Co., though it contains partners having the names appearing in the firm, is different from the Culdrench Cotton Company, bearing, as it does, the names of persons capable of bearing the *persona standi*. In the present case, I rather think Lord Moncreiff has taken the right view. Going back to the contract, every man who should become a member of the company is to be liable for its obligations. The registration of the bond is a company act; and we have a sufficient number of names to remove the objection of a descriptive firm, and do away with the supposition of the company bearing the obligation. Like other company acts, this is binding on every partner; but, a suspender would be liable for an act of the company in an ordinary action,



**MACKENZIE** (Judicial Factor on Ross's Trust-Estate), Petitioner. No. 63.

—*D. F. Hope—Ivory.*

**FERRIER** (Common Agent in Ranking of Cromarty), Respondent.—*Rutherford—A. Wood.*

*and Sale—Process.*—After great avizandum has been made with the title, in a ranking and sale, and a memorial and abstract have been presented whether it be regular or competent to remit the process of sale to the Ordinary, before whom the ranking remains, in order to determine if certain included in the summons of ranking and sale, and if so, should be done by it; or whether this should be done by an incidental petition to have out of the summons.

**MACKENZIE** of Applecross, W.S., judicial factor on the trust-estate of the late George Ross of Cromarty, presented a petition, stating that the dominium utile of the lands of Little Farnese, formed part of the trust-estate, but that from the terms of the summons of ranking and sale of Alexander Gray Ross, to whom the dominium directum of the lands belonged, it seemed to embrace the dominium utile also; that a summons was raised in 1804, and objections to it, on the above grounds, were stated by the parties then in right of the trust-estate of the late George Ross, which objections were still undisposed of; that the branch of ranking and sale, which related to the sale, had not been before the Court since 1826; and he, therefore, prayed the Court “to remit the process of ranking and sale to the Lord Fullerton, Ordinary, in far as the same is not already before his Lordship, with power to assist the petitioner as a defender therein, and to proceed

Dec. 10, 1836.

1st Division.

**No. 63.** the sale, was separated from the branch relating to the ranking, by avizandum being made with it; that this was done in the present  
**Dec. 10, 1836.** in 1826, and a prepared state and memorial and abstract, in a  
**Wright v. Bell.** form, had been laid before the Court; that the sale had merely  
 existed during the dependence of certain incidental procedure, and  
 would be contrary to established practice, and highly inexpedient  
 regard to an action so important as this, to make a remit of the matter  
 to the Lord Ordinary, especially as every legitimate object of the  
 petitioner could be attained by following the ordinary course of presenting  
 incidental petition to have the dominium utile of Little Farness  
 out of the ranking. Ferrier farther stated that it would be a departure  
 from common form, to allow the petitioner to sist himself in the  
 sale, in order to be heard on such a question; an incidental petition  
 being the only proper course, as was pointed at when this subject  
 came before the Court;<sup>1</sup> and such petition could either be disposed of  
 by the Court directly, or after a remit to the Lord Ordinary to enquire into  
 facts and to report.

The Court observed that as the petitioner represented parties who  
 originally been called in the ranking and sale, he appeared to be  
 to sist himself as a party to that process; and, as their Lordships  
 understood to be prepared to refuse the rest of the petition, the petitioner  
 intimated that he would not press it, but merely sist himself in the  
 process; which he accordingly did.

T. MACKENZIE, W.S.—J. and W. FERRIER, W.S.—Agents.

**No. 64.** ELIZABETH WRIGHT and SPOUSE, Pursuers.—*D. F. Hope*—*W.*  
 GEORGE BELL and OTHERS, Defenders.—*Robertson*—*Cowan*

*Process—Proof—Res noviter veniens.*—In an action of declarator and  
 legitimacy, the record had been closed, a proof led, and an interlocutor in favour of  
 defenders pronounced by the Lord Ordinary; the pursuer having reclaimed  
 at the advising, as additional documentary evidence, certain letters  
 had been all along in her possession, but which she stated to have been  
 put up with other papers, and only recently brought under the notice of her  
 counsel.—The Court refused to allow production of the letters.

**Dec. 10, 1836.** THIS was an action of declarator and legitimacy, raised in J  
**2D DIVISION.** 1834, in which the record had been closed, a proof led before the  
**F.** missaries, and an interlocutor on the merits pronounced by the Lord  
 Ordinary in favour of the defenders. The pursuer reclaimed, and  
 the case coming to be advised (July 8, 1836), she tendered certain

<sup>1</sup> June 1, 1836 (ante, XIV. 858).

g these letters, put them all up, without inventory, in a box or containing other papers; that the apprentice thereafter left Edinburgh without pointing out to his master the papers so received, and it was after his return in January 1836, when the Lord Ordinary's order had been pronounced, that he brought these papers under the care of the pursuer's agent.

The defenders, without admitting the accuracy of these averments, denied their relevancy, contending that they resolved into the statement that of due care and proper examination by the party's agent of the letters put into his hands to conduct the cause; that the letters in question could not be brought under the rule of *res noviter veniens ad rem*, and their production at this stage of the cause was clearly incompetent under the Judicature Act and Act of Sederunt, 11th July,

minutes were this day put out for advising.

MEDWYN.—One is always unwilling to reject evidence in a question of fact unless all our forms are to be overruled, I cannot accede to this proposition: no sufficient grounds to hold that the letters which have been tendered are *res noviter veniens ad notitiam*. They were in the hands of a former pursuer, and were got from him by a clerk of the present agent, and even inventoried. This showed negligence, especially in a case regarding which the cause was heard and decided by the Lord Ordinary in March last, when these letters were offered to be produced. If, after the provisions in the Judicature Act and Act of Sederunt, requiring production of evidence before closing the record, we should admit additional evidence at this late stage of the proceedings, I know no reason why those rules should not be thrown aside. In the case of *Wilkie v. Jackson*,<sup>5</sup> in March 1834, where the

**No. 64.** should be allowed. This showed we were not departing from the statute, a few months afterwards, in the case of *Ross v. M'Leay's Trustees*,<sup>1</sup> we refused when the record was closed, to allow a letter to be produced which had been along in possession of the party. The present proposal is made, not merely the closing of the record, but after proof and circumduction.

Dec. 10, 1836.  
*Fowlds v.*  
*Hodges.*

**LORD JUSTICE-CLERK.**—I agree with Lord Medwyn, who has given a satisfactory exposition of the law upon this point. Giving all effect to the case *Wilkie v. Jackson*, I think it stands quite clear of the present case. Here is a defect of that complete proof which is necessary to make out *res non veniens ad notitiam*. The account which is given by this party, is no sufficient ground.

**LORDS GLENLEE and MEADOWBANK** having concurred,

**THE COURT** found that the letters could not be produced, but of course allowed production of the prayer-book.

**JOHN RONALD, S.S.C.—CUNNINGHAM and WALKER, W.S.—Agents.**

**No. 65.** **MRS MARY FOWLDS OR WODROW and MRS ANN FOWLDS or ORR**  
**Petitioners.—Sol.-Gen. Cunninghame—Speirs.**

**MRS MARY CAROLINE HODGES, and JOHN W. MACKENZIE, W.S.**  
**Respondents.—D. F. Hope—Napier.**

*Factor loco tutoris.*—A factor loco tutoris having been appointed by the Court to a pupil, on the application of the mother, without intimation being made to the pupil's nearest agnates;—The appointment recalled, as originally granted without power on the part of the Court.

**Dec. 10, 1836.** **2D DIVISION.** **F.** IN May 1836, the respondent, Mr Whiteford Mackenzie, W.S. appointed factor, loco tutoris, to Mary Caroline Fowlds, a pupil child of the late William Fowlds of Skinnieland, on the application of the mother, the other respondent, Mrs Hodges, who had entered into a second marriage. The petition was intimated on the walls and minute-book, but no intimation was made to the nearest agnates.

Mrs Wodrow and Mrs Orr, the pupil's paternal aunts, now presented a petition for the recall of Mackenzie's appointment, on the ground of want of intimation; stating, that by the uniform practice of the Court all petitions for the appointment of factors loco tutoris are intimated to the pupil's nearest of kin, who thus have an opportunity of objecting to the proceedings, and that it is the duty of the party petitioning that such intimation has been given, otherwise the failure to intimate would be fatal to the appointment.<sup>2</sup>

The respondents, in their answers, alleged that, at the time of the

<sup>1</sup> May 22, 1834 (ante, XII. 631).

<sup>2</sup> Cowan, Jan. 19, 1788 (7452); Heatly, Feb. 2, 1828, (ante, VI. 47).

it entitled so to do. In regard to the naming of a proper factor loco tutoris, the Court ought first to ascertain if the pupil have no male agnate. And the result of this? That you must hold communication with the next of kin on the father's side. The mother alone is not entitled to have such a factor appointed. Here a factor loco tutoris has been granted without power on the part of the Court; and to refuse to recall the appointment would be deviating from the essential principles which give the Court power to take a step of this kind.

**JUSTICE-CLERK.**—I am entirely of the same opinion. This is a question essentially as to power. We have no power to proceed in a matter of this kind except according to the regular and established forms. Had it been stated in the petition for Mackenzie's appointment that Mr Wodrow concurred in the appointment, the respondents' case might have been better.

**MR MEADOWBANK** and **MEDWYN** having concurred,

**THE COURT** recalled the appointment, reserving to the parties to apply for a new factor loco tutoris; but found no expenses due.

**ORR** and **MARTIN**, W.S.—**JOHN ROBERTSON**, W.S.—*Agents.*

**SCRIMGEOUR OF FURMAN and HUSBAND and their MANDATARY,** No. 66.

*Pursuers.—D. F. Hope—A. M'Neill.*

**JOHN KEE and OTHERS (Scrimgeour's Trustees), Defenders,—**  
*Robertson—Neaves.*

**Trial—Process.**—In the reduction of a settlement, two issues went before the Court, 1st, Whether the deed was not the deed of the deceased? and, 2d, Whether

No. 66 Scrimgeour, senior, who had died abroad. She resided abroad, and her husband pursued along with a mandatary. The following  
 Dec. 13, 1836. Scrimgeour v. Ker.  
 went to trial :—

“ 1. Whether the disposition, dated 24th September, 1798, is the deed of the late George Scrimgeour, senior, of Thornhall ?

“ 2. Whether, at and prior to the said 24th day of September, the said George Scrimgeour, senior, of Thornhall, was a person of a weak and facile mind, and easily imposed on? And whether the late George Scrimgeour, surgeon in Polmont, taking advantage of his facilities and weakness, did, by fraud or circumvention, wrongfully procure or execute the said deed, to the lesion of the said George Scrimgeour, senior, of Thornhall ? ”

In the course of the trial it appeared that various sales of the property had been made by the defenders, acting as trustees of the now deceased George Scrimgeour, junior.

The jury returned a verdict finding for the pursuers on both issues.

The defenders made a motion for a rule to show cause why a new trial should not be granted, in respect the verdict was contrary to evidence. But before going into the evidence at all, they contended that the verdict could not apply to both issues at once, because, if the evidence warranted a verdict for the pursuers on the first issue, and was so held by the jury, then the deed was not at all the deed of George Scrimgeour senior, to any legal effect whatever. And in that case, the evidence could not warrant a verdict for the pursuer on the second issue, but could only be found, in the event of the deed being actually the deed of George Scrimgeour, senior,<sup>1</sup> and having various important legal consequences as such ; as for example, in supporting all the sales made by the defenders to third parties, against any challenge which might be brought by the pursuer's instance. Since therefore the first issue applied only to the case of the disposition of 1798, being not the deed of George Scrimgeour ; and the second issue applied only to the contrary alternative, the disposition being his deed (though fraudulently impetrated from him), it was impossible that the present verdict could stand, because, in place of adopting either alternative, singly, it had found for the pursuers on both together, which was just a finding that the disposition was not the deed of George Scrimgeour, senior. Accordingly, in a recent case,<sup>2</sup> the Lord Justice-Clerk, in charging the jury, where two precisely similar issues were before them, had carefully warned them to avoid mixing up the issues in one verdict, and directed them to find upon either of them, according to the evidence.

The Court, without granting a rule to show cause, delivered the following Opinions :—

<sup>1</sup> Jaffray, &c. Dec. 19, 1833 (ante, XII. 241).

<sup>2</sup> Dewar, July 16, 1836 (ante, XIV. 1132).

**GILLIES.**—I have not formed a definitive opinion on this question, but **No. 66.**  
 the opinion is pretty decidedly against granting the rule. There were two issues  
 raised—the first being, whether George Scrimgeour, senior, was altogether **Dec. 13, 183**  
 —the second, whether he was a man of facile disposition, and the deed **Scrimgeour v**  
 fraudulently impetrated from him to his lesion. A verdict was returned, find-  
 ing the pursuer on both issues, and I am bound to hold that the jury weighed  
 the evidence as applicable to each issue, respectively, and were satisfied that it  
 warranted a verdict on both the one and the other. But it is said that there is an  
 contradiction in such a verdict: Now I cannot see that there is, for, al-  
 though George Scrimgeour, senior, may have been sufficiently destitute of capacity to  
 warrant a verdict on the first issue, he may also have been fraudulently dealt with,  
 the deed may have been impetrated to his lesion, so as to warrant a verdict, at  
 the same time, on the second. If there be fraud in impetrating such a deed from  
 a man of no capacity whatever, that fraud is only the more palpable if he  
 is of no capacity whatever. And indeed it is in general only a differ-  
 ence of degree, and not in kind, which subsists between the state of mind, which  
 warrants a verdict on the first issue, and the state of mind which will warrant  
 a verdict only on the second. It is seldom or never that a human mind is found so  
 extinguished that it is not liable to be swayed and influenced by some  
 passion or other; and it is not to the rare case of such idiocy, that a verdict  
 on the first issue is limited. With these views, therefore, I incline to hold, that if  
 George Scrimgeour, senior, was of that degree of imbecility and inca-  
 pacity which would warrant a verdict on the first issue; and if measures of fraud  
 and concealment were used in impetrating a deed to his lesion, such as would have  
 warranted a verdict on the second issue, supposing him to have been merely a per-  
 verse disposition, then the evidence was such as to warrant a verdict at-  
 taining for the pursuer on both issues. And such I am bound *hoc statu* to  
 the present verdict to be, and to deal with it on that footing.

**MACKENZIE.**—I incline to look on it in the same light. I think there is  
 no contradiction in the verdict, when applied to both issues, for there is no  
 repugnance between them. If it could be said that the jury were doubt-  
 ful of the issues the evidence would warrant a verdict for the pursuers,  
 and merely held that if it did not support the pursuers on the one issue, at  
 least support them on the other, and had therefore returned a verdict find-  
 ing both together, considering it immaterial to which of them the evidence accu-  
 plished, that, I conceive, would have been a bad verdict, and could not have  
 been maintained. But I am bound to hold they applied the evidence in their own  
 manner, first to the one issue and then to the other, and satisfied themselves  
 that it supported the pursuer on both issues; and I see nothing inconsistent in it.  
*in se minorem*; that is a common rule: And if there was fraud  
 in getting Scrimgeour, senior, to his lesion, so as to warrant a verdict on the  
 second issue on account of his facility, that verdict would only be warranted as  
 if his incapacity was such as to have warranted a verdict on the first issue,  
 and it to have stood alone.

**PRESIDENT** and **BALGRAY** concurred.

**JURORS** were then directed to go into the evidence in support  
 of the verdict. They craved that, before doing so, the notes of evi-



**No. 66.** dence taken by the Lord President at the trial might be printed and before the Court; but the Court refused this, Lord Gillies observing that at this stage it was contrary to the rules of Court to do so.

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 No. 18, 1836.  
 Indeed v.  
 Indeed.

Subsequently to this the defenders were heard, in support of motion, especially in respect to the verdict on the first issue, which alleged they had an important interest to set aside, even if they not shake the verdict on the second issue; because if the verdict on first issue was set aside, the sales made by them, in acting under trust-deed of George Scrimgeour, junior, could not afterwards be red by the pursuers, and thus they (defenders) would be saved from cost of relief and damages at the instance of the purchasers. In order to obviate this interest the pursuers put in a minute, giving up all right to challenge these sales, and also certain feus granted by the defenders after which, the defenders desisted from pressing their motion, and the Court accordingly in respect of the minute, refused it.

MACKINTOSH and GEMMELL, S.S.C.—HOPKIRK and IMLACH, W.S.—Agents.

**No. 67.** JAMES MACLEOD, Advocate.—*Rutherford—Maitland.*  
 JOHN MACLEOD and MANDATARY, Respondents.—*D. F. Hope—Rutherford.*

*Inhibition—Reparation—Process.*—A party raised an action concluding to the defender (who resided abroad) ordained to make up titles to two heritable subjects and convey them to him; and also for expenses of process; he used inhibition on the dependence, which covered all the heritage of the defender; immediate notice of the use of the diligence was made to the defender's agents appearance was entered in the action, and, some months after decree was pronounced, the defender, having sold some of his own heritage, incurred an expense of about £20 to the purchaser, in consequence of the purchaser having made search of incumbrances and discovered the inhibition; the defender had applied to have the inhibition restricted to the two subjects which he was bound to convey to the pursuer, but this was immediately done on his application; in a subsequent action at the defender's instance that he had no claim for damages against the pursuer for the use of the diligence, in respect that it was laid in common form, and was restricted as soon as the defender required it to be so.

**No. 13, 1836.** ON the death of George Macleod, surgeon in Glasgow, there were heritable subjects in which he stood feudally vested, but which were truly the property of a copartnery, of which his brother, James Macleod, was the sole surviving partner. James was also entitled to his moveable succession, another brother, named John, being the immediate brother of George and his heir of conquest. John resided in America and James Macleod, M.D., was his mandatary in this country. As James Macleod and his mandatary at first disputed the fact of the existence of the copartnery, and the fact of the two heritable subjects above-mentioned, having belonged to the copartnery, James Macleod, surgeon, raised an action in January, 1834, to have both of these declared, and

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 No. 13, 1836.  
 1st Division.  
 d. Corehouse.  
 D.

his right to one half of the heritage, in respect of his half share in the stock of the copartnery, and his right to the remaining half thereof, in respect that, as part of the stock of a company, it was moveable in succession, and he was heir in mobilibus to his deceased brother. The action also concluded for decree ordaining John Macleod to make up titles as heir of conquest to the heritage, and to convey it to the pursuer, James Macleod, surgeon, all at the pursuer's expense. It also concluded for £500 of expenses, less or more, in the event of opposition being offered.

No. 67.

Dec. 13, 1834.  
Macleod v.  
Macleod.

On the dependence of this action, James used inhibition against John, prohibiting him to sell or alienate "any of his lands, teinds, heritages, &c., or make any public or private alienations, &c., or contract or take debts, &c., or do any other act or deed, directly or indirectly, whereby the right to the said lands and others pertaining to him, may be anywise evicted or adjudged from him, or he denuded thereof, in defraud, and to the hurt and prejudice of the complainer, anent the implementing and fulfilling to the complainer the decree to be obtained at his instance in the said depending process, and payment making to him of the whole sums to be therein contained." Intimation of the use of this diligence was immediately given by letter from the agents of James to the agents of John, and his mandatary. No opposition was made in the action, and decree was pronounced in March 1834. But some time elapsed before John Macleod made up his titles and conveyed the heritable subjects to James. In the meantime, he sold certain heritage of his own, and became liable for the expense of a search of the records, if any incumbrance should be discovered. The purchaser caused a search to be made, and, in November, 1834, found the inhibition at the instance of James Macleod standing unrestricted, and applying generally to the whole heritage of John Macleod. John had never applied before to have it restricted, and it was now restricted, on his application, so as to cover only the two heritable subjects which he was bound to convey to James Macleod. He had incurred an account of £19, 3s. 8d., in relation to the search for incumbrances, and he and his mandatary raised an action before the magistrates of Glasgow, against James Macleod, concluding for £100, in name of damages, on account of his alleged nimious and oppressive use of the diligence of inhibition, in having directed it generally against the whole heritage of John, in place of confining it specially to the two subjects which he was required to convey to James. There was no malice alleged in the use of the diligence.

James Macleod stated that John had been sequestrated under the bankrupt act, in 1793, and had never been regularly discharged: that he was understood to be in the course of realizing any property he had in this country, in order to have the proceeds remitted to America, where he resided, and therefore contended that the use of the diligence of inhibi-

**No. 67.** tion in security was a measure of prudence and expediency, and could infer no damages, especially as there was no allegation of malice in the libel. And he pleaded separately, that he had used inhibition on a dependence, according to the common style in all such cases, which was invariably of a general nature; that a special inhibition was unknown in practice, and that it was inexpedient to deviate from established style in the use of diligence, but that he had restricted his inhibition as soon as requested to do so, and that he would have done so at any time when requested. He therefore maintained that no damages were due.

no. 13, 1836.  
acleod v.  
acleod.

The Magistrates of Glasgow found “that the inhibition complained of, was directed and used not merely against the heritable subjects in hæreditate jacente of George M’Leod, claimed by the defender as belonging to the copartnership of George M’Leod and Company, but also against the whole heritable property of the pursuer in his own right, although the action at the defender’s instance, upon which the inhibition was used, was merely an action of declarator, embracing only the heritable subjects first mentioned; and although even the conclusion for expenses in the said action was merely conditional, finds it also established; that the defender subsequently allowed the inhibition to remain on the record undischarged, unrestricted, and unknown to the pursuer, even after the settlement between the parties, with reference to the heritable subjects first mentioned, in the terms desired by the defender; that the said proceedings amount to the unwarranted, nimious, and oppressive use of legal diligence, originating, if not in mala fide, at least in culpa lata, and are relevant to subject the defender in damages; that the actual expense occasioned to the pursuer by the said proceedings is sufficiently instructed; and decerned against the defender for £40 sterling of modified damages in toto.”

James Macleod brought an advocacy, and the Lord Ordinary “altered the interlocutor complained of, sustained the defences for James M’Leod, assoilzied him from the conclusions of the action before the Magistrates of Glasgow now advocated, and decerns; and found him entitled to expenses both in this and the inferior court.”

John M’Leod and mandatary reclaimed. The Court, without calling on the respondent’s counsel, unanimously adhered.

**LORD PRESIDENT.**—No application was made to have the inhibition restricted prior to the period when the search occurred. The inhibition was laid on according to the common style, and I see no ground for altering the interlocutor of the Lord Ordinary.

**LORD BALGRAY.**—I never saw an inhibition taken out in any other terms. There is no authority in law or practice for doing so. An inhibition is rendered special, only by being restricted in its operation to certain subjects, after it has first been taken out in the general terms which were used here. And the agents of

James Macleod acted most properly in giving explicit intimation to the agents of Mr Macleod, and as soon as the diligence was used. No. 67

LORDS GILLIES and MACKENZIE concurred.

Dec. 13, 18  
Swan v. Bai

THE COURT in adhering, awarded additional expenses.

MACKENZIE and MACFARLANE, W.S.—GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—  
Agents.

WILLIAM SWAN, Pursuer.—*D. F. Hope.*  
DAVID BAIRD, Defender.—*M'Neill—Shaw.*  
WILLIAM WHITE, Defender.

No. 68.

*Agent and Principal—Payment—Fraud.*—A party's agent, by his instructions, sold a lease; the party forwarded to the agent an assignation containing a receipt and discharge for the price, which the agent delivered up to the purchaser receiving the price:—Held, in a subsequent action by the seller against his agent and the purchaser, that no circumstances of collusion between them were established, sufficient to take off the effect of the written discharge held by the purchaser.

WILLIAM SWAN, residing at Holland House, Orkney, was proprietor of a lease of certain subjects at Cumnock, Ayrshire, on which he employed William White, writer there, as his factor, and which he instructed White to sell. White sold it for £250, and Swan executed an assignation in his favour, containing a receipt and discharge for the price, which he transmitted to White. White received the money from Baird, and delivered up the assignation to him. Swan's daughter, Mrs Traill, libelling on an alleged assignation in her favour, raised an action against White for the £250, in which action, Baird was ordered to be called for his interest. The action was ultimately dismissed, in respect that Mrs Traill held no assignation from Swan. Swan then raised an action in his own name against both White and Baird, alleging that they were acting in collusion with each other; that White was keeping back the price under Baird's directions; and that they were still liable to him, jointly and severally, for the price. White made no appearance. Baird denied the alleged collusion, and pleaded that as he had paid the money to the agent of Swan, and got an assignation containing a discharge of the price, he was entitled to be assolzied, there being nothing proved against him to deprive him of the benefit of that discharge. The Lord Ordinary proceeding upon grounds which are explained in detail in the subjoined note, decreed against the defender, William White, for whom no appearance was made, &c.; and in so far as regards the other defender, David Baird, he sustained the defences pleaded for him, assolzied him from the

Dec. 13, 1861  
1st Division  
Ld. Fullerton  
B.

**No. 68.** conclusions of the action, and decerned ; and found the said David Baird entitled to expenses." \*

c. 13, 1836.

Swan v. Baird.

\* " **NOTE.**—There seems to be no grounds for sustaining the action against the defender, Baird, and it appears to the Lord Ordinary that all the difficulties, experienced by the parties interested in the price of the lease, have arisen from the blunders which they, or those acting for them, committed in the conduct of the transaction. The lease belonged to the pursuer, Swan, or at least the title was vested in him. It is admitted by the pursuer, that he had employed the defender White, through the agency of his daughter, Mrs Traill, to sell the lease. The lease was accordingly sold by White to the defender, Baird, for £250, and it would appear that at first Mrs Traill had represented herself as being in right of the lease for the minute entered into between White and Baird, describes the former as 'agent and mandatary for Mrs Mary Swan or Traill, spouse of George Traill of Holland, proprietors of the subjects aftermentioned.' This was rectified, however in the assignation of the lease which was executed by the pursuer, Swan, as the true proprietor. The assignation, containing, in usual form, an acknowledgment of payment of, and a discharge of the price, was put into the hands of White by the pursuer or his daughter, in order to be delivered to the purchaser. White, holding this assignation, was clearly authorized, as the mandatary of the pursuer, to receive payment on delivery of the assignation. He did deliver the assignation to the defender, Baird, who thus holds a discharge of the price ; and while he positively avers, that the price was paid to White, the presumption arising from the delivery of that discharge is not taken off by any proof, or even positive averment, on the other side, that the price was not so paid. On the contrary, it was admitted in the proceedings, now to be mentioned, that de facto the price was paid by Baird to White. These proceedings took their rise from White's failure to pay the price to the parties for whom he received it. An action was raised, on this ground, against White, before the sheriff of Ayrshire. But by some extraordinary oversight the summons was raised, not in the name of the pursuer, Swan, but in the name of Mrs Traill, 'and the other members of the family of the said William Swan, having obtained from him an assignation to the lease in question.' It proceeds with the statement that she, and 'the other persons for whose behoof she acts,' wished to dispose of the lease, with the intention of 'dividing the proceeds among them ;' that they had disposed of it to Baird, through the intervention of William White ; a letter of White is then quoted, as showing that he had received payment of it, and the conclusion is, that White should pay the sum of £250, 'with interest thereof, from and since the same came into his hands, and in time coming, till paid,' &c. White objected to the title, and, besides other defences to the action, stated, that though the price had been lodged in the bank at Ayr, he was prevented by Mr Baird from making payment,—and that Baird, whom he represented as the principal party, ought to be called. The sheriff, after some procedure, did order Baird to be cited. Upon intimation being made to the defender, Baird, he wrote the letter of the 14th of June 1833, to the agent on the other side, stating that 'he had paid the price of the property, and got a good right thereto,' and mentioning further, that, if Mrs Traill wanted the price, she should produce the title, 'in terms of the head sheriff's judgment.' Afterwards, defences were given in in that process, in name of the defender, Baird, in which a demand was also made on the pursuers in that action, to produce the title on which they founded. Baird now denies that he ever authorized such defences to be given in,—and then does not appear to have been any express authority for such appearance. Besides the Lord Ordinary is inclined to think, that, as Baird was incidentally cited in the process, he, having taken an assignation from Swan as the true proprietor, had fair interest to state, that the different title, now founded upon by Mrs Traill ought to be produced, in order to validate his own. But what is of more importance, in the whole course of that procedure, Mrs Traill, the pursuer, repeatedly and in express terms, maintained that the price had been de facto paid by Baird to

claimed.

No. 68

THE COURT adhered.

Dec. 13, 18  
Clerk v.  
Elliott.

J. M'Cook, S.S.C.—W. DUNCAN, S.S.C.—Agents.

L. CLERK (Sole Partner of Clerk and Company), Pursuer.—  
*Monro.*

No. 69

WILLIAM F. ELLIOTT, Defender.—*D. F. Hope—Neaves.*

*t—Personal Objection.*—Circumstances in which the rule was applied, a party takes back his carriage from the yard where it has been repaired for a considerable time, without objection, he is barred from afterwards paying the coach-builder's account in respect of alleged insufficiency of repairs.

33, Sir William Francis Elliott of Stobs and Wells ordered Dec. 13, 18  
cess from Clerk and Company, coach-builders in Edinburgh, 1st Division  
sent a britzka to them, to undergo a thorough repair. After  
used the britzka, and the harness for about a year, he alleged,  
demand for payment of the coach-builder's account, that the  
was supplied, and the repairs were made, in terms of a special  
and that the account charged exceeded the contract price.

that she had no claim whatever against the former. The sheriff ultimately on the production of the letters from the brothers and sisters, and from the pursuer, Swan, decerned against White. The defender, Baird, made no defence, but White advocated; and in that advocacy the action was dismissed from the Court of Session, Ordinary, and afterwards by the Court, on the ground that the action had been expressly laid upon a particular assignation from the pursuer, Mrs Traill, and that it is admitted that no such assignation was ever granted.

In these circumstances, the present action was raised against both White and Baird. White gave in no defences, thus confirming by his silence the statements made by the pursuer of the price previously made by all parties. But the pursuer, in making decree against White at once, proceeded to make up a record with the purpose of obtaining judgment against him.

It must, of course, be pronounced against White; but the Lord Ordinary found for holding Baird to be liable. There is no doubt that White was bound to receive payment from Baird; and the delivery of the assignation to the pursuer, without a sufficient defence, unless the pursuer were to undertake, in form, to disprove the admission of payment contained in it. But he cannot aver that the price was not paid; and, on the other hand, the legal obligation arising from the delivery of the deed, is confirmed by the express statements made by Mrs Traill in the former action, statements which were admitted by the present pursuer, when he consented to, and concurred in the action. It is only farther to be remarked, that after these admissions, the pursuer had at once the means of obtaining judgment against White, a debt in this country, and whose solvency is not seriously denied, the failure in the action seems to have been entirely unnecessary, and the Lord Ordinary considers the pursuer justly liable to Baird in the

## CASES DECIDED IN THE

**1896. 101.** He also alleged generally that the items of the account were overcharged, and that the repairs were insufficiently made.

**1896. 101.**  
**1896. 101.**  
**1896. 101.**

In January, 1896, Samuel Clerk, sole partner of Clerk and Co., raised an action for payment of the account, which had been rendered a considerable time before any objections were made to it as overcharged. The defender failed to prove the existence of any special contract; and the Lord Ordinary sustained the pursuer's plea, that it was too late to take an objection on account of the alleged insufficiency of repairs, after having used the carriage and harness without objection, for so long a time, especially as it was now impossible to ascertain with precision the exact state in which the carriage and harness were when they left the pursuer's premises. The Lord Ordinary, therefore, "repelled the defences, and decreed in terms of the libel," and found the defender liable in expenses.

**1896. 101.**

The defender reclaimed.

**1896. 101.** **LORD BALCANQUH.**—In former cases the Court laid down a sound rule, which I think, should be applied here. It was that, after a gentleman takes back his carriage, and uses it for a considerable time without objection, it would be unjust to the tradesman to allow him afterwards to be dragged into a proof as to the sufficiency of the repairs at the period when they were first completed. If the employer is to object to these, he must do it tempestive. I think we should adhere.

The other Judges concurred.

THESE LORDSHIPS adhered, and at the same time ordered the pursuer to deliver up certain articles belonging to the defender, which were in the pursuer's possession, on receiving payment of his account.

W. ALEXANDER, W.S.—D. M. BLACK, W.S.—Agents.

\* "NOTE.—The account pursued for consists of articles furnished to the defender, and the repair of a carriage belonging to him. It is not denied that he received the articles, and took back and used the carriage for nearly a year after the date of the last article of the account; and, when payment was demanded, he writes the letter of 20th August, 1894, in which, without making any objection to the sufficiency of the repairs, he states that, on his return from the country, he will 'bring in your estimate for the purpose of arranging the account.' In these circumstances, and while the defender declines to produce the estimate, the Lord Ordinary does not think his objections now stated to the articles of the account can be received."



REV. JOHN CLARK, Suspender.—*Wood.*

JOHN ROSS, Charger.—*Ivory.*

No. 70.

Dec. 13, 188

2D DIVISION

Bill-Chambers

Ld. Cockburn

F.

Clark v. Ross

Mackintosh's

Trustees v.

M-Queen's

Trustees.

THESE were two bills of suspension of charges on decreets of removing and for payment of rent respectively, the questions turning upon specialties. The Lord Ordinary passed the first bill, and refused the second, whereupon the parties having reclaimed,

THE COURT remitted to refuse the first bill, and adhered as to the second, with expenses against the suspender in both cases.

JAMES MACDONNELL, W.S.—HUNTER, CAMPBELL, and COMPANY, W.S.—Agents.

CAMPBELL MACKINTOSH'S TRUSTEES, Petitioners.—*Rutherford—Marshall.*

No. 71.

HUGH MACQUEEN'S TRUSTEES, Respondents.—*D. F. Hope.*

ALEXANDER DAVID FRASER, W.S., Respondent.—*Handyside.*

*Judicial Factor.*—A judicial factor having been appointed "with the usual powers," the Court refused to authorize and ordain him, on the application of parties interested, to make appearance in a depending process against the estate, in respect it was already competent to him to do so, if he should deem it expedient; reserving to him to apply to the Court for an enlargement of his powers, if he should find it necessary and be so advised.

SINCE 1827 a process had been depending, at the instance of the trustees of Mackintosh of Dalmagavie, against the trustees of Donald Macqueen of Corryburgh, of whom the late Hugh Macqueen, W.S., was the last survivor, involving questions of accounting of great patrimonial interest to Mackintosh's trust-estate. On the petition of his trustees, the respondent, Fraser, W.S., was appointed judicial factor on the estate of Corryburgh, "with the usual powers." The petition had prayed that the appointment should be "with special power to him to appear and vindicate and defend the trust-estate in all suits depending, or which may be instituted, affecting the same;" but this special power was not granted. After the factor's appointment, the Lord Ordinary, before whom the process above-mentioned was depending, appointed intimation thereof to be made to him.

Fraser declined to sist himself as a defender, on the ground that his intimation, "with the usual powers," did not entitle him so to do, and limited merely to the management of the estate; whereupon Mackintosh's trustees presented a petition, praying the Court to empower and

Dec. 13, 188

2D DIVISION

T.

**No. 71.** appoint him, as representing the trust-estate of the late Donald Macqueen, to appear as a defender in the action.  
 Dec. 14, 1836. *Dick v. Frame.* William Buchanan and others, trustees of the late Hugh Macquosa, lodged answers to this petition, in which they submitted that the appearance required was unnecessary, seeing that the trust-estate would be more effectually defended by themselves, who were hostile and competing creditors, than by a factor owing his appointment to the petitioner. Fraser also put in answers, stating his reason for declining to sist himself.

**THE COURT** pronounced the following interlocutor:—"In respect that it is already competent to the judicial factor to make appearance in this process, if he shall deem it expedient, Refuse the prayer of the petition as unnecessary, without prejudice to any application to the Court on the part of the judicial factor for an enlargement of his powers, if he should find it necessary and be so advised."

MACKINTOSH and GEMMELL, S.S.C.—LANG and ADAM, S.S.C.—A. D. FRASER, W.S.—  
 Agents.

**No. 72.** JOHN DICK, Suspender.—*H. J. Robertson.*  
 JOHN FRAME and JAMES LANG (LANG'S Trustees), Chargers.—  
*D. F. Hope—W. Bell.*

*Sheriff Court A. S. 12th Nov. 1825—Removing—Process.*—Held incompetent (under Sheriff Court A. S. 12th Nov. 1825, c. 14, § 2) to present a reclaiming petition against the judgment of the Sheriff-depute, pronounced on appeal, whether such judgment affirms or alters that of the Sheriff-substitute; and accordingly, where such reclaiming petition was presented, and decree of removing thereby obtained, upon which a charge of removing was given—Bill of suspension passed, on juratory caution, as prayed for.

Dec. 14, 1836. By the Sheriff Court Act of Sederunt, 12th November, 1825, it is enacted, c. 14, § 2, that "no reclaiming petition against the judgment of the Sheriff-depute, pronounced on appeal, shall be competent."  
 1st Division. *Ld. Corehouse.*  
 Bill-Chamber. D. In January, 1834, the lands of Crossford, belonging to Lang's trustees, were let by public roup, and John Dick, sole offerer, was preferred. He got immediate possession, but as he failed to find caution satisfactory to Lang's trustees, they raised an action before the Sheriff of Lanarkshire, in May, 1834, concluding to have him ordained immediately to find caution in terms of the articles of roup or instantly to flit and remove, &c.

Defences were lodged, and, after considerable procedure, the Sheriff-substitute, in April, 1835, found the defender bound to find security, or instantly to remove; and ordained him, in ten days, to state what person he proposed as cautioner, "with certification that (if he failed) decree of removing would be pronounced."

Dick appealed to the Sheriff-depute, who, in June, 1835, pronounced an interlocutor, finding, that, from the peculiar terms of the articles of appeal, the obligation to find caution was not effectually imposed on Dick; that the action, as brought, was incompetent in the Sheriff Court; and therefore assoilzieing Dick from the action. To this interlocutor the Sheriff added the following note:—"A petition is competent against this interlocutor, as it alters that of the Sheriff-substitute."

A reclaiming petition was presented against this judgment, on considering which, the Sheriff, in October, 1835, altered, and returned to the judgment of the Sheriff-substitute. In a note appended to this interlocutor, the Sheriff stated, in regard to the competency of his receiving a reclaiming petition, against his own judgment pronounced on appeal, that, in consequence of a conversation which he had held with two of the Supreme Judges, when on Circuit at Glasgow, "the rule had been promulgated and acted upon in the Sheriff-Court of Lanarkshire since 20th May last, viz. that a petition is competent against an interlocutor of the Sheriff-depute, altering that of the Substitute, and that it is where he adheres only, that no such petition will be received;" and that, "from the obvious equity and expediency of the rule the Sheriff will act upon it, till the practice is declared incompetent in the Court of Session by one of the Divisions."

Some procedure followed, as to which, Dick guarded against being held to acquiesce in its competency, and at length a decree of removing was pronounced in terms of the petition.

A charge was given on this decree, and Dick presented a bill of suspension, on juratory caution, and pleaded, that, by the express terms of the Act of Sederunt, no reclaiming petition was competent against a judgment of the Sheriff-depute, pronounced on appeal, whether such judgment altered or affirmed that of the Sheriff-substitute; that the first judgment of the Sheriff-depute, in June, 1835, by which he altered that of the Sheriff-substitute, was the final interlocutor on the merits of the case, and could not be competently recalled in the Sheriff Court; that according to that interlocutor the whole merits of the petition had been decided in the suspender's favour, and all the subsequent proceedings inconsistent therewith, and particularly the interlocutor of October 1835, by which the Sheriff-depute altered his judgment, must be regarded as wholly inept; and accordingly that the charge was withdrawn, and a legal warrant.

The charge was answered, 1st, That the words of the Act of Sederunt

**No. 72.** were sufficiently satisfied, though they were limited in their application only to that class of cases (being the most numerous) in which  
**Dec. 14, 1836.** Sheriff-depute adhered to the judgment of the Sheriff-substitute, that it would be unjust to extend the words to the case where he altered the judgment, taking perhaps a new view on which parties had not been heard: and, 2d, That at all events, as the rule of the Sheriff Court of Lanarkshire had been introduced with the sanction of two of Judges of the Supreme Court, and had been there acted on for some time, it could not now be altered except by Act of Sederunt. They also contended that the bill should not be passed on juratory caution, but only caution in common form.

The Lord Ordinary “passed the bill on juratory caution.” \*

**Lang’s Trustees reclaimed.**

**LORD PRESIDENT.**—The words of the Act of Sederunt are quite general and unqualified, that “no reclaiming petition against the judgment of the Sheriff-depute, pronounced on appeal, shall be competent.” Under this enactment it is merely a judgment of adherence, nor is it merely a judgment of alteration, against which it is declared to be incompetent to reclaim. The incompetency applies equally to both classes of judgments, and these chargers might just as well say that the Act of Sederunt applied only where a judgment of adherence was pronounced by the Sheriff-depute, as only where a judgment of alteration was pronounced by him. I have no doubt that the interlocutor of the Lord Ordinary is well-founded.

**LORD GILLIES.**—I am of the same opinion. And I have as little doubt that this bill must be passed on juratory caution. The judgment by which the Sheriff-depute altered the interlocutor of his substitute, and assoilzied the suspender of the action, has never been competently recalled. It is true that the interlocutor of the Sheriff-substitute against the suspender, and the interlocutor of the Sheriff-depute in his favour, followed by the interlocutor of the Sheriff-depute against him, may be spoken of as three interlocutors, and three interlocutors they are in point of fact; but in point of law there are only two interlocutors in the case, the last of the series of three cannot receive any legal effect as an interlocutor at all, seeing that it was altogether incompetently pronounced.

**LORD MACKENZIE.**—I am of the same opinion; and as to the juratory ca

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\* “**NOTE.**—It is with regret that the Lord Ordinary passes this bill, because he considers the last interlocutor in the Court below well-founded on the merits. But he entertains very great doubt of the competency of that interlocutor, the words of the Act of Sederunt being express, that ‘no reclaiming petition against the judgment of the Sheriff-depute, pronounced on appeal, shall be competent.’ The complainer is not barred personally excepted from objecting to the competency, because he reclaimed against the interlocutor on that ground as soon as it was pronounced, and his minute of 19th October, 1835, was given in under a test that he should not be held to have acquiesced in the competency of the interlocutor in the previous procedure.”

ive the point to be perfectly clear. The charge was given without a legal No. 72.  
; and it must just go for nothing.

D BALGHRAY concurred.

Dec. 14, 1836  
Macdonald v.  
Farquharson.

THE COURT unanimously adhered.

WOTHERSPOON and MACK, W.S.—J. LOGAN, W.S.—Agents.

WILLIAM MACDONALD, Advocate.—*D. F. Hope—Ivory.*  
CATHARINE FARQUHARSON and OTHERS, Respondents.—*Keay—*  
*G. G. Bell.*

No. 73.

*erty—Possession—Trout Fishing.*—A loch was surrounded by the lands co-terminous proprietors; the titles of one proprietor contained the lands woods, fishings, &c., and pertinents; the disposition in favour of the other obtained the lands, "with woods, commonities, &c., and haill other pertinents;" superior's charter of confirmation specially reserved to him (the superior) successors certain services, "with hunting, hawking, fishing, fowling, as d went;" promiscuous possession of the right of fishing in the loch, and sailing on it, was enjoyed by both proprietors;—Held that the first proprietor was titled to obtain from the sheriff an interdict against fishing or sailing by the in respect that he had produced no exclusive title to the fishing; that not had exclusive possession; and that, as the question only regarded hing, which naturally belonged to the proprietor of the dominium utile of ljaacent to a loch, though not specially contained in his titles, the possession econd proprietor was referable to a colourable title, notwithstanding the reservation of a personal nature, in favour of the superior.

LIAM MACDONALD of St Martins, is proprietor of the estate of Dec. 14, 1836  
ddrie in Perthshire, which, on one side, is adjacent to the Loch 1st Division.  
ernick or Bainie. His title bears to be a disposition of "the four I.d. Corehouse  
lands of Inverreddrie," "with parts, pendicles, woods, fishings, B.  
rs, grassings, sheilings, and pertinents whatsoever used and wont."  
arquharson of Invercauld is proprietor of the estate of Broughdarg,  
is also adjacent to the same loch, and the disposition in her favour  
s "the lands of Broughdarg, being a seven merk land, with the  
biggings, grazings, shealings, mosses, muirs, meadows, woods,  
nties, common pasturage, yards, parts, pendicles, and haill other  
nts of the said lands." The charter of resignation and confirma-  
the above disposition, which she obtained from the superior in  
contains the said lands, "with the houses, biggings, grassings,  
s, mosses, muirs, meadows, woods, commonities, common pastur-  
s, parts, pendicles, and haill other pertinents of the said lands,"  
aving nevertheless to me and my successors the legal duties  
ees due and payable to the superiors, with hunting, hawking,  
fowling, as used and wont." There is no other property adja-  
the loch.

Farquharson gave permission to Thomas Watson, one of

**No. 73.** her tenants, who was an innkeeper, to put a boat upon the loch and fish ; in consequence of which, Mr Macdonald presented a petition to the Sheriff of Perthshire, alleging that his property surrounded the greater part of the loch, and that, if the loch was drained, the greater portion of the solum would belong to him : that he and his predecessors had possessed “ from time immemorial the exclusive and uninterrupted right of fishing in that loch, and they have constantly kept a boat thereon for that purpose ; and no boats have ever been kept upon the said loch, except by the proprietors of Invereddrie, or by their express permission.” He craved the Sheriff to prohibit Watson “ from sailing any boat upon the loch, and from fishing therein ;” and to find that he “ had no right to put a boat upon the loch,” and to ordain him to remove his boat, and to find him liable in £5, in name of damages.

Dec. 14, 1836.  
Macdonald v.  
Farquharson.

Mrs Farquharson and her tenant denied the allegations of exclusive possession, and contended, that in respect of Mrs Farquharson's property adjacent to the loch, she was entitled to put a boat upon it or fish in it; and that this was a right inherent in her right of property, and being *meræ facultatis*, could not be lost, *non utendo*. The sheriff allowed a proof of possession, from which it appeared that many persons were in the use of fishing in the loch, and, in particular, that some of Mrs Farquharson's tenants were so, and had never been interrupted by Macdonald. It was also proved that one party, who had for some time kept a boat on the loch, had asked and obtained leave from Mrs Farquharson's predecessor to do so.

In these circumstances Macdonald now pleaded, that as his titles contained “ fishings,” he had a good title, to which his possession was ascribable ; and that, as “ fishings,” were not in the disposition to Mrs Farquharson, and as her superior, in his charter of confirmation, had specially excepted “ fishings” out of it, there was no title to which her possession or her tenant's could be ascribed, and it must therefore be entirely disregarded.

Mrs Farquharson and her tenant answered, that, as no salmon fishing was in question, the right of fishing *ex adverso* of the land belonging to her, was inherent in her right of property, and that a considerable portion of the solum of the loch itself belonged to her in property ; that the exception in the superior's charter could only be pleaded by the superior; and, at any rate, it merely reserved a right of “ hunting, hawking, fishing, and fowling, as used and wont,” which was not more intended to deprive the vassal of the right of fishing in the loch, than of the right of hunting over the ground : and that in reference to such a title and the proof of possession, the petition of Macdonald ought to be dismissed.

The Sheriff assolzied from the complaint, with expenses, adding in a note to his interlocutor, dated 3d June, 1835, that it was “ settled by the decision in the case of Mackenzie against Rose, 26th May, 1830,

affirmed in the House of Lords, 14th May, 1832, that a proprietor is entitled to fish (except for salmon) *ex adverso* of his lands, as a privilege inherent in his right of property, without any proof of possession, unless excluded for the years of prescription by another proprietor having an express grant to the fishings. Now the compeerer has produced her title deeds to the property adjoining the lake, while the pursuer has not instructed a sufficient right by title or possession to exclude her from fishing in it."

Macdonald brought an advocacy, in which the Lord Ordinary found "that Loch Shechernick, or Bainie, is bounded by the lands of the advocator and of the respondent, Mrs Farquharson, at various places, and in unequal proportions; that neither party has produced an exclusive title to fish trouts in the said loch; that the advocator has not proved that he has been in the exclusive possession of trout-fishing in the loch for the period of seven years; and therefore remitted simpliciter to the sheriff, and decerned; and found the advocator liable in expenses, both in this and the inferior court."\*

Macdonald reclaimed.

LORD BALGRAY.—The reservation in the charter of Mrs Farquharson's superior, was not intended to exclude the vassal, who enjoyed the dominium utile of the property, from all right of hunting or fowling over the land, and fishing in the water. It had no such effect, but merely reserved a right to the superior to enjoy these sports notwithstanding the grant to the vassal. And as the right to all these sports is put, in this respect, upon an equal footing, and I think it clear that the superior could not have interdicted the vassal from either hunting or fishing, I can have no doubt that the vassal's titles, and the state of possession, were amply sufficient to justify the interlocutor of the Lord Ordinary, so far as regards a neighbouring proprietor.

LORD PRESIDENT.—I am clearly of the same opinion. As to the right of sailing a boat upon the loch, part of the solum of which belongs to Mrs Farquharson, I find it difficult to imagine on what plea this is opposed. There is no express

No. 73.

Dec. 14, 183  
Macdonald v.  
Farquharson.

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\* "NOTE.—The Lord Ordinary has arrived at the same conclusion with the sheriff, but not exactly on the grounds expressed in the note to the interlocutor of the 3d June 1835. This is not purely a question of title, for neither party has an exclusive title; each has a colourable title for possession, and it is a possessory question exclusively which is now at issue. With regard to the proof of possession, the admitted fact that the lands of both parties bound the loch, creates a presumption that both have a right to fish trouts in it. That presumption is not redressed by any proof to the contrary on the part of the advocator. It is proved that many persons were in the use of fishing in the loch; and, in particular, some of the tenants on the respondent's lands of Broughdarg; and it is not proved that any person was interrupted by the advocator or his predecessors. The advocator avers that all the persons who had used boats, obtained permission from him or his predecessor, but that is not proved. On the contrary, it appears that Major Ross had a boat, asked and obtained liberty from the proprietor of the said lands of Broughdarg before they were acquired by the respondent, &c."



No. 73. right of boating in the titles, to be sure, but I never heard of a grant of boating or sailing before.

Dec. 14, 1836.  
1st Div.

LORD MACKENZIE.—Had the advocator never put a boat upon the loch himself, and had he been in a condition to state that a boat there was a novelty and a nuisance, his plea would have been more intelligible, whether well or ill-founded. But in place of that, though he is just one of two conterminous proprietors, and does not even allege right to the whole solum of the loch, he insists on keeping his own boat upon the loch, in consequence of his right of property, and at the same time he attempts to deprive his co-proprietor of a right of the same kind. This is altogether preposterous. The reservation in the charter of Mrs Farquharson affords no colour whatever to such a plea, as that was merely a limited reservation of a right to certain sports "as used and wont," in favour of the superior, and it imposed no restriction, except to that limited extent, on the right of the vassal. And I cannot discover any grounds whatever for the interdict which the advocator is here demanding.

LORD GILLIES concurred.

THE COURT unanimously adhered, and awarded additional expenses against the reclaimer.

R. SMITH.—TOD and ROMANES, W.S.—Agents.

No. 74.

WILLIAM ELLIS, Petitioner.—*More.*

*Curator Bonis.*—1. Competent for the Lord Ordinary on the Bills, in vacation, to make an interim appointment of a curator bonis to a fatuous party. 2. A party became fatuous who was the partner of a trading company; part of the company stock was heritage, which was feudally vested in the individual partners; the curator of the fatuous party took his ward out of the copartnery, and it became necessary, in order to have the value of his share paid up, that a conveyance of the heritage, so far as vested in the ward, and also of his share in the moveable stock of the company, should be executed: in these circumstances the Court granted authority to the curator to execute the requisite conveyances.

Dec. 14, 1836.

1st Division.

IN August 1836, a petition was presented to the Lord Ordinary on the Bills, stating that A B had become unable to attend to his affairs on account of mental imbecility, and praying the appointment of a curator bonis. After intimation, the Lord Ordinary made an interim appointment of William Ellis, S.S.C., to endure until the 10th sederunt day in November, and directed the petition to be boxed to the Inner-House, in order that it might there be finally disposed of. This petition was considered by the Court on November 15, and the appointment of the curator bonis was then confirmed, with the usual powers.

The party under curatory was engaged in trade with three other partners, and part of the company stock consisted of cotton-mills, and some other heritage. This was feudally vested in the four individual partners. The curator, by the advice of counsel, took the requisite steps for bringing the copartnery to an end, under the contract, for the pur-

pose of disengaging his ward A B from the concern. The amount of his share in the company stock was then ascertained, for the purpose of being paid over to him, and it became necessary on his part to dispose of the above feudal subjects, so far as vested in him, to the other partners, and also to convey his share of the moveable property of the company to them. The curator presented a petition to the Court, stating these circumstances, and that it was necessary for him to obtain the special authority of the Court to enable him to execute the requisite conveyances. He therefore prayed the Court "to authorize the petitioner to execute and deliver all such dispositions, conveyances, and other deeds and writings as may be necessary and advisable for vesting in the persons of the other partners of the said company, according to their rights and interests, or in others on their behalf, if they so wish, the share of the whole property of the said company, heritable as well as moveable, which belonged to the said A B, on his retiring as aforesaid, in like manner as would have been done by the said A B himself had he retired therefrom when in good health."

No. 7.  
Der. 14, 1  
Taylor v.  
Flowerdew

THE COURT, after the usual intimation, granted the prayer of the petition.

W. A. G. and R. ELLIS, W.S.—Agents.

JAMES TAYLOR, S.S.C., Pursuer.—*Whigham*.  
WILLIAM ALLEN FLOWERDEW, Defender.—*Ivory*.

No. 71

*Compensation—Agent and Client.*—A country practitioner was employed to conduct law proceedings for behoof of a party resident in Edinburgh, and he communicated with the party's Edinburgh solicitor:—In an action by the solicitor against the country practitioner for payment of an account due to him in reference to other business, the latter pleaded compensation, in respect of the account incurred to himself—Held that there were no termini habiles for the plea of compensation as proposed.

In the years 1829 and 1830, the pursuer Taylor, S.S.C., was employed by the defender Flowerdew, to conduct business for his behoof, and thus became his creditor in the sum of £23. In the year 1829, Flowerdew was employed by one M'Intyre, S.S.C., the Edinburgh agent of a party called Cox, to conduct certain law proceedings in the country for behoof of Cox, who, on the death of M'Intyre, employed as his Edinburgh agent the pursuer Taylor. In regard to these proceedings various communications passed between Flowerdew and Taylor, importing that Taylor became, in 1829, the accredited Edinburgh agent of Cox, and the employment of Flowerdew for behoof of Cox, though not originally recommended of Taylor, was continued with his

Dec. 14, 18  
2d Division  
Ld. Mon.  
R.

No. 75. concurrence and sanction. Cox's account with Flowerdew remained unpaid.

Dec. 14, 1836.

Taylor v.  
Flowerdew.

Thereafter Taylor raised action against Flowerdew for payment of the sum of £23 incurred as above-mentioned. Flowerdew, in defence, pleaded compensation, in respect that Taylor, as his employer and only correspondent in regard to Cox's law proceedings, was liable for the account due to him in consequence thereof.

Taylor, on the other hand, maintained that he had not employed Flowerdew, and was not liable; but, at all events, that Cox, as the true debtor, must first be discussed, and that this was not a case in which compensation could be pleaded.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—"In respect that the sum pursued for, under deduction of the sum of £5, 15s. 2d., admitted in the record, and subject to taxation by the auditor, is admitted to be in itself a just debt for business

\* "It appears to the Lord Ordinary that the defender has taken an incorrect view of the point which he means to maintain. He holds that Mr Taylor, as Edinburgh agent, is directly and personally liable to him for the whole of the account in Mr Cox's business. Supposing he were right in this, it is still clear that Cox is the proper debtor, and that before compensation can be admitted on it, there must be a competent form for constituting the debt; because otherwise, no judgment in this case could affect or bind Cox. The defender may think that he is not bound to go against Cox, and that if he were to do so, it might seem to imply that he has not a direct claim against Taylor. The Lord Ordinary thinks that no such inference could be justly drawn, because, in any view, the claim is good against Cox, so far as the debt should be sustained, and that the proper course was to raise an action against both, as was done in the case of Greig v. Stewart and Tinning, June 12, 1811. But, supposing that the defender might competently proceed without calling Cox, *at least* he ought to have brought his action against *Taylor*, leaving it to him to call Cox in an action of relief. But he does neither. Mr Taylor *could not call Cox into this action*, with which he has no concern, and he could not call him in any direct action for the defender's account, because it is not due to him, and has never been constituted against him; and yet, if the plea of compensation were to be sustained, he would lose his own debt in the first instance, without obtaining any judgment on which he could immediately demand relief from Mr Cox, or which would at all bar the objections, which Mr Cox may make to the account. The Lord Ordinary, however, says nothing of any claim of *retention*, if a proper action were brought.

"The Lord Ordinary, in these circumstances, will refrain from giving any opinion as to the pursuer's liability for the account, assuming that the law held in the case of Greig, will apply to the case of a country agent, employed by an Edinburgh agent, unless a special usage were averred, as in *Marshall v. Kerr*, 1 Murray, p. 59. There may be a material distinction as to the question, whether Taylor is to be considered as the employer, between the part of the account contracted before M'Intyre's death, and that contracted after it.

"In general, the Lord Ordinary thinks that this matter should have been settled by a reference. Mr Cox being perfectly solvent, it is absurd for two agents, both employed by him, to be contending with one another at a useless expense, and as he was quite willing to settle by reference, the defender could have no cause to fear the result, assuming the account to be right. But if he saw cause to decline this, he should have brought a proper action."

lone, and that the defence resolves into a plea of compensation ; and in respect that the counter-account, on which compensation is pleaded, is altogether illiquid, and that there is no action or proceeding before the Lord Ordinary, under which a decree constituting that account as a just debt could be pronounced, to the effect of securing the pursuer, in case he were found liable for the whole, or any part of it, in his relief against Mr James Cox, the proper party in the law proceedings referred to : Finds that there are no termini habiles for the said plea of compensation in the shape in which it is here proponed : Therefore repels the defences, except to the extent admitted, reserving to the defender to bring such action as he may be advised, against the said James Cox and the defender, or either of them, and to them their defences as accords : And of new remits the accounts sued on to the auditor of Court, and supersedes further advising till the report be received, and reserves the question of expenses."

Flowerdew reclaimed, and maintained, that had Taylor admitted his liability, the plea of compensation would have been competent, but that the circumstance of his denying his liability could not affect the competency of the plea, and that therefore the Lord Ordinary's interlocutor was well founded.

Taylor reclaimed on the point of expenses.

THE COURT refused the reclaiming notes of both parties.

JAMES TAYLOR, S.S.C.—WILLIAM MILLAR, S.S.C.—Agents.

MARY RENDALL, Pursuer.—*Rutherford—Pyper.*

MRS CHRISTIAN ROBERTSON'S REPRESENTATIVES, Defenders.—

*D. F. Hope—G. G. Bell.*

No. 75.

Dec. 15, 1812.  
Rendall v.  
Robertson's  
Representatives.

No. 76.

*Property—Superior and Vassal—Udal.*—Circumstances in which the Court held that certain lands in Orkney were udal lands, and were not held by feudal tenure.

In 1806, Robert Rendall, the eldest of three brothers, sold and disposed the four-penny lands of Ingsay and others, in Orkney, to his youngest brother, Samuel. Robert and Samuel died in 1809, and Samuel left a son, George, and a daughter, Mary, both in pupillarity. John Rendall, the next youngest brother to Robert, claimed the lands, in respect that, though held (as he alleged) by a feudal tenure, Robert had never made titles, and could not effectually convey them to Samuel ; but he afterwards, in the same year 1809, under reservation of his own liferent, executed a disposition of the fee of the lands, in favour of his nephew. In 1812, John Rendall obtained, in absence, and during the absence of his nephew, a reduction of that disposition, on the ground

Dec. 15, 1812.

1st Division  
Ld. Cockburn  
S.

No. 76.

—  
 re. 15, 1836.  
 Rendall v.  
 Robertson's  
 representatives.

of facility, circumvention, and lesion. In 1813, he expedite a service to an ancestor named John Spence, said to have been duly infeft in 1677 and he obtained a Crown precept, on a retour of this service, under which he was infeft. Afterwards, in 1819, he sold and disposed the lands to Mrs Christian Robertson. In 1827, George Rendall, having recently come of age, raised a reduction of the decree of 1812, the titles made up by John Rendall in 1813, and the subsequent conveyance to Mrs Robertson. In the course of the action he died, and his sister, Mary Rendall, became pursuer in his place. Both the original defenders also died. The representatives of Mrs Christian Robertson were then sisted; and Mary Rendall, the pursuer, put into process a minute renouncing all right of representing her uncle, John Rendall, which was signed by herself, as well as her counsel, after which the action proceeded.

Among other pleas maintained by Mary Rendall, she insisted that the lands of Ingsay were proper udal lands, and had never been effectually feudalized; and that, in consequence of this, the conveyance, in 1806, by her uncle, Robert Rendall, to her father, was effectual, although Robert had never made up a feudal title, because he was in full possession of the lands as proprietor, and that was enough to entitle a udaller to convey them. But if this was the case, the disposition by the defender her uncle, John Rendall, in 1809, could not possibly have been to his lesion, as it disposed nothing to his nephew George, which was not his nephew's property already. And therefore the decree of reduction obtained by John Rendall in 1812, was, on that separate ground, ill-founded and reducible. On the point whether the lands were properly udal, or feudal (besides other points not now requiring notice), cases were ordered by the Lord Ordinary, and reported to the Court. The following evidence was referred to by the parties, as to the true character of the tenure of the lands:

In 1661, a Crown charter, containing the earldom of Orkney and lordship of Zetland, was granted in favour of Viscount Grandison, as trustee for the Earl of Morton. Alexander Douglas of Spynie was appointed factor, commissioner, and principal chamberlain for the earldom and lordship. In 1665, on the narrative that Robert Spence "had right and claim of right" to the four-penny lands of Ingsay, in Orkney, and for the purpose of giving him "ane better right and security thereof by the granting of the instrument of feu-farm underwritten," Douglas "gave, granted, in heritable and perpetual feu-farm, sett and lett, and be this my prt. charter, confirmed to the said Robert Spence alias Ingsay, and Margt. Seatter, his spouse, the langer leivand of them twa, in conjunct fee, and to the aires laughfullie gotten, or to be gottin, betwixt them," the lands in question. The reddendo clause was "payind therefoir yearly the said Robert Spence, &c., to the said George Viscount of Grandison, his aires, assignays and successors, their factors, &c., during the not redemption of the said earldom and lordship; and after the lawful redemption thereof to our Soverane Lord the King's Maie., his highnes aires and successors, their tacksmen, factors, chalmerlins, and others in their names, the scatt duties

justly addebtit furth of the said lands, with the pertinents, conforme to the rental, viz., two barrell butter merchandable wair, and with twelve poultrie fowls, as for the hail feu-farm, scatt and teind dewtie, justlie addebtit and in use of payment furthe of the said landis, with the pertinents yearlie, togithir with the soume of two shillings six pennies Scottis money, at the feast of Martimas yearlie, in augmentation of the rental thereof, mair nor evir the samen land payit of befor." The deed contained a clause of irritancy in case of failure to pay "the said feu-farm and augmentation above written, swa that two termis run togidder is the third unpayit." The warrandice was from fact and deed.

No. 76.

Dec. 15, 18  
Rendall v.  
Robertson's  
Representa-  
tives.

An instrument of sasine under this conveyance or charter, was recorded in the particular register of sasines at Kirkwall, on 20th October 1665. In 1669, a decree of reduction was obtained, at the instance of the Lord Advocate on the part of the Crown, rescinding the grant in favour of Viscount Grandison, and declaring Orkney and Zetland to be the annexed property of the Crown; and by the statute 1669, c. 13, this decree was ratified, and two former acts of annexation, in 1540 and 1612, were also ratified.

In 1677, an instrument of sasine was entered in the particular record of sasines at Kirkwall, setting forth that Robert Spence, "feu-fermerer" of the lands, "fewed be him from Alexander Douglas of Spynie," gave "heritable state and saisng, as also actual, real and corporal possession" of the lands of Ingsay to his son John Spence. The instrument narrated that the seisine proceeded on "a certain charter of alienatione and herell. dispositione, containing ane precept of saisng on the end thereof;" and that the lands of Ingsay, so conveyed, were "to be baldine in manner spect. in the said charter."

John Spence was succeeded by a son Robert (2), who made up no feudal title to the lands. Robert (2) was succeeded by a daughter, Mary, who was married to John Rendall, wright in Stromness, and who left the three sons already noticed, Robert (3), John, and Samuel. None of these parties made up any feudal title; but a settlement, executed by Mary Spence or Rendall in 1774, which was intended to convey the fee of the lands to her three sons, contained an obligation to infest by two several infestments; the one, of and under herself, for payment of one penny Scots; the other, of and under her superiors "for the yearly payment of the superior duty, cess, taxations, and others payable furth thereof, &c.; and that either by resignation or confirmation, &c." The deed contained a precept of sasine.

Mary Spence died about the year 1800, and Robert (3), who had made up no feudal title, but who entered into possession, executed, in 1806, the disposition already mentioned, in favour of his youngest brother Samuel, in which deed he described himself as "heritable udaller of the lands of Ingsay and others," and deduced his descent from John Spence, who was also described as "heritable udal proprietor

**No. 76.** of the lands." The disposition contained an obligation on Robert (3) to procure himself "served and retoured heir to his mother, or to any other of his said predecessors who may have died last vest and seised" in the lands, and thereupon to have himself infeft; "and being thus vested in the complete feudal right thereof," he bound himself to infeft the disponee, Samuel Rendall, by two several infeftments, &c. The deed also contained procuratory of resignation and precept of sasine.

Dec. 15, 1836.  
Rendall v.  
Robertson's  
representa-  
tives.

In reference to this state of the titles, the pursuer pleaded, 1st, The presumption was that lands situated in Orkney, in the seventeenth century, were held by udal tenure, and the onus lay on the defenders to prove the contrary. And the terms of the deed by Douglas of Spynie, in themselves implied, that a change in the tenure was intended to be made by that grant, which could only be, if the tenure was previously udal. And that deed also bore that the lands paid "scatt,"<sup>1</sup> which was properly a udal duty, or tax on udal lands; which also showed the lands of Ingay to be of this sort. Besides, the terms of the conveyances, even as late as Robert Rendall's deed in 1806, described them as udal lands. 2. They had never been effectually feudalized. Douglas of Spynie possessed no powers except what were derived from, and dependent on, the grant to Viscount Grandison, which was reduced<sup>2</sup> as null and illegal in 1669, and the decree of reduction ratified by statute. Any rights granted by him were therefore rendered void. But, separately, a udal proprietor, being allodial, and having no over-lord, could not have his lands effectually feudalized by obtaining a feu-charter from any subject-superior, but only from the crown: otherwise, there would be a subject, having a feudal vassal in lands, in which that subject had himself no superior, but was lord paramount, which was contrary to the genius of the feudal system, and altogether anomalous.<sup>3</sup> 3. From 1677 to 1806 there was no feudal title made up, and as the proprietors were all along enjoying full possession, and every right of property, on the same terms on which udallens do, this was enough of itself to have worked off the feudal tenure, even if it had been regularly and effectually ingrafted on the investiture by the grant from Douglas of Spynie. 4. If the lands were udal it was of no moment that Robert Rendall (3) had not made up a feudal title before executing the conveyance to Samuel Rendall, the pursuer's father. He was clothed with the full right of the lands by mere possession; and his conveyance, though containing clauses which were useless except in reference to a feudal holding, contained a valid and sufficient dispositive clause, which was effectual to convey the lands to Samuel Rendall.

The defenders answered, 1. There were both feudal and udal tenures

<sup>1</sup> Thre; Glossar. Suigoth.; Peterkin's Rentals of Orkney, Appendix.

<sup>2</sup> Feb. 25, 1669 (7857); Lord Advocate Dundas, Feb. 3, 1779 (15103).

<sup>3</sup> Beaton, Feb. 2, 1832 (ante, X. 286).



in Orkney, in the seventeenth century, and there was no presumption in favour of the one more than the other. But as the earliest title-deed produced contained a feudal holding, it must be presumed retro that such was the previous holding, and there was no sufficient evidence to rebut this presumption. 2. But whatever was the previous holding, it became feudal by the charter from Douglas of Spynie to Robert (1), followed by sasine<sup>1</sup> in 1668; and again by another sasine in favour of the son of Robert in 1677. This was after the decree of reduction and the statute 1669, and showed that this feudal right, being granted with an augmentation of the rental, was not struck at by these proceedings, to which Robert (1) was not a party, and which had no object except to recover Orkney and Zetland to the crown, without injuring any heritable rights granted under the right bestowed on Viscount Grandison. The only effect of the reduction was to make the lands hold of the Crown as superior, in place of Lord Grandison. And the infestment on the precept from Chancery in 1813, showed this to be the true nature of the holding. 3. After the title was fully feudalized, the possession of the successive proprietors must be imputed to that form of their right, whether they made up a regular feudal title or not. And this was confirmed by the terms of the settlement of Mrs Mary Spence or Rendall in 1774, which, though allowed to prescribe as a conveyance, was nevertheless a good document of evidence to show in what light she had considered the tenure of her lands, which was evidently feudal. 4. As the pursuer founded on a deed conveying the lands to her father, in common feudal form, she was personally barred from objecting that they were not lands feudalized.

No. 76.  
Dec. 15, 1836  
Rendall v.  
Robertson's  
Representa-  
tives.

The Lord Ordinary reported the case.

LORD PRESIDENT.—I think it clear that the lands were originally udal, and that they were not effectually feudalized. They are termed king's lands, in some of the deeds, but that expression is quite immaterial as to this question. It was merely applied to them in contradistinction to bishop's lands, and did not imply that the tenure was feudal.

LORD BALGRAY.—The decree of reduction by this Court, which was ratified by statute, cut up, ab initio, the right of the party from whom the feudal grant in 1665 flowed, and that grant fell along with it. I think that the lands were originally udal, and that we cannot hold them to be feudal now.

LORD MACKENZIE.—I have no doubt that these lands were originally udal. The terms of the feudal grant itself, in 1665, afford a strong presumption of this, as they declare the purpose of the grant to be that of giving "ane better right and security thereof by the granting of the instrument of feu-farm underwritten." The question is whether they were ever duly feudalized. Supposing this to have been the case, if the right of the granter of the feu charter in 1665 to Robert

**No. 76.** Spence had remained unimpeached, still I think that that feu charter necessarily fell by the reduction of the right of the granter. The Crown set it aside, and I think the effect of that reduction was complete. It would have been impossible for the Crown thereafter, as feudal superiors, to have compelled feudal prestations from Robert Spence or his heirs, or proceeded against them for feudal delinquencies. I think the lands therefore stand now in their original situation of udal lands.

Dec. 15, 1836.  
M'Arthur v.  
Scott.

**LORD GILLIES.**—The granter of the charter in 1665, which was to convert the tenure of the lands from udal, into a feudal holding, had his own right reduced and set aside, not only from the date of the decree of reduction in 1669, but retro from the origin of the illegal Crown grant in his own favour. As it must now be held therefore that he had no right *ab initio*, I think the lands of Ingeay are still udal, and that the proceedings which were intended to feudalize them became frustrated and abortive. But at present I would not incline to pronounce any farther finding than that the tenure of the lands is udal, and remit *quoad ultra* to the Lord Ordinary.

**THE COURT** accordingly found that the lands were udal, and *quoad ultra*, remitted to the Lord Ordinary.

**R. URQUHART, S.S.C.—P. CROOKS, W.S.—Agents.**

**No. 77.** **JOHN M'ARTHUR and JAMES WEDDELL, Advocators.—*J. Anderson.***  
**GEORGE SCOTT, Respondent.—*Milne.***

**Process—Contract—Cautioner.**—Where a cautionary obligation bound three parties, not jointly and severally, but each *pro rata*, only,—Held competent to raise action against two of the co-obligants, for payment of their respective shares, without calling the representatives of the third, who was deceased.

**Dec. 15, 1836.** **ARRESTMENTS** were used by Lithgow, on the dependence of an action against Anderson, and George Scott of Boghall granted bond to make the arrested effects forthcoming, in consequence of which bond an arrestment to the amount of £59, 8s. 6d. was loosed. Before granting the bond, Scott obtained the following letter, on the faith of which the bond was granted:—"April 17, 1832. Sir,—If you will become security for James Anderson in loosing the arrestments which have been used in the hands of Mr James Lumsden against him at the instance of Andrew Lithgow, we hereby bind and oblige us to free and relieve you of the obligation thereby come under, and of all costs and skaith which you may suffer in consequence. We are, Sir, your most obedient servants. (Signed) John M'Arthur, James Weddell, James Cumming." Lithgow obtained decree in his action, and afterwards recovered payment from Scott of £70, 17s. 2d., being the principal sum of £59, 8s. 6d., with subsequent interest,

1st Division.  
d. Fullerton.  
S.

and the expenses of taking an unopposed decree in a forthcoming against **No. 77.**  
**Scott.** Scott, who was under interdiction, then raised an action with  
 consent of his interdictor, against John M<sup>r</sup>Arthur and James Weddell, <sup>Dec. 15, 183</sup>  
 before the Magistrates of Glasgow, libelling on the missive of 17th April <sup>M<sup>r</sup>Arthur v.</sup>  
 1832, and concluding that they "should be decerned and ordained to <sup>Scott.</sup>  
 make payment to the pursuer of the foresaid sum of £70, 17s. 10d. ster-  
 ling, or as much thereof as they shall be found liable in, with interest  
 thereon from and since the same was disbursed by the pursuer." The  
 libel bore that James Cumming, the other co-obligant in the missive, was  
 now deceased. The defenders objected to the competency of the action  
 that the representatives of Cumming should have been called. They  
 also pleaded defences on the merits. Scott in his replies stated that Cum-  
 ming had died insolvent and unrepresented; but that, independently of  
 this circumstance, it was unnecessary to call his representatives, because  
 the obligation libelled on did not bind the parties jointly and severally,  
 but each pro rata only. It formed a separate obligation, against each of  
 the three co-obligants, to the extent of one-third of its amount, and, it  
 would have been competent to call any of them singly, and compel him  
 to pay his own third, without calling the others.

The magistrates "upon the footing of the conclusions of the libel being  
 limited and restricted as agreed to in the replies to the proportions of the  
 alleged debt due by the defenders severally and respectively, repelled the  
 preliminary objection, that the representatives of the other obligant,  
 Cumming, have not been cited, and with the said limitation and restric-  
 tion of liability, sustained the competency of the action." They after-  
 wards decerned in favour of Scott upon the merits. M<sup>r</sup>Arthur and Wed-  
 dell brought an advocacy, in which the Lord Ordinary, on 9th Decem-  
 ber 1835, pronounced an interlocutor, inter alia, "decerning in terms of  
 the libel, as explained and restricted in the pursuer's replies, against each  
 of the defenders respectively for one-third of the said sum."

The advocates reclaimed, and the Court "recalled the interlocutor of  
 the Lord Ordinary reclaimed against, and remitted to his Lordship to hear  
 parties as to the propriety of calling Cumming's executors as a party, and  
 as to the necessity of allowing further proof."

The Lord Ordinary then pronounced this interlocutor:—"Finds that  
 the letter of relief libelled is held by both parties in the present litigation  
 to import a several obligation, binding each of the obligants pro rata only :  
 Finds that, agreeably to this construction, the conclusions of the libel  
 against the advocates M<sup>r</sup>Arthur and Weddell were, by the replies in the  
 inferior court, expressly restricted to the advocates' respective shares of  
 the debt covered by the said letter of obligation : therefore finds it unne-  
 cessary to call the representatives of James Cumming, the other obligant,  
 as to the judgment of the sheriff, repelling the preliminary  
 that Cumming's representatives were not called; further, in

- No. 77.** respect that both parties demand a diligence for the recovery of writing  
 Dec. 15, 1836. appoint them to lodge specifications of the writings called for," &c.\*  
 Mack v. Dixon. The advocates reclaimed.  
 Ill.

THE COURT adhered.

J. CULLEN, W.S.—GREIG and MORTON, W.S.—Agents.

- No. 78.** JOHN HAMILTON MACK, Advocate.—*D. F. Hope—Russell.*  
 WILLIAM DIXON, Respondent.—*Keay—Patton.*

*Expenses—Relief—Process.*—A party against whom decree passed in the sheriff court, raised an action of relief, and wrote to the defender in that action, that he did not mean to take the original process to advocacy, unless the defender intimated his wish that it should be done; the defender intimated no such wish; the party, nevertheless, took the original process to advocacy, and, being unsuccessful, was subjected in expenses,—Held, that the defender in the action of relief was not liable for the expenses of the advocacy, though liable in relief quoad ult.

- Dec. 16, 1836. In 1829 a horse, belonging to Allan and Simpson, fell into an old pit  
 1st Division. on the estate of Cliftonhill, in Lanarkshire, and was killed. The pit lay  
 d. Fullerton. within a yard of the public road, and was insufficiently fenced. Allan and  
 D. Simpson raised an action, before the Sheriff of Lanarkshire, against John  
 Hamilton Mack, the judicial factor on the estate of Cliftonhill, which was  
 under sequestration, concluding for £15, as the price of the horse, and  
 £8 of damages. Mack pleaded, in defence, that the minerals on the  
 Cliftonhill estate were under lease to William Dixon, of Calder Iron  
 works, who had sunk the pit and worked it; that it was his duty to have  
 duly fenced the pit when he ceased from working it; and that, therefore,  
 if any party was liable in reparation, it was he alone; or at least, in the

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\* "NOTE.—The summons, as it originally stood, was not altogether free from ambiguity, for it concludes against M<sup>r</sup> Arthur and Weddell, the only parties called for payment 'of the sum of £70, 17s. 10d. sterling, or as much thereof as they shall be found liable in,' &c. But the matter is made perfectly clear in the reply in the inferior court, in which the pursuer assigns as his reason for not calling Cumming's representatives 'that the obligants are not taken bound jointly and several in the letter of relief,' and that 'the defenders are sought to be decerned and ordained only for what part of the sum libelled they may be found liable in. The sum is two-thirds of the amount of the whole sum paid by the pursuer, with interest, as libelled, under deduction of two-thirds of the composition which has been paid by the common debtor Anderson.' And the same construction of the letter is expressly recognised by the advocates, whose eighth plea in law in their revision note is that 'the letter does not infer a joint and several obligation, but merely a pro rata.' The advocates, then, being called as bound only each for his own share and they admitting, or rather maintaining, that to be the true nature of the obligation, there is no ground for requiring the representatives of the other obligant Cumming to be made parties to the present process."

at instance, he was the proper party. In July and October 1830, Allan and Simpson obtained a decree against Mack, in terms of the libel, with expenses, in the sheriff court, and, Mack having brought an advocacy, the sheriff's judgment was affirmed with expenses in both courts, on the 14th February, 1832.<sup>1</sup>

No. 78.

Dec. 16, 1830.

Mack v.

Dixon.

In May, 1830, Mack raised an action of relief against Dixon, before the Sheriff of Lanarkshire, concluding to have Dixon ordained to free and relieve him of the action at the instance of Allan and Simpson, and the conclusions thereof, and also of the expenses incurred by him in defending against that action. Dixon resisted this demand, but decree of relief was pronounced against him by the sheriff in January and April, 1832.

On 11th December 1830, before the original action at the instance of Allan and Simpson was advocated by Mack, his agent wrote to Dixon, stating the terms of the sheriff's judgment in that action, and adding, "I ask there are grounds for disputing the soundness of the sheriff's interdict. But as Mr Mack has an action against you, seeking relief of the same process and sums decerned for, he does not consider it incumbent on him to litigate the matter farther. I beg, therefore, to mention, that you mean to acquiesce in the sheriff's judgment, and to settle with Allan and Simpson in terms of it, unless you wish the process to be advocated, and intimate your wish to him on this point within eight days from this date." No answer was returned to this letter by Dixon.

In 1833, Mack raised a new action before the Sheriff of Lanarkshire against Dixon, concluding, *inter alia*, for payment of the whole expenses incurred in the advocacy of Allan and Simpson's action, as falling under the decree of relief, and as being part of the consequences of Dixon's wrongful neglect of the fencing of the pit, from which he was bound to keep Mack free. In support of this claim he contended that unless he had obtained the judgment of the sheriff to advocacy, it might have been objected by Dixon, in the subsequent action of relief, that he had not obtained an authoritative adjudication of the question of his liability; and, if the action of relief should have been taken by Dixon to the Court of Session, then, who was no party to the original action, might there have obtained judgment finding that Mack had never been truly liable to Allan and Simpson, and consequently that Dixon was not liable to relieve him of the effects of the sheriff's decree in their favour. And as Dixon returned answer to the letter of December 11, 1830, he thereby threw upon him the same necessity of acting on his own responsibility, as if no letter had been written; because Dixon, in the action of relief, would not have been barred by that letter from carrying the action of relief to the Court of Session, and if he chose, trying the question there, whether

<sup>1</sup> Ante, X. 349.

78. Mack was properly liable to Allan and Simpson at all. Dixon answered that the final decision of the sheriff, in Allan and Simpson's action against Mack, was a sufficient adjudication of the question to have warranted every competent claim of relief against him. There was no more of an advocacy, to effect this, by a judgment in the Court of Session than there was need to carry that judgment to appeal, in order to the matter still more authoritatively decided. But, the advocacy was only unauthorized by Dixon, it was brought after Mack was distinctly certiorated that he did not desire it to be brought, which was done, precisely in terms of the letter of Mack's own agent, by sending no answer to the letter of 11th December, 1830. And as one main plea in Mack's advocacy was, that he (Dixon) was the party who ought properly to be subjected, there was no room for subjecting him in the expense of process on account of its being in rem versum of him.

The sheriff found Dixon liable in relief of the damages for which he had been subjected to Allan and Simpson, and also of the expenses of the action on his side of that action in the sheriff court, but "dismissed the action in so far as it concluded for the expenses incurred in the advocacy." He then brought an advocacy, and the Lord Ordinary found "that, after the letter of 11th December, 1830, the advocator was not entitled to advocate the original action of damages at the expense of the respondent, without obtaining his authority, or, at all events, without giving notice retracting the intimation made in the foresaid letter; found it not proved that he either obtained such authority, or gave such notice: Therefore, he decrees that the advocator has no claim against the respondent for the expense of the said advocacy, and remitted the cause simpliciter to the advocate and decerned, and found the advocator liable in expenses."

Mack reclaimed.

**LORD BALGRAY.**—The letter of the 11th December, 1830, is decisive of the case. The agent of Mack distinctly intimated to Dixon "that he means to quiesce in the sheriff's judgment, and to settle with Allan and Simpson, in terms of it, unless you wish the process to be advocated, and intimate your wish to Mack within eight days from this date." It is not alleged that Dixon ever intimated a wish to have the process advocated, and the effect of this letter was to entitle him to rely that no advocacy was to be taken, since he did not require it. And it is not instructed that Dixon in any way consented to the advocacy, or approved of it. The Lord Ordinary's judgment is quite right.

**LORD PRESIDENT.**—I concur. In regard to the expenses of the advocacy, I cannot imagine how Mack can have any claim after the letter of 11th December, 1830. It puts an end to all question on that subject.

**LORD MACKENZIE.**—If that letter had merely intimated that unless Dixon gave instructions as to the advocacy, Mack would proceed to act on his own responsibility, it would have been at least a different case. But, instead of that, the sheriff certiorated Dixon that an advocacy was not to be taken without his instructions.

ness. He gave no instructions, and it would be rather too much to subject him now, to the expenses of that advocacy. I consider that the advocacy was, besides, an instance of unreasonable litigation in itself.

LORD GILLIES concurred.

No. 78.

Dec. 16, 1836  
Pearson v.  
Casamajor.

THE COURT unanimously adhered, and awarded additional expenses against the advocator.

WORTHESPOON and MACK, W.S.—TOD and ROMANES, W.S.—Agents.

ALEXANDER PEARSON and WILLIAM ROBERTSON, W.S. (Mrs Fotheringham's Trustees), Claimants.—*D. F. Hope—H. J. Robertson.*

No. 79.

JAMES ARCHIBALD CASAMAJOR and CHILDREN, Claimants.—*Rutherford—Marshall.*

MRS JANE MILLIKEN RYND and SPOUSE, Claimants.—*Christison.*

ALEXANDER PEARSON, W.S. (Trustee for Mrs Helen Paterson or Bligh, and Mrs Mary Ann Paterson or Shephard), Claimant.—*Forbes.*

MRS ANN PORTERFIELD or PATERSON, Claimant.—*Forbes.*

Competing.

*Testament—Legacy—Clause—Vesting—Conditio Si Sine Liberis.*—Terms of a trust-deed of settlement, according to which held, 1. That certain annuities provided by the deed, were not to be burdened, on a deficiency of funds, with the interest of two special legacies. 2. That certain residuary legacies were not so vested in the legatees as to enable them effectually to dispose thereof. 3. That the children of a residuary legatee who had predeceased the term of payment had right to the legacy as conditional institutes.

In the year 1810, the late Alexander Porterfield of Porterfield executed a trust-disposition and settlement in favour of the late Frederick Fotheringham, his brother-in-law, and of Alexander Pearson, W.S., whereby he conveyed to them his whole property in trust for the following purposes:—1st, To dispose of and realize the estate; 2d, To pay debts and necessary expenses; 3d, To make payment of a legacy of £500 to his sister, Mrs Alexander; 4th, To “pay the following annuities to my sisters after-named, which I hereby leave to, and settle on them during their respective lives, viz. to Mrs Christian Porterfield, Fotheringham, wife of the said Frederick Fotheringham, an annuity of £400 sterling; to Mrs Ann Porterfield, or Paterson, wife of Lieutenant-Colonel Thomas Paterson, residing in Charlotte Square, Edinburgh, an annuity of £400 sterling; to Mrs Margaret Porterfield, or Buchanan, an annuity of £200 sterling, and this over and above, and in addition to an annuity already settled on the said Mrs Margaret Porterfield, or Buchanan, by me; which several annuities hereby provided, I direct and appoint my said trustees or trustee to pay to my said sisters, during all the days of their respective lives, and that half yearly, commencing payment at the second term of Whitsunday or Martinmas, which

Dec. 16, 1836

2d Division.  
Ld. Moncreiff  
F.



No. 79. shall happen after my death, for the year preceding such first term of payment, and continuing payment thereafter at two terms in the year, Whitsunday and Martinmas, as aforesaid, during the lives of my said sisters respectively: And for the better fulfilment of this purpose, I hereby direct and appoint my said trustees or trustee, to vest and lay out capital sums for answering the foresaid respective annuities, on any security or securities which they or he may think proper, either personal, heritable, or in the public funds, and to take said securities in such terms as they or he may think best adapted for fulfilling the foresaid purpose: And, in the event that after payment of my debts, fulfilment of the obligations in which I may stand bound at the time of my death, payment of the expenses attendant on the execution hereof, and of the £500 to my said sister, Mrs Alexander, the residue of the proceeds of my funds and estate shall not be sufficient for yielding the foresaid annuities hereby settled on my said sisters, then it is my meaning and intention, that the said residue, whatever it may be, shall be vested and laid out, and the interest or dividends arising therefrom be paid unto and divided among my said three sisters, Mrs Fotheringham, Mrs Paterson, and Mrs Buchanan, during their respective lives, in the same proportions, and exactly in the same terms, in every respect, as above pointed out, with respect to the full annuities of £400, £400, and £200;" 5th, "In the event of there being any of the proceeds of my said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of £400, £400, and £200, as above specified, then I hereby direct my said trustees or trustee to pay such surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and when such capital sums become tangible by the deaths of the said annuitants respectively, or in the event of there being no surplus, then the capital sums, whatever their amount may be, so to be vested and laid out as aforesaid, as and when such capital sums become tangible, as aforesaid, to and among Mary Paterson, Helen Paterson, Alexander Paterson, and Mary Ann Paterson, all children procreated of the marriage between the said Lieutenant-Colonel Thomas Paterson and Mrs Ann Porterfield of Paterson, Buchanan, Buchanan, and Buchanan, all daughters of the said Mrs Margaret Porterfield of Buchanan, equally among the said Mary, Helen, Alexander, and Mary Ann Patersons, and Buchanans, share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas, after their respectively attaining majority, or being married, whichever of these events shall first happen (under the declaration, however, after-mentioned), or as soon after the first of said events as the said capital sums, so to be set apart for answering the foresaid annuities, shall become tangible, by and through the deaths of the said several annuitants respectively: Hereby declaring, that until such several shares become payable, the interest

Dec. 16, 1836.  
 Paterson v.  
 James Major.

d, but that such deceasers shall leave lawful issue of their bodies and which issue shall be in life at the time their father or mother have been entitled to have received payment of their shares, had died, the share of such deceasing parent shall belong to and be divided among their issue respectively, and that at the periods at which such deceasing parents would have received the same had they been in life. But farther, it is hereby expressly provided and declared, that I hereby direct and appoint my said trustees or trustee to regulate and pay accordingly, that it shall be completely in the power of my trustees or trustee, if they or he shall think it proper so to do, to hold and secure the shares falling to all or any one or more of the said Helen, and Mary Ann Patersons, and

Buchanans, so as all or any one or more of them shall be entitled to draw the interest or dividends of their respective shares during their several lives, and the capitals of their shares shall in due time fall and descend to their respective heirs, executors, or assigns.

6th, " In the event that the residue of my funds and estate, after payment of all my debts, fulfilment of all obligations in which I am bound at the time of my death, payment of the expenses attending the execution of this trust, and of the £500 to my sister, Mrs. John, as above-mentioned, shall amount to the sum of £15,000 or upwards, then I hereby direct and appoint my said trustees to pay out of such residue the sum of £1000 sterling to each of my sons George and Thomas Patersons, also sons procreated of the marriage of the said Lieutenant-Colonel Thomas Paterson and Mrs Ann Paterson; but if such residue shall be under the above sum of £15,000, and shall not be less than the sum of £8000, then the said

No. 79. tinmas after my death, with interest from the said term of payment paid."

Dec. 16, 1836.

Pearson v.

Casamajor.

Alexander Porterfield died in 1815. The trust was accepted by the trustees appointed, one of whom, Mr Fothringham, died in 1824, and it thereafter carried on by Mr Pearson as surviving trustee. After payment of debts and expenses, and of Mrs Alexander's legacy of £500, residue of the estate amounted to upwards of £15,000.

Of the sisters of Alexander Porterfield, to whom annuities were provided by the 4th purpose of the trust, Mrs Fothringham and Mrs Paterson survived him. He was also survived by five of the residuary legatees mentioned in the deed, viz. Mary Paterson, afterwards married to James Archibald Casamajor; Helen Paterson, afterwards Mrs Bligh; Alexander Paterson; Mary-Ann Paterson, afterwards Mrs Shephard; and John Buchanan, afterwards Mrs Rynd.

In 1819, Alexander Paterson, who had now attained majority, executed a general disposition in favour of Frederick and Mrs Fothringham, whereby he made over to them and the survivor whatever funds or effects should have right to at his death, in any manner of way, and appointed them his executors. He died in the following year.

Thereafter Mary Paterson (Mrs Casamajor) died, leaving three children, Jane, Mary, and Elizabeth, having previously executed in favour of her husband a conveyance of whatever right she might have under Porterfield's trust-settlement.

In 1833, Mrs Fothringham made a trust-conveyance of her effects in favour of Messrs Pearson and Robertson, W.S., and she died in 1834. At this time, considerable arrears were due to both the annuitants, doubt having been entertained whether the income of the trust-estate would admit of their being paid in full. By Mrs Fothringham's death a portion of the capital of the trust-fund, which had been applied in payment of annuities, was set free, and fell to be divided among the various parties interested in the trust-estate.

With the view of extricating the claims of these parties, Mr Porterfield's surviving trustee brought the present process of multiple poinding.

Pearson and Robertson, W.S., as representing Mrs Fothringham, claimed to be preferred on the fund in medio; 1st, *primo loco* for arrears of annuity due to that lady at the time of her death; 2dly, for the fifth of the residue of the trust-estate, as directed to be paid to Alexander Paterson, in whose right the claimants now stood.

James Archibald Casamajor, the husband of Mary Paterson, claimed 1st, to be ranked for payment of one-sixth of the legacy of £1000 provided by the sixth clause of the deed to her brother George Paterson; this claim he abandoned in the course of the proceedings; 2d, he claimed alternatively, either in his own right or as the administrator-in-law of the children, to be preferred upon the fund for payment of one-fourth of the residue of the trust-estate.

ranked for the arrears of annuity due to her, and for the full of £400, hereafter, during her life.

These competing claims three questions arose :—

1. Fotheringham's trustees and Mrs Ann Porterfield maintained, under the fourth provision of the trust-deed, which was absolute and unqualified, they were entitled to be preferred, *primo loco*, to the annual income of the trust-estate during the subsistence of the lives of the annuitants; and that, in ascertaining the amount of the income, the interest of the special legacies declared payable by the provision of the deed, must be held to be a burden diminishing the income falling to the residuary legatees.

2. Her claimants contended, that looking to the whole deed, and to the fourth with the six provisions, the interest of the legacies was to be a burden diminishing the annuities.

3. Fotheringham's trustees pleaded, that the share of the residue was to Alexander Paterson by the fifth clause of the trust-deed, and was held to have vested in him previous to his death; the law being that, as to the vesting of such legacies, while the circumstance of the legacies being made payable to persons *nominatim*, known to and preferred by the testator, supported this construction; and that the right to the question was now in the trustees, under Alexander Paterson's disposition to their constituent in 1819.

4. It was answered by Casamajor and the other residuary legatees, that Fotheringham's representatives were not entitled to a share of the income by virtue of Alexander Paterson's settlement in her favour, because, under the deed, no right could vest in him till the capital of the trust or a portion thereof became "tangible" by the death of the

No. 79. **ander Paterson accresced to the survivors on his predecease without issue, and was not transferable, especially by a gratuitous mortis causa settlement.<sup>1</sup>**  
 c. 16, 1836.  
**Anderson v. Casamajor.**

3. Casamajor pleaded, in support of his claim, that Mary Paterson's share of the residue belonged, in one view, to himself, in virtue either of his *jus mariti* or of her conveyance in his favour; or, otherwise, to his children, for whom he was administrator-in-law, in respect of the same being destined to them by the deed, as the issue of their mother.

It was answered by the other claimants that Mary Paterson's share had not vested in her so as to transmit to her children, and at all events not so as to be carried by the disposition to her husband.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note: \*—"Finds, Primo, That as the trust-deed, in the fourth

<sup>1</sup> Archibalds, January 1673 (4274); Lord Boyd, 22d November, 1740 (4205); Bisset, 26th November, 1799, Appendix to Death-bed, No. 2; Littlejohn, January 1684 (4330); Moffats, 6th February 1724 (4321); Macready, 15th November, 1752, (4402).

\* "This cause is certainly one of great difficulty, in two points, but especially in that which stands *fourth* in the findings of the above interlocutor. The first point presents a considerable perplexity, by the apparent contradiction between the *fourth* and *sixth* heads of the trust purposes. But after much consideration, the Lord Ordinary is of opinion, that the provision of the annuities must take effect according to its terms, which are quite clear, unambiguous, and unqualified, except by the clauses of that provision itself. The *sixth* provision of the conditional legacies to George and Thomas Patersons, however it may seem to interfere with the investment of the funds for securing the annuities, contains no declaration that the annuities shall be at all diminished on account of those legacies. Although, therefore, it may be difficult to explain under what views it was that the testator regulated those legacies by the amounts of residue stated, the Lord Ordinary is satisfied that there is no such distinct expression of will to alter or restrain the provision of the annuities, as can be held legally to produce that effect. The ultimate question here is not at all between the annuitants and the legatees, George and Thomas, but solely between the residuary legatees and the annuitants. There is no doubt that the special legacies must be paid, because the free residue did exceed £15,000, and they must, of course, bear interest from the term of payment. The real question is, whether the interest of those legacies is to be held as a burden diminishing the annuities, or as a burden diminishing the ultimate residue to remain for the residuary legatees. The Lord Ordinary is of opinion, that neither by the terms of the deed, nor by any presumption as to the probable intention of the testator, can it be held, that the burden was meant to affect the annuities which were made a primary purpose of the trust. It is entirely a question of intention. But the provision of the annuities being the first in order, and from its nature, presumed to be of first importance in the testator's mind, and the words being clear, the Lord Ordinary thinks that nothing but the most express words in a later part of the deed, could be held to take away a right so explicitly given.

"There seems to be no doubt on the point which stands *second* in the interlocutor, that the annuitants were entitled to a full year's annuity at the second term after the testator's death. It is much the same as if he had ordered a *half-year's* annuity to be paid at the first term after his death. The point seemed to be conceded.

"The third finding merely comprehends certain points of fact, necessary for raising the fourth question. But it was certainly admitted in the debate, that the fact of Alexander Paterson having survived majority was sufficiently proved.

"That *fourth* question is the great difficulty in the case. It is purely a question

r, if they also attained marriage or majority. But though this circumstance is a peculiarity in this trust, if the shares of the capital sums invested for the issue must be dealt with in a different manner, it does not appear to the Lord that it goes a great way to solve the question here in controversy. The case of a surplus is a very simple case; and it could scarcely come to any result, unless it were supposable that it might be a question, whether even marriage or majority was necessary to vest the right. But while the terms of the will would probably exclude this last construction, the question as to the capital which were to be locked up evidently stands on a separate footing, in so far as its separate and independent quality or condition necessarily came to be added to her suspensive declarations.

The trustees are appointed to pay that part of the residue, '*as and when capital sums become tangible by the deaths of the said annuitants respectively.*' means *tangible to the trustees: When that event happens, they are to pay to the dividend named, 'and the survivors or survivor of them.'*—*Survivors of the testator.* If the deed had gone no farther, the words must either have meant survivors of the testator, or survivors of the event before-mentioned. The subsequent clause will not admit of the first construction; and it seems but reasonable to suppose, that at least '*survivors*' of the event was included in the expression. But the clause goes on to fix the terms of payment, which are the first term after *marriage or marriage, 'or as soon after the first of the said events as the capital sums become tangible by the deaths of the annuitants respectively.*' Here it is clearly contemplated, that the parties might be *married or of age*, while the shares *could not be paid to them*, the funds not being tangible. This rent, therefore, is a separate and necessary term or condition of the payment; it must be granted that the provision in favour of the survivors is a condition, with reference to the terms of *marriage or majority*, it is very well indeed to say, that it is not so in respect of the term before which no payment could be made to any one.

The two clauses which follow, allowing the interest or dividends to be applied to the maintenance and education of the legatees until the shares become payable, empowering the trustees to advance part of the principal sum to Alexander Gordon, if they should think it necessary, evidently have reference to this state of case, that the funds *had become tangible* by the death of the annuitants, yet *some of the legatees were neither married nor of age*; for it cannot be supposed that the trustees could exercise such a power, while the funds stood wholly

No. 79. first payment at the second term of Whitsunday or Martinmas after testator's death ; and as the only event provided for, whereby the amo

ss. 16, 1836.

Marson v.  
Marson.

IN LIFE at the time their father and mother WOULD HAVE BEEN entitled to have received payment of their shares, HAD THEY SURVIVED,' the share shall belong, and be paid to such issue, 'and that at the periods at which such decessing parent would have received the same, *had they been in life.*' It is impossible to doubt that in this clause the testator had in view all the events on which the payment was suspended, and specially the decease of the annuitants. The words '*one or more*' in the way they are placed, are very singular, and really must relate to the successive contingencies in the deaths of the annuitants. What is the substance of the provision? The effect of it will be best tried by looking to the case of *M. Paterson*. The clause necessarily supposes marriage ; so that *that term of payment was necessarily past.* Yet it is provided, that in the event of any of the parties dying '*before the term of payment,*' ('*one or more*'), leaving issue, who shall be in life at the time when their father or mother would have been entitled to receive payment, '*had they survived,*' the share shall belong, and be paid to such issue. The party being married, and leaving issue in life, even *that issue* shall take, unless it be in life *at the still postponed term* at which the parents, if surviving, would have been entitled to payment. Then, who is to take if the issue survived the parent, *but was not in life when the money was payable?* Plainly, *the parent who had predeceased the child,* nor any one in that parent's right ; and not the *child's heir,* seeing that it never was within the condition of the destination not having been in life at the period fixed. In the case supposed, the share must evidently go to the '*survivors*' of the other legatees.

" But take it in another way. Mary Paterson dies, her children survive, and are in life when Mrs Fotheringham's annuity ceases. Are they not *conditional institutes?* The very case stated is, that they were in life at the time when Mary Paterson would have been entitled to receive payment, *if she had survived ;* in which it is implied, that as she did *not* survive, *she* never was entitled to receive payment, and that it is in their own right as conditional institutes, and not as substitutes through her, that the children are entitled to take the share, and exclude *the other survivors.* The Lord Ordinary must confess that he sees no other way in which the clause can be reasonably construed. It distinctly explains the meaning of '*survivors*' in the previous clause, and renders it impossible to suppose that the testator considered the share as already vested in the married legatee, so as to enable him or her to defeat the right of the children.

" But, if the share was not vested in Mary Paterson, so as to enable her to exclude her own children, neither could it be vested either in her, or in Alexander Paterson, to the effect of excluding, by deed, the conditional institution of the other legatees surviving, in the more general case of the party dying before the capital sums were tangible, and *leaving no issue.* The clause seems to demonstrate, that in the estimation of the testator, the term of payment to which the *survivorship* peculiarly referred, was the period when the capital sums might successively be set free ; and, therefore, the Lord Ordinary is, on the whole, of opinion that it is impossible to hold that there was any vested right to render a conveyance effectual by a party who did not survive that term.

" It must necessarily follow, from the view above taken of the clause as to the case of a legatee dying, but leaving issue, that such issue must be considered as in the same place in which the parent, if surviving, would have been, and so entitle as one survivor to a share of the legacy fallen by the death of Alexander Paterson.

" The Lord Ordinary will not enter minutely into the cases cited. The late case of *Marjoribanks against Brockie*, February 18th, 1836, was much relied on. That was itself a very difficult case. The Lord Ordinary would have concurred in the judgment, though he must also have agreed with the Court, in not adopting the test for such cases laid down in the note of the Lord Ordinary in that case.



orm of expression in the destination to *Andrew Leitch*, from that which was used in all the previous branches of the destination, and the omission in some of the material words which distinctly qualified the right given in the

the only other case to which the Lord Ordinary will refer (though a great one was quoted to him), is that of *Wallace against Wallace*, January 28th,

He certainly thinks that case of great importance, and it seems to him, carefully considered, to afford a safe guide for the decision of this cause. There were two points in it; and the parties who maintain the vested right, naturally refer to that which is reported *second* in order, as the most important. That was to a simple legacy to Alexander Wallace; the deed providing, that on the death of the longest liver of the testator and his wife, the trustees should pay that to him. *There was no destination over or ulterior*; and the simple question was, whether that legacy had lapsed, by Alexander Wallace predeceasing Houston? It cannot be doubted, that the judgment was right, which found that it had not lapsed. But it would have been a very different case even in that case, if there had been a farther, and as in this case *nominatim* institution in favour of others, in case he did not survive the longest liver.

At the first part of that case appears to be the most instructive for the present case. That related to the *residue of the estate*, which was to be divided among the children of Alexander Wallace, 'that may be in life at the death of the longest liver of me and my said spouse'; these sums being made payable also by a majority, 'whichever of these events shall first happen after the death of the longest liver of me and my said spouse.' Then there was a provision that in the event of the death of any of the said children before their share was payable, it should accrete to the survivors equally. Nothing can be more like the present case, except that the deed there did not contain the clause, excluding from the right of the survivors the case of a child dying before the share was payable, but leaving issue. But what was the question and the ground of decision? It was entirely on the implied condition, '*si sine liberis decesserit*,' qualifying the farther institution of the survivors. No one imagined or attempted to say that, independent of that special case of a child left, which stands on a fair presumption of equity, the share of the residue could have been held to belong to the child predeceasing Mrs Houston, to the effect of supporting a conveyance to a stranger. The whole pleadings and opinions assumed the reverse. Wherein does this case differ? Essentially in this only, that here the testator

No. 79.

A. 16, 1836.

Paterson v.  
Casamajor.

and one legacy of £500 to Mrs Alexander, 'the residue of the proceeds of my funds and estate shall not be sufficient for yielding the foresaid annuities hereby settled on my foresaid sisters,' the said annuitants were entitled to receive, and the trustees were bound to pay, the full annuities so provided to them during their lives respectively, so far as the residue, after those deductions, was sufficient for the purpose; and finds, that their claim to such annuities cannot be diminished or affected by the subsequent provision of the two legacies to George and Thomas Patersons, by the sixth purpose of the said trust, or by the interests accruing on those provisions: Finds, Secundo, That the annuitants were entitled to a full year's annuity at the second term after the testator's death, it being expressly provided that the annuities shall then be paid 'for the year preceding such term of payment:' Finds, Tertio, That it has been sufficiently proved, and is now admitted, that Alexander Paterson, to whom a share of the residue of the estate was provided, survived the years of majority; and finds that Mary Paterson, another of the residuary legatees, was married to the claimant, James Archibald Casamajor, many years ago; but finds it admitted, that both these parties predeceased Mrs Fotheringham, the annuitant, who died on the 31st March 1834: Finds, Quarto, That the shares of the residue of the estate, so far as the same consisted of capital sums set apart for answering the said annuities, provided to the said Mary and Alexander Patersons, by the *fifth* article of the purposes declared, whereby the said residue was appointed to be paid to the seven individuals therein named, share and share alike, 'and the survivors or survivor of them,' under the conditions farther therein expressed, were not so vested in the said Mary and Alexander Patersons, as to enable them effectually to dispose thereof: Finds, that the children of the said Mary Paterson, who were in life at the death of Mrs Fotheringham, are entitled, as conditional institutes, to succeed to the share appointed in the first instance to be paid to her, according to the express provision to that effect; and finds, that in the event which has incurred, the share provided to Alexander Paterson must fall to the 'survivors' of the seven legatees named, who were in life at Mrs Fotheringham's death, together with the children of Mary Paterson, surviving, to the extent of one portion thereof, in the place of Mary Paterson herself, as conditional institutes: Therefore ranks and prefers the claimants, the trustees of Mrs Fotheringham, in terms of the first article of their claim, reserving all questions as to the amount of such arrears of annuities; but repels the second claim made for them. Ranks and prefers the claimant Mr Casamajor, as administrator-in-law for his children, Jane, Mary, and Elizabeth, and their attorney and mandatories, in terms of the second alternative in the second article of his claim; but repels the claim made in his own right; and in respect that the claim made to a share of the legacy left to George Paterson was abandoned at the debate, as it had become known since the record was made up, that George Paterson had left a deed of

settlement, repels the first article of Mr Casamajor's claim; ranks and prefers the claimant, Mrs Rynd, according to the second article of her claim, but supersedes consideration of her first claim, with reference to the Lord Ordinary's interlocutor of the 24th March last; ranks and prefers Mr Alexander Pearson as trustee under the marriage-settlement of Mrs Helen Paterson or Bligh, in terms of his claim; ranks and prefers Mr Pearson in like manner as trustee in the marriage-settlement of Mrs Ann Paterson or Shephard, in terms of his claim; ranks and prefers the claimants, Mrs Ann Porterfield or Paterson, and her husband and mandatories, in terms of her claim; reserving all questions as to the amount of such arrears of annuities; finds no expenses due to any party; and appoints the cause to be enrolled, in order that the points remaining for consideration may be disposed of, and the multiplepinding finally extricated, on the principles of this interlocutor."

Mrs Fotheringham's Trustees, Casamajor, and Mrs Bligh severally reclaimed.

**LORD JUSTICE-CLERK.**—It is on the terms of the deed itself that the claims in question are to be determined; and I agree with the construction put upon it by the Lord Ordinary. As to the annuities, it is clear that the parties provided to them were personæ predilectæ; and the Lord Ordinary is right in holding that nothing was to interfere with the payment in full of these annuities, except the single event mentioned in the deed. In regard to the other questions of the vesting of the legacies in the testator's nephews and nieces, on reading the fifth clause of the deed from beginning to end, it appears that the term of payment is made to depend on the marriage or majority of the parties; but these events are to be coupled with the tangibility of the funds. If we can discover from the deed what was the will of the testator, we must give it effect.

**LORDS GLENLEE and MEADOWBANK** concurred.

**LORD MEDWYN.**—I am of the same opinion, and would only add, in regard to the legacy of Mary Paterson transmitting to her children, that this case is still stronger than that of Wallace in favour of the right vesting, because the condition *in fine liberis*, which was held to be implied in Wallace's case, has been expressed in the present.

**THE COURT** accordingly adhered, and remitted to the Lord Ordinary to apply the findings in the interlocutor to the respective claims.

**PEARSON and ROBERTSON, W.S.—J. and C. NAIRNE, W.S.—Agents.**

No. 79

Dec. 16, 18

Pearson v.  
Casamajor.

No. 80.

s. 17, 1836.

Buchanan v.  
Dennistoun.ANDREW BUCHANAN, Pursuer.—*D. F. Hope—Neaves.*GEORGE and ROBERT DENNISTOUN and Co.'s TRUSTEES, Defenders.—  
*Ivory.*

*Process—Jury Trial—Stat. 6 Geo. IV. c. 120.—1.* Where certain facts of importance were admitted on the record or proved by evidence in process, but certain other facts were disputed, the Court, looking to the nature of the matters in dispute between the parties, appointed such farther proof as might be offered on either side to be taken by commission. 2. Question, whether, since the union of the Jury Court with the Court of Session, it be competent to reclaim against an interlocutor of the Lord Ordinary, remitting a cause for trial by jury.

s. 17, 1836.

D Division.  
Lord Jeffrey.  
T.

SEQUEL of the case reported May 29, 1835, ante, XIII. 841, which see.

The action here in question was raised at the instance of the late Mrs Buchanan, wife of the late Andrew Buchanan of Ardenconnal, and carried on after their death by the present pursuer, their grandson and testamentary representative. It was founded on the following letter of guarantee by George and Robert Dennistoun and Co. :—" Madam—As we understand from our partner, Mr James Buchanan, that he owes you £5250, on a promissory note for that amount, dated Glasgow, 11th November, 1820, payable one day after date, we, at his request, hereby engage to guarantee said bill to the extent of the value of the stock which he may have in our house, subject to the liquidation of our debts and engagements. And we further engage, should the said stock be reduced in value to the sum of £10,000, to apprise you of the same at the time of docqueting our books. We are your most obedient servants —GEO. & ROB. DENNISTOUN & Co." Mr James Buchanan, whose bill was guaranteed by this letter, was the son of Mrs Buchanan and the father of the present pursuer.

The interlocutor of the Lord Ordinary (Mackenzie), adhered to by the Court, was as follows :—" Finds that the company of George and Robert Dennistoun and Company were validly bound, in terms of the letter of guarantee libelled, and repels the defences of want of statutory solemnity and prescription ; finds it sufficiently proven, by the admission and evidence in process, that as early as the 30th April, 1821, when a balance was struck in the said Company's books, the stock of James Buchanan was not truly, and according to a fair and reasonable estimate, of the value of £10,000, and that this was known to the said Company ; and finds that, nevertheless, the said Company did not apprise the pursuer, in terms of their obligation ; finds no ground in law on which it can be inferred that, in consequence merely of the said failure to implement their obligation, the said Company became directly and absolutely liable to pay to the pursuer the sum contained in the promissory-note to which the

mid guarantee related, or interest thereon; but finds, that they did become liable to make payment to the pursuer of the said sum and interest, in so far as it may appear reasonable to believe that she would, in case of receiving due notice, in terms of the letter on the said 30th April, have been able to secure payment thereof, either out of James Buchanan's share in the Company's stock, or his other funds; but finds no sufficiently precise averments, or sufficient admissions in process, to enable the Lord Ordinary to decide on that subject, nor have the parties said that they were content to restrict themselves to the evidence in process, and therefore appoints the cause to be enrolled, that an order may be made for further procedure in relation to it."

No. 90.

Dec. 17, 18  
Buchanan v  
Dennistoun

The cause having returned to the Outer House, the Lord Ordinary (Jeffrey), in order to follow out the above interlocutor, appointed the parties to condescend on the subject therein referred to.

An additional record having been accordingly made up, the facts admitted appeared to be as follows:—At the date of April 30, 1821, James Buchanan was possessed of the estate of Ardenconnal, then affected by heritable debts to the extent of £25,000; in 1824, two other bonds were granted over the property, one for £500, and the other, which was in favour of Dennistoun and Company, for £3000; in September, 1826, the estate was valued by two valuers, at £28,173; at March, 1827, the real burdens had increased, from the accumulation of interest and otherwise, to £36,238; of that date, the estate was exposed at an upset price of £40,000, and sold to Sir James Colquhoun of Luss for £50,400; at and subsequent to April 1831, James Buchanan was a partner in various mercantile concerns, besides that of Dennistoun and Company; no real diligence was used by Buchanan's creditors against the lands of Ardenconnal.

The following averments were denied, or not admitted, viz. That at and subsequent to April, 1821, the whole estate of James Buchanan, including Ardenconnal, was worth more than the amount of the debt due to Mrs Buchanan, over and above the heritable burdens upon it; that the value of the lands of Ardenconnal in 1821 was equal to what they realized in 1827; that their real value was less than the price they brought; that Buchanan was urged to give securities beyond those already mentioned in implement of certain liabilities, but refused to do so, on the ground of the lands being already burdened to the utmost extent, in which view his creditors concurred; that the obligations come under by Buchanan posterior to 1821 were chiefly renewals of other obligations of prior contraction; that he suffered heavy losses about and after that date, in consequence of his connexion with companies which failed, and was not a gainer by his connexion with any com-

of the record, the Lord Ordinary appointed the cause to the parties to state whether they were prepared to renounce

No. 80. farther probation, or to have the case remitted to the jury-roll; and  
 Dec 17, 1836. thereafter, "in respect both parties decline to renounce farther proba-  
 Buchanan v. tion, and that the case depends on disputed facts not admitted," his  
 Lordship pronounced an interlocutor remitting the case to the jury-roll.

The pursuer reclaimed, praying to have it found "that there are no disputed facts material to the case requiring to be ascertained by jury trial or otherwise, but that, under the admissions of parties, as well as the evidence already in process, the pursuer has sufficiently established his grounds of action, and is entitled to a decision therein."

On the note coming to be advised, the defenders objected that it was incompetent to reclaim against an interlocutor remitting to the jury-roll, which was final by the 6 Geo. IV. c. 120, § 15, and the Act of Se-derunt 1825.

The pursuer answered, that the case was altered since the union of the Jury Court with the Court of Session by the 1 Will. IV. c. 69; that the remit to the Jury Court implied a remit to a different Court, but now, the jury-roll being essentially a roll belonging to the Court of Session, an interlocutor remitting to it must be subject to be reclaimed against like any other interlocutor in that Court.

The cause having been remitted back to the Lord Ordinary, his Lordship, in order to avoid the difficulty thus raised, on a motion being made to retransmit to the Court of Session roll, made avizandum with the cause to the Inner-House.

At the advising, the pursuer contended, in terms of the prayer of his note above quoted, that, looking to the circumstances of the question, to the interlocutor of Lord Mackenzie, and the state of the facts and admissions, this case was already in a condition to be decided, and, at all events, was not a case for trial by jury.

The defenders answered, that this was a question of damages, and was contemplated as such in the Lord Ordinary's interlocutor on the merits; that as their case depended on disputed facts, and as there must be additional proof, such proof ought, according to the Judicature Act and the recent practice, to be by jury trial.

LORD JUSTICE-CLERK.—I am of opinion that it is inexpedient to have a jury trial as to this matter. In England, such a case would not have been five minutes in Court before the judge would have said it was a case for a reference. This is not a question of damages. I do not think it is yet in a fit state for decision; but any additional evidence should be taken by commission.

The other Judges having concurred,

THE COURT found, "that the matters now in dispute between the parties are not proper for being tried by a jury, and therefore remitted to the Lord Ordinary, with instructions to retransmit the case to his Court of Session roll; and, in regard to such farther proof as may be offered on either side, to appoint the same to be taken by commission."

NATIONAL BANK OF SCOTLAND, Petitioners.—*More.*  
 THOMAS JOHNSTONE, Respondent.—*D. F. Hope—E. S. Gordon.*

No. 81

Dec. 17, 18  
 National B  
 v. Johnston

*Bankruptcy—Sequestration—Diligence—Public Record.*—Letters of horning were issued against a debtor on 27th February, 1834, and a charge given, which was followed by denunciation in March, the letters and executions being then duly registered and marked; in 1836 a second charge was given on the same letters, and the debtor denounced, when the execution of charge and the denunciation were duly recorded, but the letters were not again registered or marked, reference being merely made to them in the execution of horning;—Held, on a petition for sequestration at the instance of the creditor, that the evidence of bankruptcy was not objectionable on the ground of the letters wanting a certificate of registration in 1836.

On the 27th February, 1834, letters of horning were issued at the instance of the National Bank, in virtue of which a charge was given to the respondent Johnstone, and denunciation followed on the 13th March; the letters and executions being recorded and duly marked on the same day. This diligence was not proceeded with; but, on 10th November, 1836, a second charge was given to Johnstone on the same letters, and he was denounced on the 17th. The execution of horning and the denunciation were registered the same day, each of them being marked as registered of that date by the keeper of the record. The execution of horning was not recorded at length but in an abridged form.\* The

Dec. 17, 183  
 2d Division  
 T.

\* Execution of Charge of Horning.

[The parts printed within brackets are not in the Record.]

Upon the 10th day of November eighteen hundred and thirty-six years [by virtue of letters of horning, dated and signeted the twenty-seventh day of February eighteen hundred and thirty-four years, raised at the instance of the National Bank of Scotland], I, Robert M'Lellan, messenger-at-arms [passed, and in his Majesty's name and authority, lawfully commanded and] charged Thomas Johnstone, writer in Dumfries, to pay to the said National Bank of Scotland the [principal] sum of one hundred and eighty pounds sterling, and interest thereon, since due, and till paid, contained in and due by a bill, dated the 1st day of June eighteen hundred and thirty-three years, drawn by the said Thomas Johnstone upon, and accepted by George Adamson, draper in Dumfries [payable four months after date, indorsed by the said drawer to the said National Bank of Scotland, at whose instance the said bill was duly protested, and the protest registered, as narrated in said letters], deducting always the sum of sixty-five pounds eleven shillings paid in account of said bill, upon the seventh day of August, and twelve pounds on the twenty-fourth day of September, both in the year eighteen hundred and thirty-four [and that within six days next after the date hereof, under the pain of imprisonment and putting of him to the horn; with certification, conform to the said] and giving a copy of charge whereof, to the effect foresaid, I left for the said Johnstone, with a woman within his dwelling-house, in High Street, and gave to him [as I could not apprehend himself personally, which



81. letters of horning were not so registered or marked, but reference was merely made to them in the execution of horning as dated and signeted in 1834.

Thereafter the bank presented a petition to have Johnstone sequestered under the Act 54 Geo. III. c. 137, as under legal diligence by the horning and caption at their instance. To the competency of this application Johnstone objected, that the legal and statutory evidence of bankruptcy had not been produced, contending that the formalities of the Act 1579, c. 75, which regulates the registration of letters of horning and executions, had not been complied with, and, particularly, that the letters of horning founded on ought to have borne a certificate of their registration in November, 1836.

It was also objected that the execution had not been recorded in terms of the act, and in such a manner as to admit of an "authentic" extract thereof being made.

It was answered for the Bank, that, the letters of horning having been already registered and marked in 1834, it was unnecessary to have this form gone through a second time in 1836; and that the manner in which the execution was recorded was conform to the practice in the Register of Edinburgh for the last 40 years.

THE COURT repelled both objections, and granted sequestration.

GORDIE and PATON, W. S.—HAY and WOOD, W. S.—Agents.

No. 82.

ALEXANDER LOW, Petitioner.—*Johnstone.*

*Bankruptcy—Sequestration.*—In granting the petition of a trustee, for confirmation, in common form, the Court refused another part of the prayer which craved their Lordships to approve of a resolution of the creditors authorizing the trustee to conclude a private bargain as to the disposal of the bankrupt's stock in trade, on any such terms as he might consider beneficial to the estate.

20, 1836. ALEXANDER LOW, accountant in Edinburgh, being elected trustee of the estate of Falkner and Cunningham, wine merchants in Edinburgh, stated in his petition for confirmation, that, at the meeting of creditors

copy of charge was signed by me, did bear this date, date and signeting of said letters of horning, and contained the names and designations of] John Watson and Robert Wightman, both residing in Dumfries, witnesses [present at my executing the premises, and hereto subscribed with me on this and the preceding page.

(Signed) John Watson, witness.  
Robt. Wightman, witness.]

(Signed) Robt. McLellan.

which elected him, he had been authorized by the whole creditors present to dispose of the entire stock of the bankrupts' estate in trade, including counting-room and cellar furniture, by private bargain, instead of bringing the same to public sale, and to accept of any offer which he conceived to be adequate, and advantageous. The petition, besides praying for confirmation, in common form, farther craved the Court "also to approve of the foresaid resolution of the meeting of the bankrupts' creditors, and authorize the petitioner to accept of any offer that may be made to him for the purchase of the bankrupts' whole stock in trade, including counting-room and cellar furniture, by private bargain, on such terms and conditions as he conceives to be of advantage to the estate." No. 82  
Dec. 20, 18  
Maxwell v.  
Logan.

At moving the petition,

**LORD PRESIDENT.**—In so far as the petition prays for confirmation in common form, it should be granted, but no farther. In regard to any private offer which may be made to the petitioner for the purchase of the bankrupts' stock in trade, he must just judge for himself and act on his own responsibility: at least there is nothing stated at present to justify us in granting him any special authority on the subject.

The petitioner then intimated that he restricted the prayer of his petition to confirmation in common form, which was accordingly granted.

A. DOUGLAS, W S.—Agent.

**JOHN LOGAN MAXWELL, Pursuer.**—*A. McNeill.*

No. 83

**GEORGE LOGAN and OTHERS, Defenders.**—*Sol.-Gen. Cunningham.*  
Et e Contra.

*Entail—Process.*—1. A party disposed his lands in liferent to a lady, and in fee to the second son to be procreated of her body, and his issue, whom failing, other heirs; he died two years before the lady's second son was born; the fetters were imposed upon the lady, and the "heirs" of entail: Held that there was no peculiarity in the case to exempt it from the general rule that the fetters of an entail which are laid upon heirs, do not bind the institute. 2. Held by the Lord Ordinary and acquiesced in, that the institute under an entail, in pursuing a declarator of freedom from the fetters of the entail, should call the whole heirs of entail as parties.\*

In 1793, John Maxwell of Fingalton executed a conveyance of that estate, on the narrative of affectionate regard for Mrs Margaret Mitchell, wife of Walter Logan, junior, merchant in Glasgow, and that he had always intended her "to succeed him in his estate after his death." By Dec. 20, 18  
1st Division  
Ld. Corehen  
B.

83. this deed he disposed the estate "to the said Margaret Mitchell in life-rent only, during her lifetime after me, and to the second son to be lawfully procreated of her body, and the heirs to be lawfully procreated of his body; whom failing, to the next youngest son to be lawfully procreated of her body, and the heirs to be procreated of his body," &c. whom failing, to her other children in a certain order. John Maxwell died in 1798, and John Logan Maxwell, the second son of Mrs Mitchell or Logan, was not born for two years afterwards.

1836  
1837  
1838

The deed executed by John Maxwell of Fingalton was in the form of a strict entail. The prohibitory clause declared that it should "not be lawful to the said Margaret Mitchell, or any of the heirs aforesaid, to alter" the order of succession, &c. In like manner the irritant and resolute clauses were directed against "the said Margaret Mitchell, or any of the heirs hereby called to the succession."

In one of the conditions of the entail, imposing the obligation to carry the name and arms of Maxwell of Fingalton, it was declared "that the second lawful son of the said Margaret Mitchell and the heirs of his body, and the whole other heirs substituted by this deed, whether male or female, and the descendants of their bodies," &c. should be under that obligation, "and if the said second son, or any of the heirs so succeeding, shall do in the contrary thereof, then, and in that case, the person so contravening, shall for him or herself alone, ipso facto amit, lose," &c.

In 1816, John Logan Maxwell was served heir of entail and provision to John Maxwell of Fingalton under the entail, and he took infestment under all the burdens, provisions, and conditions contained in the entail.

In 1834 he raised a declarator that the fetters of the entail did not apply to him, as he was the institute, but only to the heirs of entail, and that he was at liberty to sell the estate, or alter the order of succession at pleasure. The substitute heirs, including Mrs Catherine Logan or Gill, and Archibald Speirs Logan, residing in India, pleaded as a dilatory defence, that the whole heirs of entail should have been made parties; and in particular that the infant son of Archibald Speirs Logan had been cited as forth of Scotland, but his tutors and curators were not called; and that the children of Mrs Catherine Logan or Gill had not been called; and it was doubted whether the appointment of a tutor ad litem, which had been made to these absent parties, was valid.

The Lord Ordinary "sustained the preliminary defences to the effect of sisting process till Logan, son of Archibald Speirs Logan; and Walter Gill, &c. (children of Mrs Logan or Gill), and their tutors and curators, as well as all the other heirs of entail to the lands libelled, who have not been already cited, or have not entered appearance, be duly called as parties." A supplementary summons was then raised, duly calling the omitted heirs; and it was pleaded by the defenders on the merits, that, by the true construction of the entail, the pursuer was

bound under its fetters. The substitute heirs afterwards raised a counter-declarator against John Logan Maxwell, to have it found that the fetters applied to him "as institute, or first person called under the entail," and that he should be interdicted from selling or affecting the lands to the prejudice of the entail. No. 53  
Dec. 20, 18  
Maxwell v.  
Logan.

The substitute heirs admitted the general rule to be indisputably fixed, that fetters which were imposed only upon heirs, would not bind the institute, however clearly it might be the intention of the entailer to have bound him, but they contended that the general rule did not apply here, because, 1st, John Logan Maxwell was not born for two years after the entailer's death. During that period the fee of the entailed estate, which could not be in pendent, was necessarily in Mrs Mitchell or Logan, either as fiduciary fiar or otherwise. In consequence of this, John Logan Maxwell could not take up the estate without a service,<sup>1</sup> which proved that he took as heir and not as institute: and accordingly he had expedite a service as heir of provision and entail in 1816. 2. As the fetters were effectually imposed on Mrs Mitchell or Logan, who was called before John Logan Maxwell, this was a peculiarity distinguishing the case from every preceding decision, because in all former cases, the institute who claimed exemption from the fetters, had been called before any of the parties on whom the fetters were effectually imposed. 3. John Logan Maxwell was personally barred, after stamping himself with the character of heir by his service, from claiming any rights inconsistent with that character, so long as the service stood unreduced. 4. No right whatever had vested or could vest in him during the lifetime of Mrs Mitchell or Logan, who still survived.

John Logan Maxwell answered, 1. If he was truly the institute under the entail, then the precedents of Duntreath, &c. directly applied. And he was the institute by the terms of the disposition.<sup>2</sup> He was not indeed called nominatim, because he was not born at the date of the deed; but he was designated and individualized as distinctly as if named, by being described as the second son of Mrs Mitchell or Logan. The disposition conveyed the liferent only to her, and it was as disponent that he took the fee. The service took nothing out of the hereditas jacens of the entailer under the entail, because the entailed disposition itself included every thing, and effectually conveyed away both fee and liferent from the entailer. The service had merely the declaratory effect of instructing that John Logan Maxwell was the disponent or institute under the entail; and a process of declarator in this Court would equally have served the purpose of enabling him to take infeftment under the precept or procura in the disposition, by legally certiorating the notary that he was the

83. disponee. 2. Though the fetters were imposed on Mrs Logan, the life-renter, that was of no importance unless they were also laid on the institute. 3. In the greater part of the cases in which entails were challenged the pursuer had made up titles under the entail, and was never held barred by that circumstance from bringing his challenge. And although the pursuer's title here was made up under the fetters of the Fingalton entail, yet, if these did not reach him, he was entitled to decree notwithstanding his service. 4. The full right of fee was already vested in him but burdened with the liferent of his mother, Mrs Mitchell or Logan.

The Lord Ordinary "in the action at the instance of John Maxwell Logan, decerned in terms of the conclusion of the libel; and in the action at the instance of Mrs Catherine Cameron Logan or Gill, assoilzied the defender, and decerned; and in these conjoined actions, found the said John Maxwell Logan entitled to expenses." \*

Mrs Gill and others reclaimed, and, *inter alia*, explained that there was an inadvertency in the note of the Lord Ordinary as to a matter of fact, in supposing that John Logan Maxwell had served heir to his mother; as she was still alive, and it was to John Maxwell, the entailer, that he had served.

**LORD PRESIDENT.**—That makes no difference whatever. The interlocutor on the merits is clearly right. But I think it should be altered as to expenses. John Logan Maxwell wishes to have a clear and indisputable right to the estate in fee-simple, and it is very much for his benefit that he has had his right tried in fore and decided on.

The other Judges concurred, and

THE COURT altered as to expenses, but unanimously adhered on the merits.

HOPKINX and IMLACH, W.S.—A. DUFF, W.S.—Agents.

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\* "NOTE.—The Lord Ordinary hopes it is no longer necessary to state the grounds of a judgment finding, that the fetters of an entail, imposed upon heirs only, do not bind the institute. If it be, no point in the law of Scotland can be held as settled. The attempt to show that John Maxwell Logan is not the institute, but an heir of entail, it is thought has entirely failed. The estate is conveyed to his mother in liferent, for her liferent use only, and to her second son; the fee vested in the second son Maxwell Logan *ipso jure* as soon as he came into existence as institute. No fee could be transmitted to him from his mother; if he served heir to her, it was for the purpose, not of acquiring, but of declaring a right to the estate. None of the decisions cited by the substitute heirs bear upon the case."

ROBERT CUNINGHAME, Advocate and Pursuer.—*Marshall.* No. 84  
 N DUNLOP and JAMES ROBERTSON, and OTHERS, Respondents and  
 Defenders.—*D. F. Hope—A. Wood—Mure.* Dec. 20, 18  
 Cuninghame  
 Dunlop.

*Submission—Servitude—Pasturage.*—The terms of a decree-arbitral were what ambiguous, in defining a servitude-right of cutting reeds and rushes in a loch, as combined with a servitude-right of pasturage on the space between summer-margin of the loch and its winter flood-mark : a proof was allowed as to condition of the loch, and rushes, &c., and of the practice in using the servitude considering which, decree was pronounced in terms of the decree-arbitral thereby elucidated.

ROBERT REID CUNINGHAME of Auchinharvie, Lieut.-General James Dec. 20, 18  
 op of Dunlop and Lochwood, and Mrs Hunt of Ashgrove, were 1st Division  
 minous proprietors in Ayrshire, and were at variance as to their respec- Ld. Coreho  
 ights of property and servitude in the Loch of Stevenson, which was B.  
 unded by their grounds. Lochwood was the name of the property  
 eneral Dunlop, which adjoined the loch. They entered into a sub-  
 on of these differences to Mr James Ferguson, advocate, who, in  
 , pronounced a decree-arbitral finding that the property of the loch  
 ged to Cuninghame ; “ that none of the other parties in this sub-  
 on have any right to the property of this loch, by any grant or ex-  
 on in their title-deeds, but that they have satisfactorily proven that  
 of them has severally enjoyed the right of fishing and shooting in  
 och, and of cutting reeds and rushes within the same, opposite to  
 anks of their lands, and of pasturing within the space overflowed by  
 ch in winter, as far as cattle can reach within the water-marks at  
 seasons, as part and pertinent of these.” The decree therefore de-  
 the property of the loch to be in Cuninghame, “ but subject to  
 of servitude, which I hereby find, decern, and declare, now and in  
 ne coming, to belong to each of the said Mrs Hunt and General  
 op, and their heirs and successors, of fishing and shooting in the  
 ch at their pleasure, and also of pasturing at low water in the same,  
 utting reeds and rushes within the same, opposite to the banks  
 lands severally belonging to them in property.”

1832 Robert Cuninghame, now of Auchinharvie, presented a peti-  
 to the Sheriff of Ayrshire, stating that James Robertson, tenant in  
 of the land, was altering the level of the loch by making drains of im-  
 depth, for the purpose of reducing the quantity of surface covered  
 by water, and thereby extending illegally the servitude of pasturage ;  
 that he was not merely using the servient tenement for the  
 purpose of cutting on it, but by an unwarrantable encroachment on the  
 he cut the grass upon it and made it into hay. Cun-

No. 84. inghame therefore craved interdict against Robertson, and his landlord, now John Dunlop of Dunlop, prohibiting them from continuing the practice complained of.

Answers were lodged by these parties, stating that, under the terms of the decree-arbitral, they enjoyed not only a right of pasturage, which included the privilege of cutting the grass on the pasturage-land, for the cattle of the dominant tenement, but also a right of cutting the reeds and rushes within or beside the loch, which could not be done, without cutting all the grass which was growing interspersed with the reeds. Statements in defence were also made in respect to the alleged improper draining. The petitioner denied that this was the meaning of the decree-arbitral, and alleged that the reeds and rushes there referred to were a species of large bullrushes, which grew within the lake in deep water; that these had nothing to do with the pasturage of cattle, though useful for other purposes, and that the right of cutting was limited exclusively to them, leaving nothing but a mere servitude of pasturage on the ground between high and low water mark.

The Sheriff allowed a proof, intimating that the terms of the decree-arbitral were somewhat ambiguous, and that he was chiefly desirous of ascertaining whether the right of cutting reeds and rushes, allowed in the decree-arbitral, especially when taken in conjunction with the right of pasturage there allowed, could imply any thing less than the right of cutting the grass as well as pasturing on it. On considering a proof relative to the condition of the reeds and rushes in the loch, and the practice of cutting them, the Sheriff assailed from the petition, observing, that he considered the right of cutting reached not only to the greater reeds or bullrushes which grew in deep water, but also to the smaller and more delicate rushes or thrushes growing between the high and low water marks, and that in cutting these the right of cutting the herbage, which was more or less interspersed with them, was included, especially as there was a servitude of pasturage there.

Cuninghame brought an advocation, and afterwards raised a declarator for the purpose of having the same rights declared, which he had asserted in the petition for interdict. In the declarator certain other proprietors were called besides Dunlop. That action, under an exception as to some of the parties, was conjoined with the advocation, and the Lord Ordinary pronounced this interlocutor:—"Recals the interlocutor of the Sheriff; finds that the rights of all the parties, in so far as the questions at issue in this process are concerned, must be regulated by the decree-arbitral pronounced by James Ferguson, Esq. in 1807; finds that, under that decree, the defenders have right to a servitude of pasturage at low water in the Loch of Stevenson, and cutting reeds and rushes within the same, opposite to the banks of the lauds severally belonging to them in property; finds that, under a servitude of pasturage, the defenders are not entitled to cut and carry off, or to make into hay, the grass or herb



on the ground over which the servitude extends, except in so far as it is unavoidable in cutting rushes or reeds; finds it proved, that the terms rushes and reeds in the decree-arbital, import the large rushes or bull-rushes, and the reeds growing on the side or within the loch, as described in the proof, neither of which plants is proper as fodder for cattle, or generally used for that purpose; finds that these terms do not comprehend sprits or sprats, a species of coarse grass or herbage, which is fit, and generally used for fodder, and which cannot be cut with the scythe, without at the same time cutting the grass or other plants among which they grow; and in respect it is not denied that the defender, John Dunlop, or his tenants, have cut and carried off, or made into hay, coarse herbage or grass, grants the interdict as craved in that matter, and decerns; and, before further answer, allows the pursuer a proof of the averments contained in the sixth and seventh articles of his condescendence, and to the defenders a conjunct probation." \*

No. 84.

Dec. 20, 18;  
Cuninghame  
Dunlop.

\* "NOTE.—These actions have been brought to ascertain the meaning of a decree-arbital pronounced by Mr Ferguson in 1807, and to enforce it; by which decree all the parties are bound, or have consented to be bound, in so far as the questions at issue are concerned.

"It is settled that the Loch of Stevenson, that is, the water with the ground it covers, is the exclusive property of the pursuer, Mr Cuninghame, and the first question is, whether Mr Dunlop and his tenants, under a servitude of pasturage to which he has right by the decree, and which extends over the ground covered by the loch when full, but left dry when the water subsides, are entitled to make into hay, and carry off the herbage growing there? To the Lord Ordinary it appears that they are not entitled. A servitude of pasturage is a limited right, well known in the law of Scotland. The proprietor of the dominant tenement is entitled to feed the cattle of that tenement on the servient tenement; and if he keep no cattle on the dominant tenement, or not enough to consume the pasture, the owner of the servient tenement is entitled to use the whole grass, or the surplus. If the servitude man were allowed to cut and carry off the grass in the shape of hay, he might sell it without restriction as to quantity, or use it for purposes having no connexion with pasturage. Further, pasturing cattle improves the ground on which they feed, whereas making the crop into hay tends to impoverish it; and accordingly it is believed that no such right is understood to be included in the grant of a servitude of pasturage. It is said, however, that the defenders are entitled to do this under the finding in the decree-arbital, by which they are allowed to cut rushes and reeds. But this matter is well explained in the proof by the witnesses cited for the pursuer. There are large rushes or bullrushes growing by the side of the loch, and also a considerable way within the water, sometimes reaching the height of six or eight feet, and as thick as a goose-quill. These are altogether unfit for fodder, but are cut for thatch to houses, stacks, and similar purposes. There are also reeds equally unfit for fodder, but used by shoopers and other tradesmen. Both of these may be cut without interfering with the herbage. But there is likewise a small plant, called a sprat or spirit in Scotland, which grows not merely by the side of lakes, but generally where there is wet ground, or where the subsoil is wet, and which constitutes a principal part of the herbage of such ground, and is relished by the cattle. These plants are sometimes called rushes, or in Scotland, thrashes, and not improperly, for though of a different quality from a bullrush, they have an affinity to the tribe. Giving a liberty to cut rushes and reeds, could not have had any effect, otherwise he would have found at once that the defenders

D. 84. The proof here allowed referred to the allegations of improperly draining the loch.

20, 1836.  
Graham v. The defenders reclaimed.

THE COURT, without calling on the pursuer's counsel to support the judgment, unanimously adhered.

LORD GILLIES.—The servitude of pasturage is quite well known and well defined in the law of Scotland. I never saw an attempt made to interpret it into a right of cutting down the grass and making hay of it.

LORD MACKENZIE.—Servitudes are to be strictly construed, and the proprietor has a right to confine the servitude of pasturage within its true limits.

LOKES PRESIDENT and BALGRAY concurred.

THE COURT in adhering, reserved all questions of expenses, and remitted to the Lord Ordinary to proceed quoad ultra.

GIBSON and DONALDSON, W.S.—G. DUNLOP, W.S.—Agents.

might cut the whole herbage by the side of the loch; for it is impossible to separate the one from the other. The same thing may be said of paddock or paddock-pipes (equisetum or horse-tail), a small plant intimately mixed with the grass in wet places.

"The question with regard to cutting herbage was properly raised before the Sheriff; a proof was competently allowed, and being ready for decision, the Lord Ordinary has given judgment upon it.

"But the other question is in a different situation. The arbiter found that the property of the loch is in the pursuer, who avers that some of the defenders, or their tenants, with a view to increase the extent and value of their right of pasturage, cut a drain or drains from the loch, or unnecessarily deepened the aqueduct to the mill, by which he is deprived of part of his property, or the servitude improperly extended. Some evidence was taken before the Sheriff on that point, but the greater part of it relates to acts done fourteen or fifteen years before, and which, therefore, could not be completely proved in the possessory action. That evidence, therefore, is irregular, and cannot be referred to, unless parties consent to abide by it, which they have not done. Undoubtedly, Messrs Hamilton and Warner are entitled to clear out their aqueduct, but they are not entitled to deepen it, unless a supply of water, according to use and wont, cannot otherwise be procured. If the drain or aqueduct was unwarrantably made, it is thought the pursuer is entitled to counteract its effects, by raising a mound to restore the loch to its original size, which may be discovered, if, as he alleges, it was originally bounded by march-stones. But if, on the contrary, no such illegal act is proved, it may be doubted whether the march-stones will be of any advantage to him, for the arbiter has made no provision for the case of the loch being diminished, gradually and slowly, by the accumulation of soil in the basin from natural causes; and in that case, it may be thought that the rights of parties will be regulated by its varying magnitude. But this point is left for argument, after the proof now allowed has been taken. It is not probable, however, that its surface should have been diminished in that way, to the extent of twenty acres since 1807, the difference, as is alleged, between its size then and at the present time."

JAMES M'WHIR, Pursuer.—*Keay—Ivory.*  
 JAM CONSTABLE MAXWELL, Defender.—*M'Neill—Moncreiff.*

No. 85.

Dec. 20, 1836

M'Whir v.

Maxwell.

*Jury Trial—New Trial.*—On a motion for a new trial, on the ground that the jury having been tampered with, and having misconducted themselves by allowing of the facts alleged, by witnesses other than the jurymen.

case, which regarded certain salmon-fishings in the Solway, a trial took place at Dumfries on Saturday, 30th April, 1836, and was returned by order of Lord Moncreiff, the presiding judge, from 9 o'clock, P. M., till Monday morning following. A verdict was returned in favour of the pursuer M'Whir, who stood defender at

Dec. 20, 1836

2D DIVISION

Jury Cause

He thereafter moved for a new trial, on the ground, inter alia, of the misbehaviour of the party towards the jury, and of misconduct of the

agent, Mr Goldie, made affidavit, that Lord Moncreiff, in adjournment, had given the jury in charge to two sheriff-officers, to whom he administered an oath: "That, thereafter, the said officers accompanied the jury from the court-house to the Commercial Inn: That Robert Neilson, another sheriff-officer, who had not been named and appointed in charge of the jury, and who is a nephew of the defender M'Whir, accompanied the two officers, Richardson and Dickson, and accompanied them to the Commercial Inn: That, on going there, Dickson, first, asked Neilson why he came, as Lord Moncreiff had not named him? and Neilson answered, that he had been directed by Mr Goldie, writer, Dumfries, who was M'Whir's agent, to do so: That, at the Commercial Inn, the officers supped with the jury, and Neilson took the head of the table: That, before supper, Neilson went with one of the officers, about nine or ten o'clock, to the inn of Joseph Pagan, innkeeper, Maxwelltown, to see his horse fed; upon which occasion Pagan remarked to the jurymen, that, as he had never been there accompanied by a livery servant, he should give them a treat; to which the other answered, that he intended so: That Neilson and Pagan left the jurymen in the stable with the hostler and some other men: That the jurymen followed them in about ten minutes, and they had some whisky together in the bar, which was the subject of conversation; and, after spending about half an hour there, the jurymen and Neilson, having been about an hour at the Commercial Inn, returned there and supped with the officers, Neilson taking the head of the table, as above deposed to. One of the jury remarked it was a case they could not understand, and that they had nothing to do with it: That, after sup-

o, 85. per, the jurymen went to bed, and Neilson attended some of them to  
 80, 1836. their bedrooms: That, after the jury went to bed, the officers got a glass  
 his v. of spirits and water at the bar of the inn, when Mr Wilson, the inn  
 well. keeper, observed to Neilson, that he seemed to take great interest in the  
 case, and to be a partisan of M'Whir's; when Neilson answered, that it  
 well became him, or that he had a good right, as M'Whir was his uncle.  
 That, next morning, being Sunday, Neilson and the other officers breakfasted  
 with the jury, when Neilson began to talk about the case, and said  
 that M'Whir should gain it, or words to that effect: That this was said to  
 the jury, or some of them, or in their presence and hearing: That Dickson  
 checked Neilson, and said there should be no conversation on the subject:  
 That, after breakfast, several of the jurymen went to church, and  
 Dickson went along with them, but one or two of the jurymen remained  
 at the inn, and Neilson remained with them: That, in the course of the  
 Sunday the jury were in different parties with one or other of the  
 officers, and Neilson had what opportunities he pleased to converse with  
 them separately; Neilson and Dickson dined with the jury on Sunday,  
 but Richardson did not, as the macer told the officers they should not be  
 with the jurymen: That the free intercourse betwixt the jury and officers  
 was noticed by others, and particularly by Lord Moncreiff's servant, who  
 remarked that it was improper, and believes that this led to the macer's  
 interference: That Neilson, in his whole conduct, betrayed a greater  
 degree of interest in the case on behalf of M'Whir than was fitting  
 for an officer having charge of or attending the jury: and the deponent  
 verily believes that the said Robert Neilson did improperly hold inter-  
 course with the jury on the subject of the cause, to the effect or with  
 the tendency of influencing their verdict in favour of the defender  
 M'Whir."

With reference to this deposition, Maxwell contended, that the interference with the jury on the part of Neilson was a sufficient ground for a new trial,<sup>1</sup> and that the facts deposed to could be proved by witnesses other than the jurymen, which took this case out of the rule of the case of *Stewart v. Fraser*.<sup>2</sup>

The Court, before answer, and without requiring any farther condescendence of the facts alleged, granted commission to examine witnesses "in relation to all matters connected with the inclosure of the jury at the trial of this cause at the time, and after the order pronounced by Lord Moncreiff on the 30th day of April last."

A proof was taken accordingly, and reported as concluded on the part of Maxwell; the Commissioner, at the same time, reporting the objections to two witnesses (one of whom was Neilson) adduced by M'Whir.

<sup>1</sup> Adam on Jury Trial, p. 207, 210.

<sup>2</sup> March 10, 1830, 5 Murray, 166.

WILLIAM MARTIN, S.S.C.—ALEX. GOLDIE, W.S.—Agents.

MINISTER OF PARISH OF EDROM, Pursuer.—*D. F. Hope—Milne.*

No. 86.

HERITORS OF PARISH OF EDROM, Defenders.—*Maitland—A. Dunlop.*

**Augmentation.**—Circumstances in which the Court refused to award augmentation to the minister of a parish, having a stipend of sixteen chal-

ders, in bringing a process of augmentation, at the instance of the minister of the parish of Edrom, who had a stipend of 16 chalders, the heritors of Edrom, who had already possessed the maximum stipend in the presbytery, in application for reception of the presbytery seat, and the parish of Dunse, which is a royal burgh, and contained a population of 3500, while the parish of Edrom was 1485, and was decreasing; that the duties of the minister were in no respect peculiarly burdensome; and that there were no grounds for considering that the provision from the teinds, awarded at the last augmentation in 1815, as an adequate provision, was not equally suitable now. The minister demanded twenty chalders.

Dec. 21, 1836.  
Teind Court.

**THE COURT** refused to award any augmentation.

p. 87.

On 22, 1836.  
 Munn v.  
 Munn.

MRS ELIZABETH MACEWAN, of MUNNOCH, Pursuer.—*H. Bruce.*  
 ARCHIBALD MUNNOCH (Munnoch's Tutor), Defender.—*D. F. Hope—  
 Marshall.*

*Aliment—Provision to Children.*—Circumstances in which the Court awarded aliment at the rate of £60 per annum, on account of a child of 2½ years of age residing with its mother.

- 1 22, 1836. By antenuptial contract in 1832, Alexander Munnoch, soap-manufacturer and wholesale spirit merchant in Stirling, settled the interest of £2000, together with the liferent of his household furniture, upon his wife. This provision was in lieu of all her legal claims. He died in April, 1835, leaving one child, a boy then about one year old. He had made no settlement, but his estate amounted to above £12,000, and his brother was served tutor-at-law. A difference arose between the widow and him as to the amount of annual allowance which should be made to the widow on account of the child who lived with her. She raised an action of aliment, concluding for an allowance of £120. The defender stated that the deceased had always lived in the flat of a house, with no other establishment but two maid servants, and that he considered £40 the proper sum, especially in reference to the extreme youth of the child.
- 21 Division.

LORD PRESIDENT.—In fixing the aliment for this child, who is little more than two years of age, we should have it in view to adopt such a scale as may be suitable for several years to come; perhaps until the child shall be seven years old or so. The sum of £40 is decidedly too little, and probably, in all the circumstances, £60 might be the most suitable. But any extra expense, such as for medical attendance, &c., should be allowed in addition to this.

LORD MACKENZIE.—I am of the same opinion. We cannot give such an allowance on account of the child as would not only provide suitably for its maintenance, but also prove a source of profit to the mother, and raise the scale of the whole family. In all the circumstances, I approve of the aliment proposed by your Lordship.

LORDS BALGRAY and GILLIES concurred, and

THE COURT awarded aliment to the child at the rate of £60 per annum.

W. A. G. & R. ELLIS, W.S.—J. F. WILKIE—Agents.

No. 92;

Dec. 22, 1833  
Macdonald v.  
Langton.

NALD and OTHERS, Suspenders.—*D. F. Hope—Paterson.*  
BICKNELL, and MANDATARIES, Chargers.—*Rutherford—*  
*Mackenzie.*

*Charge—Proof.*—A charge was given to the acceptors of a bill of exchange that had not been acquired by the chargers until after the term of payment: the bill was noted for non-payment: in a suspension, the acceptors alleged that they were not debtors in the bill, and that the chargers were duly paid: that fact; they recovered documentary evidence, under a diligence, of these averments: Field, presumptions, but not conclusive proof, of these averments: Field instances, they were entitled to a proof *prout de jure*, in respect of the bill, to allow investigation by parole evidence, where there was no other evidence: it was unfair dealing as to bills of exchange.

MACDONALD, William Macdonald, and Others, were partners Dec. 22, 1833  
Macdonald, Son, and Co., dyers and printers in Glasgow. <sup>1st Division</sup>  
were sequestered in October, 1832, and they were dis- <sup>Ld. Corbett</sup>  
charged by a composition contract, in May 1833. In August, 1833, <sup>3.</sup>  
Bicknell, oil merchants in London, and their mandataries,  
of horning to the partners of Macdonald, Son, and Co.,  
for payment of the first instalment of the composi-  
tion for £283, 4s. 9d., dated May 29, 1832, bearing to be ac-  
ccepted by Macdonald, Son, and Co. The drawer of the bill was Wil-  
son, drysalter in Glasgow, and the bill fell due on 1st Sep-

A bill of suspension was passed, and a record was made  
of the suspenders alleged that the bill was signed by William  
Macdonald, one of the partners of Macdonald, Son, and Co., who had  
permitted the company firm to a private oil speculation of his  
own: that he was engaged along with William Richardson, the  
drawer of the bill; that it was known to Richardson that the company  
was in the speculation; that Richardson received the whole  
of the bill, and was bound, even in a question with William  
Macdonald, to have retired it; that he discounted it with Edward Railton,  
a partner in the Ship Bank of Glasgow; that the bill was  
noted for non-payment, but afterwards uplifted by Railton,  
in favour of Richardson; that Railton had some transactions both  
with Macdonald, and with Andrew Rowley, the Glasgow agent of Lang-  
ton, and that he (Railton), at adjusting one of these trans-  
actions, gave his own indorsation on the above bill, and delivered it to  
Macdonald, still containing Richardson's blank indorsation, for the  
purpose of being handed over by Rowley to Richardson, but that, as  
Macdonald became insolvent, while indebted to Langton and Bicknell,  
he had fraudulently retained the bill as a means of obtain-  
ing satisfaction of Richardson's debt.



10. 88. The suspenders pleaded, that, as the bill did not pass into the hands of Rowley, until not only the term of payment was passed, but it was noted for dishonour, it could only be acquired by Rowley and the chargers, Langton and Bicknell under liability to every exception which was pleadable against Richardson; and that if it could be proved, either that Richardson knew the bill not to have been granted by William Macdonald for a company transaction, or that Richardson was not the proper creditor in the bill, but was himself bound to retire it, then the chargers could not enforce payment of the composition on that bill against the company and Macdonald, Son, and Company, and their cautioners.

23, 1830.  
Macdonald v.  
Langton.

The Lord Ordinary, "in respect it is admitted that the bill in question was indorsed to Andrew Rowley, the agent for the chargers, not only after the term of payment was passed, but after the bill had been dishonoured and noted accordingly, found that the chargers are not entitled to the ordinary privileges of holders, but are exposed to the exceptions pleadable against the indorsers, and therefore allowed the suspenders a proof, by competent evidence, of their averments, that Richardson, the drawer, was the proper debtor in the bill, and that he knew that William M'Donald, in accepting the bill, used the company's firm for his private purposes, in a transaction in which the company had no concern, and also their averment that Rowley, the chargers' agent, improperly delivered the bill to the chargers for their behoof, when he ought to have given it up to Richardson, the drawer: and appointed the case to be enrolled, that the suspenders may state what is the nature of the proof they mean to adduce." \*

In this interlocutor the chargers acquiesced. The suspenders then lodged a minute in reference to the nature of the proof, craving a diligence for recovering the correspondence between Richardson, William M'Donald, Rowley, and Railton, or either of them, touching the bill, &c., and excerpts from their books of all entries relating to that subject. The suspenders farther offered to prove their averments by the oaths of

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\* \* NOTE.—By the law of Scotland, the circumstance of a bill being indorsed after the term of payment, does not take away any of its ordinary privileges in the hands of the indorsee, and in this respect, our law differs, at least to a certain extent, from the law of England. But it appears to the Lord Ordinary that the case is altered if the bill has been dishonoured, and the dishonour marked by the notary on the face of the instrument. A party is then put upon his guard that an objection exists against its payment, into the nature of which he is bound to inquire. It does not follow from this, that a proof *prout de jure* should be admitted of all the acceptor's defences against payment. There is still written evidence against him, under his own hand, of the existence of the debt, which evidence can only be redargued *habili modo*. This is the view taken by Mr Bell, in his Commentaries, Vol. I. p. 403, and it seems to be sanctioned, if not by express decision, at least by the principles assumed in argument on the bench, in some of the cases to which he refers, particularly in that of M'Gowan, February 24, 1826. It must be admitted, however, that the case of Adam, June 19, 1830, has a contrary aspect, and the question, therefore, is not unattended with difficulty."

Richardson and Railton. The Lord Ordinary, "before farther answer," No. 88 granted a diligence for recovering the documentary evidence, "in so far as written previous to the raising of the action."

Dec. 23, 18  
Macdonald  
Langton.

Among the documentary evidence recovered, were two letters of Richardson in June and July, 1833, which was long subsequent to the period when Rowley became holder of the bill. These letters were addressed to Langton and Bicknell, when requesting them to accede, along with Richardson's other creditors, to a private composition, and in both of them he stated that Rowley their agent, had admitted, in presence of Railton, that he (Richardson) had informed Rowley he could give no right to Rowley over the bill for £283, 4s. 9d., as he (Richardson) had no right to it himself. Entries were also recovered from the books of the several parties, which afforded presumptions in support of the allegations made in Richardson's letters. And these were farther strengthened by the circumstance, that no claim on the bill had been lodged for the chargers in the sequestration of Macdonald, Son, and Co., though their agent, Rowley, had attended several meetings of the creditors, being himself a creditor on another account. And the bill in question was not given up by Macdonald, Son, and Co., among the debts due by them.

In these circumstances the Lord Ordinary "allowed the suspenders a proof prout de jure of their averments, that they were not debtors to Richardson in the bill in question; that Rowley was made aware of that fact, and that he unwarrantably indorsed the bill to the chargers, when it was his duty to have returned it to Richardson." \*

The chargers reclaimed.

LORD BALGRAY.—I think the Lord Ordinary has put the cause on its right

\* "NOTE.—It is settled by a final interlocutor, that the bill in question is not a privileged document in the hands of the chargers, and they hold it subject to the exceptions pleadable against Richardson. But it is not yet sufficiently proved that Richardson was not truly creditor in the bill, or that Rowley was not entitled to indorse it to them as a good document of debt, though, in consequence of the acceptor's bankruptcy, not of the same value it would otherwise have been. Richardson's letters, of a date subsequent to the indorsation, are all the direct evidence yet obtained on the subject, which, by themselves, are not conclusive. But they furnish at least a presumption to that effect, and there are other presumptions arising from the state of the books, both of the suspenders and chargers, and also of the books of Railton and Rowley, and these are strengthened by the circumstance, that neither Rowley nor the chargers claimed under the sequestration of the suspenders. It is asserted in Richardson's letter of the 29th June 1833, that Rowley admitted, in presence of Railton, that Richardson said he could give him no right in the bill, from its not being due by the suspenders. Railton and Rowley are both competent witnesses to the fact, and other parole evidence can perhaps be obtained. If it be proved that Rowley improperly indorsed away the bill, this will let Richardson's evidence with regard to its onerosity, for he will no longer be held to be deponing to the validity of the debt after the assignation. In short, the Lord Ordinary that there are sufficient grounds in this case to sustain by parole evidence, as has always been done, where there is no unfair dealing as to bills of exchange."

- No. 88. footing, and that we ought to adhere. The excerpts from the books appear to me to be exceedingly material, and to require explanation. The case is one which ought to be thoroughly expiscated.
- D. 23, 1836.  
B v. David-  
son. The other Judges concurred, and

Dalrymple v.  
Ranken.

THE COURT therefore adhered.

J. CULLEN, W.S.—W. B. CAMPBELL, W.S.—Agents.

No. 89.

A B, Pursuer.—*Robertson*.  
— DAVIDSON, Defender.—*McNeill*.

*Reparation—Expenses.*—A pursuer refused a sum which was tendered, in name of damages, before he raised his action, and which was again tendered in the defences; a record was made up, and issues were prepared, after which the pursuer accepted the sum that had been offered;—Held that the defender was entitled to his expenses, in respect that the whole litigation would have been saved, if his offer had been timefully accepted by the pursuer.

- D. 23, 1836. AN action of damages being threatened by a law-agent against Davidson, he offered a sum of £10 in name of damages. This was refused, but an intimation was made to Davidson that 100 guineas would be accepted. Davidson adhered to his previous offer, and, an action being raised which concluded for large damages, Davidson, in his defences, repeated his offer of £10. A record was made up and issues were prepared, after which the pursuer agreed to accept of the sum of £10. Davidson then moved for expenses, in respect, that, if this offer had been timefully accepted by the pursuer, the whole expense of the litigation would have been saved. The motion came before the Inner House, in consequence of the advanced stage of the cause, in its preparation for trial; and the Court unanimously found Davidson entitled to his expenses.
- D. 23, 1836.  
B v. Davidson.

— Agents.

No. 90.

SIR JOHN HAMILTON DALRYMPLE and OTHERS, Suspenders.—  
*D. F. Hope—Rutherford—Maitland*.  
CHARLES RANKEN, Respondent.—*H. J. Robertson*.  
ALEXANDER GOLDIE, (Curator bonis to Lord Stair), Compearer.—  
*R. Bell*.

*Trust—Possession.*—Trustees under a settlement bought lands to be entailed, but delayed executing the entail, and, in the mean time, took the conveyances in their own favour; the party who, by the trust-deed, was made first heir of entail, entered into the natural possession of the lands, and, after some years, executed an onerous disposition and assignation for behoof of his creditors, and afterwards became insane; his disponee, in the meantime, had entered into possession; in a bill of suspension and interdict at the instance of the trustees against the disponee, the Court, in the circumstances, refused in the Bill-Chamber to prohibit him from ~~lifting~~ lifting the rents, but passed the bill, on caution, to try the question.

In January, 1835, the Earl of Stair executed a trust-conveyance of his whole heritable estates, and of his whole moveable estate in Scotland, in favour of Charles Ranken, solicitor in London, whom failing, certain other trustees to be named by his Lordship's creditors. The purposes of the trust, after paying expenses and public burdens, were declared to be to pay annuities, amounting to above £14,000 per annum, and chiefly consisting of premiums upon policies effected on the life of Lord Stair; and also to pay other debts existing at the date of the trust. Among the annuities, one of £1020 was due to Ranken. The trust-conveyance gave powers not merely to uplift rents, but also to cut timber, enter vassals, let leases, without grassums, and in general to execute every power competent to the granter of the trust, and consistent with the terms of the deeds of entail under which he had right to the lands. The trust-conveyance, besides other estates, included lands to the value of £170,000, which had been purchased by Sir John Hamilton Dalrymple and others, the trustees of the late Lord Stair, who died in 1821, under trust-directions to add them to the entailed estate of the family of Stair. The conveyance to Ranken specially included "all claims and demands of whatever nature and description" competent to Lord Stair against the trustees of the late Earl. The lands, which had been purchased by the trustees, were acquired at various times; and the trustees, in place of taking the titles directly in favour of the present Lord Stair, as first heir of entail, took the titles to themselves, and were still infeft in the estates, all of which were said to have been bought as early as 1827. The trustees stated that, in thus holding the estates they acted by the advice of counsel, in order to save expense, by finally including the whole of the lands which were to be purchased by them, in one deed of entail, by which means also the irritant and resolute clauses could be made more conveniently to affect each and every parcel of the estates. But as Lord Stair was the first heir of entail, and entitled, so soon as the trust was brought to a completion, to be infeft under the entail, and as his Lordship in the meantime had the corresponding beneficiary interest in the estates, he was put into the natural possession of them, and drew the rents by his own factor. This state of possession had continued for several years prior to the execution of the trust-deed in favour of Ranken. Under that deed Ranken took infeftment in July 1835, and subsequently uplifted rents. In May 1836, before the term of Whitsunday, Sir John H. Dalrymple and others, presented a bill of suspension and interdict, stating that Lord Stair had become insane; that they were feudally infeft in the estates above-mentioned, to the value of £170,000, which they had bought under the trust of the late Lord Stair; that they had a right to the natural possession, merely under an obligation to pay over the net rents to the present Lord Stair, but that his Lordship, as a matter of convenience, had been allowed them to enter into the natural possession of these lands and draw the rents; that this was done by their mere tolerance and permis-

No. 90

Dec. 23, 18  
1st Division  
Ld. CockburnDalrymple  
Ranken.

1 90. sion; that such permission was personal to Lord Stair himself, and his  
 3, 1836. Lordship had no power to put a third party into possession without their  
 100 v. consent, and therefore that Ranken had no lawful title of possession; and  
 " they prayed the Court to prohibit Ranken from interfering with the  
 trust-estates, and "in the meantime to interdict the said Charles Ranken  
 from uplifting, or attempting to uplift, any part of the rents, or any way  
 to interfere in the management of the aforesaid estates standing vested in  
 the complainers, as trustees of the late Earl of Stair, until the issue  
 hereof." They offered caution if required.

Answers were ordered, and interdict was granted in the meantime, as  
 craved.

Ranken answered that he had come under heavy advances to Lord  
 Stair on the faith of the trust-conveyance; and that, whatever right his  
 Lordship himself possessed in the trust-estates, was onerously transferred  
 to him, and the present question must be decided precisely as if the bill  
 of suspension had been directed against Lord Stair himself. For, although  
 the disposition and infeftment by his Lordship to Ranken, could confer  
 no real right until after his Lordship should be infeft, it was at least an  
 onerous transference of every other right and interest competent to Lord  
 Stair, especially as against the suspenders. If the suspenders had obeyed  
 the trust-deed of the late Lord Stair, they would never have infeft them-  
 selves in the trust-estates, but would many years ago have infeft Lord  
 Stair as first heir of entail, in which case his Lordship's own title of pos-  
 session, and Ranken's title, derived from his Lordship, never could have  
 been called in question. It was the fault of the suspenders that they had  
 omitted this, and neither Lord Stair nor his onerous assignee should be  
 placed in a worse situation thereby, at least in any question with the sus-  
 penders. And especially as this was a question in the Bill-Chamber, the  
 actual state of possession should not be summarily inverted, and the in-  
 terim interdict ought to be recalled.

The Lord Ordinary, "on caution, passed the bill, and continued the  
 interdict at the instance of the suspenders." \*

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\* "NOTE.—The Lord Ordinary does not proceed at all upon the alleged derange-  
 ment of Lord Stair. But, according to the respondent's own statement, the sus-  
 penders stand infeft, as trustees, in the lands, while Lord Stair, under a disposition  
 from whom Mr Ranken acts, has never been infeft, and has no title made up under  
 which he could convey: Indeed, the facts, that the trustees have taken the titles  
 to themselves, and have not enabled Lord Stair to get a title, form the very griev-  
 ance complained of. Whether the trustees have been correct or incorrect in this, is  
 not the question. The Lord Ordinary does not see how they could have avoided  
 taking the titles to themselves in the first instance. But however this may be, or  
 whether they ought, by this time, to have given the lands over under the entail to  
 Lord Stair, the fact is, that they have not done so. If they be wrong, his Lord-  
 ship's remedy resolves into a right to compel them to proceed correctly; but he  
 was neither qualified nor warranted in ousting them, *via facti*, by a conveyance to  
 a donee of his own. Considerable credit is due to them as trustees selected and  
 appointed by the deceased Earl."

...ing at the same time that such appointment should not pre-  
e rights of parties in the depending processes.

vising the reclaiming note of Ranken, appearance was made for  
tor bonis of Lord Stair, who stated that he was not yet suffi-  
informed as to the facts of the case to identify himself with either  
rties.

**PRESIDENT.**—It was merely as a matter of convenience that the execu-  
tails of the lands which were bought by the suspenders, was allowed to  
Had the trust been literally followed out, that would have been done  
is time, and Lord Stair would have been infeft as first heir of entail. It  
lt of his Lordship that this has not been done, and I think that, in every  
with the suspenders, both Lord Stair and his onerous assignee must be  
h as if the trust had been so far implemented. It would be unjust to  
r if he was not to be held as being in the same situation in which he  
re been, if the entail of these lands had been executed, and he was infeft  
ir of entail.

**BALGRAY.**—I am of the same opinion. Had the trust been followed out  
to its natural meaning, Lord Stair would have been long ago infeft as  
of entail in the estates bought by the trustees. I consider that Ranken,  
e onerous assignee of Lord Stair, is in the same position with his Lord-  
that the powers which he exercises in virtue of his Lordship's deed, must  
garded as powers exercised by his Lordship himself. He is just the hand  
Lord Stair acts, and if Lord Stair had a right to levy the rents and ma-  
estate, so has Ranken. At the same time, I apply these observations  
the power of uplifting the rents, and I think Ranken should beware, in  
cumstances, how he grants leases of the lands. At present the case is  
the Bill-Chamber, and I certainly am not prepared, de plano, to invert  
ng state of possession. It is clear that the expenses of managing the  
d paying the public burdens, must fall on Ranken if he levies the rents,

**No. 90.** and Lord Stair, or his onerous assignee (which is the same thing), I decidedly think they should be dealt with just as if Lord Stair was now infeft as first heir under the entail. It is a principle of equity and common sense in disposing of questions which arise out of trusts, especially between the trustees and the beneficiary under the trust, that, when any delay occurs without his fault, in carrying into effect the directions of the trustee, still the beneficiary must be dealt with as if the trust had been duly implemented. In this case, therefore, I look upon Ranken just as if he was the assignee of the first heir of entail in these estates. He holds an onerous assignation from the party who possesses the substantial right in the rents and administration of the estates. Against the suspenders he has a good right to found on Lord Stair's assignation to him, and it is no answer, on their part, to say that Lord Stair was never infeft, because it is through their fault alone that this has happened. I am far from imputing the smallest male fides to them, though I doubt whether the course they have adopted will save expense in the end. But whether it does so or not the embarrassing circumstances connected with the present question have arisen in consequence of their deviation from the directions of the trust in not sooner entailing these estates, and they are not to be permitted thereby to place Lord Stair, or his onerous assignee, in a worse position than if the entail had been executed.

LORD MACKENZIE concurred.

THE COURT recalled the interim interdict, and, quoad ultra, passed the bill on caution.

*A. MACLEAN, W.S. — MACKENZIE and INNES, W.S. — Agents.*

**No. 91. JAMES CAMPBELL and OTHERS (Munro's Trustees and Executors), Raisers and Claimants.—**

*Sol.-Gen. Cuninghame—Rutherford—A. Wood.*

**SIR THOMAS MUNRO and CURATOR AD LITEM, Claimant.—D. F. Hope —Anderson.**

*Foreign—Settlement—Approbate and Reprobate.*—A Scotsman died resident in India, after having executed, whilst in England, a settlement in the English form: he left some heritage in Scotland, which the settlement did not effectually convey, and a much larger amount of moveable estate which was effectually conveyed by it:—Held, that reference must be made to the law of England to determine whether the settlement was so expressed as to put the heir-at-law to his election, and to deprive him of all benefit under the will if he took up the Scottish heritage as heir-at-law; and also as to the import and effect of the will in other respects; and judgment pronounced in terms of the opinion of English counsel.

**Dec. 23, 1836.** THE late Sir Thomas Munro, Governor-General at Madras, was by birth a Scotsman, but spent the greater part of his life in India, and died resident there, in 1827. In 1819, whilst in London on a visit to this country, and on the eve of departure for India, he executed a last will and testament, in the English form, which was not so conceived as to be capable of conveying Scottish heritage. At his death he left two sons. His fortune amounted to nearly £150,000, besides a sum of £90

**1st DIVISION.**  
**Ed. Fullerton.**



ated in trustees under his marriage-contract. Of the £150,000, No. 91.  
 ere was a sum of £16,900, consisting of Scottish heritable bonds, and  
 2,600, consisting of house property in Scotland. There was no other  
 otish heritage. Dec. 23, 1836  
 Campbell v.  
 Munro.

The will of Sir Thomas directed the residue of his whole estate, heritable and personal, after payment of legacies, to be invested in Scottish heritage, so far as this was not already done, and to be strictly entailed a series of heirs, of which his eldest son was first called. Under the element several questions arose, for the extrication of which the trustees raised a multipoleinding. In this process, the eldest son, now Sir Thomas Munro, and his curator ad litem, claimed a right to the whole heritage in Scotland, as heir-at-law, and also to take the benefit under the will of being first heir of entail, alleging that, by the terms of the will, he was not put to his election, but could take the whole Scottish heritage without repudiating or defeating any part of the will. He also contended that he was immediately entitled to the rents and produce of the whole estate, under burden of a suitable maintenance to his younger children, and that the trustees had no power to accumulate the income of the estate during his minority or for any other period.

The trustees maintained that, by the terms of the will, a distinct intention to include the whole Scottish heritage was expressed, and that, by the law of England, the will was so expressed as to put him to his election, so that he could not take benefit under the will, if he carried off the Scottish heritage as heir-at-law, thereby defeating the testator's intentions. They also contended that, after providing him a suitable maintenance, they were entitled, in reference to the terms of one provision in the will, to accumulate the surplus annual produce during his minority, and purchase lands to add to the entail.

Both parties referred to the law of England for the true import and effect of the deed; and a case was laid before English counsel, who gave opinion that the will was sufficiently expressed to put the heir to his election, and that he could not claim benefit under it, and at the same time defeat it by taking the Scottish heritage. They also were of opinion that the trustees had not power to make an accumulation of the annual produce, and that the heir was entitled to the whole income.

The cause was then reported to the Court on cases, and

**THEIR LORDSHIPS** found in terms of the English opinions.

**CAMPBELL, W.S.—FOTHERINGHAM and LINDSAY, W.S.—W. RENNY, W.S.—Agents.**

1 . 92.

Dec 4, 1836.  
 v.  
 in rry.

— WHITE and OTHERS, Petitioners.— *Sandford.*

— MACKERSY, Respondent.— *Neaves.*

*Advocation—Process.*—The defender in a summary process declined the jurisdiction of the sheriff, and presented a bill of advocation, which was passed: the respondents in the advocation presented a petition to the Inner-House for warrant to discuss the reasons summarily on the passed bill, but, after some discussion, withdrew their petition,—Opinion of the whole Judges intimated by the LORD PRESIDENT to have been that the prayer of the petition could not have been granted consistently with the existing forms of process.

Dec 4, 1836.

1st DIVISION.

WHITE and OTHERS presented a summary application to the Sheriff of Edinburgh, against Mackersy, W.S., praying for the delivery of certain papers, &c. Mackersy, as a member of the College of Justice, declined the sheriff's jurisdiction, and presented a bill of advocation, in respect of his professional privilege. The bill was passed on answers; and before the letters were expedite, White and Others presented a written petition to the Inner-House, praying for a warrant to discuss the reasons summarily on the bill. They pleaded, that, as they were willing to dispense with the induciæ, and as the case was one requiring despatch, they were entitled, according to the old forms, to have the merits of the cause thus disposed of, and no change in this respect had been occasioned by the new forms of process. Mackersy answered that he was ready to proceed with every despatch under the expedite letters, but that the only regular course of procedure under the present forms was to expedite the letters and prepare a record in common form.

It was stated from the bar, during the discussion, that, in a recent case of a bill of suspension of a charge given by a presbytery, the Judges of the Second Division had held that, if both parties consented to discuss the reasons on the bill, it was a competent form of procedure.

LORDS GILLIES and MACKENZIE intimated, that they considered this to be a question in which the competency of the procedure could not depend on the consent of the parties.

After some incidental discussion, it was stated by the petitioners, that they were not inclined, in all the circumstances, to press their petition; and no deliverance of the Court was pronounced on it.

On the following day, the LORD PRESIDENT intimated, that the nature of the application had, on that morning, been laid by his Lordship before the Judges in the robing room, and that it was the opinion of their Lordships that the prayer of the petition could not have been granted, consistently with the existing forms of process, and especially in reference to the necessity of making up a record before disposing of the cause.

and interdict against the Manager of the Western Bank of Scotland presented a petition to the Court, stating that they were desirous of ; one of the two cautioners who had signed the bond of caution y them in the Bill-chamber, and to get up that bond, that they luced a new bond of caution, signed by one of the former cau- and by another sufficient obligant ; but that the clerks to the bills to deliver up the former bond, without the authority of the Court. tioners, therefore, prayed their Lordships “ to take this petition sideration, and on the same being intimated to the clerks to the l on a report from them as to the sufficiency of the bond now l, to grant warrant to, and ordain them to receive the said bond produced, in place of the one formerly lodged in the Bill-cham- be said suspension ; and to deliver up to the petitioners the latter order to be given to the cautioners who subscribe the same.” Court ordered intimation to the chargers, and to the clerks to the , report was returned by the clerks, that the new bond of caution cribed by sufficient obligants ; on considering which report,

1st Division.  
S.

THE COURT granted the prayer of the petition.

MACINTOSH and DUCAT, W.S.—Agents.

CATHARINE JACKSON OF MARSHALL, Petitioner.—*Sol.-Gen.*  
*Cunninghame.*

No. 94.

BERT GOURLAY (Marshall's Factor loco tutoris), Respondent.—  
*A. M'Neill.*

94. the rental to £384, 19s. There was expected to be a considerable increase of rental in about five years, on the termination of certain long leases. A factor loco tutoris was appointed to the eldest son, and the widow presented a petition for an award "of £300 per annum, for the support and aliment of herself, and for the maintenance and education of the minor heir and younger children." The factor lodged answers, stating that he concurred in having a suitable aliment awarded to the widow and the heir, but felt it to be his duty to resist an award of aliment to the minor children, in consequence of the law being now fixed that an heir of entail was not liable to such a burden; but that it was for the Court to consider whether, in awarding aliment to the widow and the heir, the existence of younger children could enter into their consideration. He also stated that, by the entail, the heir was prevented from imposing any burden on the lands except by way of locality to a widow, not exceeding one-fourth part of the free yearly rent of unlocated subjects.

LORD PRESIDENT.—The law is quite fixed that an heir of entail is not liable to aliment his younger brothers and sisters. The proper amount of aliment to be awarded is a question, which, to a considerable extent is discretionary, and, in the whole circumstances, I should think an award of £100 per annum, for the maintenance and education of the heir, and £150 per annum, for aliment to the widow, would be fair and reasonable during the pupilarity of the heir.

The other Judges concurred, and

THE COURT pronounced this interlocutor:—"Grant warrant to and ordain the factor to make payment to the petitioner, for her eldest son, and till he is 14 years of age, of the yearly sum of £100, payable half-yearly at Martinmas and Whitsunday, beginning as on the 15th July, 1835; and to the petitioner, being as aliment till her eldest son is of the age foresaid, of the yearly sum of £150, payable half-yearly as aforesaid, and decern; and appoint the expense of this application to be paid out of the rents."

W. WADDELL, W.S.—CAMERON and MACDOWALL, W.S.—Agents.

No. 95.

KING'S ADVOCATE, Pursuer.—*Sol.-Gen. Cuninghame—Maitland.*

LORD DUNGLAS and CAPTAIN R. CUNNINGHAM, Defenders.—

*D. F. Hope—Anderson.*

*Title to Pursue—King's Advocate—Stat. 2 & 3 Will. IV. c. 112, and 3 & 4 Will. IV. c. 69—Process.*—1. Under the statutes 2 & 3 Will. IV. c. 112, and 3 & 4 Will. IV. c. 69, the Commissioners of Woods and Forests have no title to pursue a reduction of a royal grant of an office of chamberlain and collector of the hereditary revenues of the Crown. 2. The Lord Advocate has no title, without a special warrant under the sign-manual, to institute an action regarding the patrimonial rights of the Crown. 3. Such action not validated by a royal warrant of ratification subsequently obtained. 4. Circumstances in which a preliminary defence of want of title in a reduction held not to be foreclosed, notwithstanding the satisfying of the production and pleading on the merits.

27, the management of the hereditary revenues of Scotland was transferred from the Barons of Exchequer to the Commissioners of Woods and Forests, it being provided that, from and after the act's coming into operation, "all honours, castles, manors, lands, tenements, and appurtenances, in Scotland, which now do, or hereafter shall appertain to the King's Majesty, his heirs," &c. &c. "and all and every the duties, and profits thereof, or of any of them," &c. &c. ; "and all the ways and means for recovering the same, or the possession thereof, and accounts relating thereto," &c. &c. "shall be under the management, control, and direction of the Commissioners, for the time being, of His Majesty's Woods, Forests, Land-Revenues, Works, and Buildings in England and Ireland, and their successors acting under, or by authority of, an act passed in the 10th year of the reign of his late Majesty George IV."

The following year an act was passed (3 and 4 Will. IV. c. 69), to amend and enlarge the powers of the Commissioners in regard to the revenues of Scotland. It was thereby enacted, that the Commissioners should have the same powers in regard to the land-revenue of Scotland as they possessed in regard to that of England, and in particular as contained in the provisions of the 10 Geo. IV. c. 50. It was also enacted that the passing of the act should not vacate the appointment of a chamberlain or collector, but that every such chamberlain or collector should continue in office "until his death or resignation, or until he should be removed by the Commissioners, for the time being, of His Majesty's Woods and Forests," &c., saving always the rights of "any person of the Crown, under an appointment lawfully made by his Majesty previously to the passing of this act." The act further contained the following clause (§ 22) :—"And be it farther enacted, that

1 95. Office, shall be deemed and held to be sufficient service on the said Commissioners, any law or practice to the contrary notwithstanding."

1836  
Advoc-  
Lord  
"

In the year 1827, his late Majesty George IV. had granted to the defender, Lord Dunglas, for life, by commission under the seal used instead of the Great Seal, the office of chamberlain and collector of the rents, revenues, &c. of the lordship of Ettrick Forest, part of the hereditary estates pertaining to the Crown of Scotland, which rents, &c. amounted to only £235, 7s. 7d., with a salary to himself of £300 a-year and £20 a-year to a deputy, "out of the monies of the said collection, and wherein they come short, out of the first and readiest of the rents, revenues, and feu-farms, and other casualties of superiority, issuing and payable to the Crown, out of the lands and lordship of Dunbar, in Scotland, by the purchasers of the lands of Spott, and other lands within the sheriffdom of Haddington."

In 1834 a summons was raised for setting aside this grant as ultra vires of his late Majesty, together with a deputation granted by Lord Dunglas, and for repetition of the salaries, in which summons Lord Dunglas was called to answer "at the instance of the Right Honourable Francis Jeffrey, our advocate, for and in name and behalf of Us and of the Commissioners of our Woods, Forests, Land Revenues, Works, and Buildings, in terms of an act passed in the 3d and 4th years of our reign, c. 69, and acts therein recited, pursuers, to whose great hurt and prejudice, as acting for Us and the public in virtue of the said acts, the warrant, and grant, letters patent, or commission aftermentioned, were made, given, and granted."

As preliminary defences Lord Dunglas pleaded—

1. The pursuer prosecuting on behalf of the "Commissioners of the Woods, Forests, and Land Revenues," has no title to claim repetition of the salary paid to the defender, or his deputy, during the lifetime of his late Majesty King George IV. The salary was paid out of the hereditary revenue of his late Majesty, and the pursuer has no title to prosecute for or recover any payment of salary made prior to the accession of the present king.

2. All parties are not called. As the summons seeks to reduce the deputation granted by the defender, and likewise concludes for repetition of the salaries paid to his deputy, the deputy ought to have been made a party to the action.

The Lord Ordinary (25th June, 1834), pronounced an interlocutor reserving "consideration of the first preliminary defence on the want of title to pursue till the merits of the cause come to be disposed of," finding that all the proper parties were not called, and sisting till the deputy should be called by a supplementary action. A supplementary summons was thereafter raised against the defender, Captain Cunningham, the deputy, as well as Lord Dunglas, to which joint defences were given in;

and in the mean time there was lodged in process a warrant, sign manual, ratifying the institution of the action by the Lord on behalf of his Majesty, and authorizing his lordship to proceed to a final issue.

*for the Defenders—*

According to the true construction of the summons, the action is at the instance of the Lord Advocate for the Commissioners of the Woods and Forests, as acting on behalf of his Majesty in the management of the hereditary revenues, and not at the instance of his Lordship acting for himself.

The powers of the Commissioners are limited to the management of the woods and revenues, and the collection of the rents, &c.; but no authority was given them to pursue reduction of commissions or to sue by the sovereign prior to the surrender, and which are the objects of the statute transferring to them the management.

Considering that, under the terms of the summons, the Lord Advocate is held as pursuing on behalf of his Majesty, his Lordship has no authority *ex officio*, and without a special warrant under the sign-manual, to pursue an action regarding the patrimonial rights of the Crown, which are under the exclusive guardianship of the Officers of State.

A warrant of ratification cannot validate the instance; for although, if the instance is properly set forth, the want of authority at the date may be supplied by subsequent ratification, this can be of no use in the present case, where, without a special warrant, the Lord Advocate had no title to pursue; and,

The question of title is still open, having been reserved by the first plea of the Lord Ordinary, and kept up by the plea in law on the



u. 95. move every obstacle to their collecting these revenues, and to set aside all grants or rights interfering therewith, under the sole reservation contained in the act, of grants "lawfully made;" under which clause they undertake on the merits to establish that that here in question does not fall.

24. 1836  
The Advocate  
v. Lord  
Glas.

3. The title of the Lord Advocate to appear for the King is general, and is not limited to matters criminal; and in practice he has long been in use to sue for his Majesty in civil questions.

4. The defect of a special warrant, if such is required, is fully cured by the warrant of ratification, in the same way as the want of a mandate from a party abroad, when an action is raised, is suppliable by a mandate of ratification subsequently obtained.<sup>1</sup>

5. The objection to the title is foreclosed. The preliminary defence reserved, regarded only the conclusion for repetition of the salary drawn in the reign of his late Majesty, and the plea now insisted in was not taken as a preliminary defence, but was incorrectly inserted in the defence on the merits, after the production was satisfied, and thereafter also incorrectly retained on the record; and besides it has only reference to the title of the Lord Advocate as suing for the Commissioners, but not to his Lordship's title as insisting for behoof of his Majesty.

**LORD MEDWYN.**—In considering the important and somewhat novel question brought before us in these papers, it is proper that we attend particularly to the character and object of the present action. It is not a simple process for recovery of any of the revenues of the Crown, brought against a vassal holding lands in Estrick Forest, nor a challenge of a grant made subsequent to the period when the management of the Crown property was vested in the Commissioners of Woods and Forests; but it is a process of reduction for setting aside a commission, granted many years ago by his late Majesty, upon the ground that it was ultra vires of the Sovereign to grant it. It is raised by "our Advocate for and in name and behoof of us, and of the Commissioners of our Woods, Forests, Land-Revenues, Woods and Buildings, in terms of an act passed in the 3d and 4th years of our reign, 1689, and acts therein recited."

The defenders plead against this action two defences,—on the title and on the merits.

The Lord Advocate protests against the right of the defender now to state a preliminary plea on the title,—that, according to every rule of our forms and pleadings, such a plea is now foreclosed; for though this plea was set forth in his defences, it was not insisted on by the defender at the proper time, and was abandoned or waived; and it is farther said, that it is now resorted to for a very obvious reason. I quite understand the nature of the proceedings in this case, this objection being well founded; for it appears, by the interlocutor of 25th Jan. 1834, that the first preliminary defence, on the want of title to pursue, was

<sup>1</sup> Wylie, Feb 5, 1836 (ante, XIV. 430).

, intended at these instances to be taken into consideration, and  
room for argument, and more serious than I first thought when the point  
finally pleaded to us. The Commissioners act "on behalf of his Majesty;"  
form of the deeds in the schedule appended to the act which confers their  
import, and the instance is by the " Lord Advocate for US and the Com-  
missioners, in terms of a certain act, pursuers." Now, at the very outset, there is  
a difficulty; when it is said " for us," is this in compliance with the form that the  
Commissioners act on behalf of his Majesty, or is it a separate instance? I am  
inclined to think, if it had been with a view to comply with the act, that the same  
could have been observed, and so as to make the Lord Advocate pursue for  
the Commissioners on behalf of us; but then does the word pursuers apply to the  
Commissioners solely, or to them and the King, as both pursuing? I rather think  
either view, it would have been as correct, if the Lord Advocate had raised  
the instance in his own name, in behalf of the Crown, as well as for the Commis-  
sioners, and being to prosecute for both, that he should have been stated simply as  
pursuer, like any mandatary for two parties. But the ambiguity as to who are the  
pursuers, seems cleared up, as the summons goes on to say, " to whose great hurt  
and prejudice, as acting for us and the public," the commission was granted. Now  
the instance is to the pursuers. This is clearly the Commissioners, for it is added,  
pursuers for us. The prejudice is not to the Lord Advocate, neither is it stated  
to the Crown directly; but to the pursuers as acting for the Crown, that  
is the Commissioners of Woods and Forests. The decerning clause, too,  
leads to the same conclusion, for it bears that the defender should make  
restitution and payment to the pursuers. Now, the Commissioners alone claim  
to receive these rents, for it is previously stated, that his Majesty had sur-  
rendered them: and this shows strongly, that as the term pursuers here applies to  
the Commissioners, so, where it is used at the commencement of the summons, the  
pursuers should apply to them also. It is, however, averred in the conclu-  
sion of the fourth reason of reduction, that we, and the said Commissioners,  
are right to collect and dispose of the hereditary revenue; and however in-

No. 95.  
 Dec. 24, 1836.  
 King's Advocate v. Lord  
 Douglas.

especially when the further conclusion is, that the said warrant is made in violation of *our* rights, and has the effect of diminishing *our* hereditary land-revenues, which implies that the Sovereign is interested in the action. Still, however, there is much difficulty even in this; for, besides that these latter expressions do not relate to the instance, but to the ground of action, they would have been correct if the instance had been by the Advocate on behalf of the Commissioners alone. In such a summons, it must be recollected, is a writ proceeding in the King's name, directed to Sheriffs in that part, to cite the defender to appear before the Lords of Session to have a commission set aside, as prejudicial to the rights of the Sovereign. This could only be described by the King speaking in his own person, and using the regal term, as *our* rights, just as the reference in the second reason of reduction to his late Majesty, styles him *our* Royal predecessor. It is with much hesitation, therefore, that I get over this objection; perhaps I ought not to do so, merely because the instance is not set forth in a clear precise manner, so that at least it is ambiguous; but I do not wish, in this case, to proceed on grounds which it is possible even to question as too critical; and, upon the whole, I incline so to interpret this summons, however awkwardly expressed, as to give the Lord Advocate the advantage of holding that he prosecutes for the King as well as the Commissioners.

Our next enquiry is, whether the Commissioners of the Woods and Forests, who may sue or be sued in name of the Lord Advocate, have a title to pursue the reduction of a grant by the Crown, on the ground of its being *ultra vires* of the Sovereign. The act 2d and 3d William IV. c. 112, may be just noticed in passing, to show that it is not overlooked. By it no powers were given beyond what were previously enjoyed by our Court of Exchequer, who clearly had no such power. The next act, 3d and 4th William IV. c. 69, passed on this subject, is specially referred to in the summons, and is mainly relied on by the Lord Advocate. It bears to have been passed to extend and enlarge the powers of the Commissioners, in relation to the management and disposition of the land-revenues of the Crown in Scotland, and the preamble following out this object declares, "that it would be expedient that the Commissioners should have the same powers of selling, leasing, and administering Crown property in Scotland, as they had in England," for which purpose the act 10th Geo. IV. c. 50, is extended to Scotland and made part of this act. But these regulations have reference merely to sales and leases of the property, and to the subsequent investment of the funds, and not the most distant allusion is made to the conferring any power to call in question, by reduction, any commission flowing from the Crown, or to institute any similar proceeding; and the pursuer can never be held, to come under a clause which empowers the Commissioners to remove any deputies, clerks, or receivers, &c.<sup>1</sup> These are officers acting under the Commissioners; and the concluding words of this very section show that they are officers that may be appointed by them, so that they are totally different, both in name and character, from the Chamberlain, who holds his office independent of the Commissioners, in virtue of a commission under the Great Seal of Scotland, issuing upon a warrant under the Sign-manual; and the necessity of such a process as the present shows, that the powers conferred by that clause do not meet such a case as that of the defend-

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<sup>1</sup> 10 Geo. IV. c. 50, § 12.

to be removed by any simple order of the board for removing him ; but under which he holds his office must be first set aside in a court of law. the argument no better founded, which, alleging that the commission with their receiving the revenues of the Crown, the Commissioners are to remove it out of the way, in order to enable them to levy the rents of rest. This would be a very bold stretch of interpretation indeed. But it is provided for by enacting, " That the passing of this act shall not vacate the appointment of any chamberlain or collector ; but every such chamberlain or collector who shall be in office at the time of the passing of this act, shall continue in office until his death or resignation, or until he shall be removed by the Commissioners, or until his appointment shall cease under the provisions herein and referred to." The removal here mentioned can allude only to such officers as hold their offices at pleasure, and where the royal pleasure has been to the office, or to meet the case of any who may be removable by the Commissioners, if there be any such ; and this general expression (for it must be that there is no clause in this act similar to the clause in the 10th of Geo. removing deputies, clerks, &c., which expressly gives the power of removing chamberlains to the Commissioners), cannot possibly imply a right in the Commissioners, and give them title to reduce the appointment of a chamberlain for life, or to be removed till that is done ; and when the ground of reduction is, that the commission is illegal, as *ultra vires* of the Sovereign.

It is further said, that the saving clause only protects a grantee of the Crown, of any appointment *lawfully* made by his Majesty, and that the commission of the defender is not lawfully made. Be it so. But then, at whose instance is the lawfulness of this commission to be tried ? If not lawfully made, it may be set aside ; but the defender is entitled to have the question tried by a court duly authorized to challenge it on the only ground on which it can be, that it was *ultra vires* of his late Majesty, and is in violation of the authority of the present Sovereign. The statutes referred to have conferred no such power on the Commissioners of Woods and Forests.

It is also said, indeed, that if the Commissioners had found any person collecting rents without a title, or interfering with diligence used by them for their duties, they would have been fully authorized, by the powers conferred upon them by the acts referred to, to insist in name of the Lord Advocate, just as the officers of Excise or Customs formerly were. Nay, the officers of these departments are authorized to insist in all such actions for recovery of duties ; therefore it is idle, in support of either the one instance or the other, to refer to such cases as *Wingate* against *Robertson* against *Jardine*. The defender, being a Chamberlain, may sue any of the Crown vassals of *Ettrick Forest* for their rents or feu-duties ; see case of *Sir Henry Munro*, 20th June,

and the Commissioners might probably be heard in a declarator, that they were the persons entitled to collect these rents, similar to the Commissioners of Customs. *Lord Dundas*, 25th May, 1810, as to the custody of wrecks in Orkney. The action would attain their object ; but they would immediately be removed by the commission from the Crown, which can only be got out of

No. 95. the way by reduction on grounds which they clearly have no authority, as managers of the Crown property, to institute.

no. 24, 1836.  
King's Advocate  
v. Lord  
Langdale.

It is just as idle to refer to the Commissioners of annexed estates purporting approbation of a subvaluation of tenns; case against Sir R. Menzies, 1773. It might fall under powers of management to lessen the burden on the rents; but would it have been competent for them to object to and reduce a grant of tenn by a former Sovereign to an heritor, as ultra vires of the Crown, and against the prerogative of the present Sovereign? That case clearly imports no such right.

The statutes under which the Commissioners act might have expressly conferred upon them power to set aside the commission; and this would have been a good title in them, without interfering with or diminishing the inherent right of the Crown to challenge it; then either might have been pursuer, or both might have joined sue. But there is no express power given,—that is unquestioned; and it is only inferred by implication, that with the power of management which has been taken from the Crown and vested in the Commissioners, this right or privilege has been transferred also. If this be so, it rests no longer in the Crown, as little as the management and levying of the rents do. But the Lord Advocate has produced a warrant from the Crown on which he founds as a title. He must hold, of course, that the power of challenge is still in the Crown, if this authorizes it, and then it cannot have been transferred to the Commissioners. It might have been created and bestowed upon them by statute, without impairing the right of the Crown but it cannot be transferred along with the powers of management without diminishing the Crown. It cannot be in both—in the original holder of the right, and the party to whom it has been transferred at the same time, otherwise than by a creation of the right in favour of the latter. So that the warrant seems to give the deathblow to the title of the Commissioners.

Under the powers then conferred upon the Commissioners by the acts, I am of opinion that they cannot pursue any process for setting aside a commission granted by the Sovereign, as ultra vires of the Crown, and as being contrary to the prerogative of the reigning Monarch; and therefore, that the instance, so far as it proceeds in the name of those Commissioners, cannot be maintained.

Let us now enquire into the other branch of the instance, in so far as it may be supposed that the Lord Advocate pursued this action, “for and in name and behalf of his Majesty.”

But before entering upon this important enquiry, embracing a point of some curiosity in our practice, as a subject of constitutional law, I must first advert to the production of the warrant, dated 6th February, 1836, ratifying and confirming the proceedings in this process; and consider whether this is sufficient to obviate the objection to the action having been raised by the Lord Advocate, for and in name and behalf of the King, supposing that instance objectionable. For if this will cure the defect, it will be unnecessary to enquire into the objection, as to the instance in the suit as originally brought into Court.

That such a warrant, granted previous to the institution of the reduction, would have been sufficient authority to raise it in the name of the Lord Advocate, there can be no doubt; and it is argued that it should validate the proceedings which took place previously, as was held in the recent case of Wylie against Adam, 5th February, 1836, where the objection that an action had been raised in name of a person out of the country, and without his knowledge or authority, was obviated by production of a mandate from him. But there the action was brought in name

of title, at present assuming that matter?

Be quite aware that there are many instances in which the Court has allowed a title to be made up and produced cum processu, or the want of a link in a title to be supplied. But this is always where the pursuer has truly the right, and the action is properly instituted in his name, though there may be some formal defect in the title, which is necessary to complete his title. But where a pursuer brings an action, having neither the right nor title to do so, it is quite a different matter. Whether it will be sufficient that the proper party afterwards comes forward to regularize the proceedings. They were originally invalid, and I think the rule *actio vitiosa* applies to such a case; so that "a title supervenient after a summons, is not sufficient for pursuing thereof." This has been a rule of practice from the earliest times; and two cases are reported by Balfour, p. 15, to this effect, in 1541; and being a rule of essential justice, it has continued to be observed down to the present day, amidst all the manifold changes in the law of process. Thus, on this ground, a comprising was found null, because the assignment to the debt was subsequent to the date of the charge to enter heir. 15th November, 1666.<sup>1</sup>

A decree upon an assignation dated after the summons was granted, was not valid, though the cedent concurred, the pursuit not being at his instance. 15th November, 1666.<sup>2</sup>

A decree of redemption of a wadset was not sustained, because, before making order of redemption, the pursuer had not been served heir to the reverser. 15th November, 1666.<sup>2</sup> But against Lord Macdonald, 19th January, 1672; being, as I suppose, a decree of provision, and not having the general character of heir.<sup>3</sup>

A decree by an adjudger against a superior, will not validate a summons of redemption on that title, prior to it. Dundas, 10th November, 1683.<sup>4</sup> But a decree subsequently taken infestment on a charter of adjudication, this was valid, because he had a title; but it was imperfect and incomplete, which is stated. Keith, 24th January, 1695.<sup>5</sup>

No. 95.

—  
 s. 24, 1826.  
 ag's Advo-  
 v. Lord  
 nglas.

A similar judgment was given in Dunbar, 30th July, 1714. And very recently, a charge having been given by a married woman on a bill payable to herself, a suspension was raised on the ground that it should have been at the instance also of her husband. The husband sisted himself as a party to the proceedings in the Bill-Chamber, the answers to the bill being in his name also, and it was pleaded that this obviated the objection. But the Court held otherwise, and suspended the letters. Jeffrey against Matheson, 28th June, 1826 (S. & D).

Now, these decisions proceed on this principle, that although a party having the right by a general title as heir or executor, may complete the right and process, and validate a prior action raised on that title, yet a singular title, such as an assignation or adjudication, is not to be dealt with in the same manner; and still less therefore, can it be pretended, where the pursuer has not the semblance of a title where he has no right in himself, and is not authorized by the party having the right, that his unauthorized proceedings in his own name as pursuer, challenging the right of another who is in possession, will be validated upon any subsequent ratification by the true party. The proceedings are null, as not being at the instance of the proper party, but in name of one not authorized to institute them or carry them on. And when the true party appears, he must just proceed by a maintenance of his own instance, or with the instance duly authorized by him; and he cannot, except with the consent of the defender, adopt the prior null proceedings by any ratification of them. It would be contrary to the most ordinary rules of judicial procedure, to allow a pursuer such a mode of curing a blunder on the instance which brings a process into Court. The first thing a party has to consider, before he commences any judicial proceeding, is to consider whether he has the proper title in his person duly completed to do so.

Entertaining the opinion then, that the production of the warrant will not support the instance by the Lord Advocate for the Crown, if it was previously bad, I have now to consider this point, and whether it was competent for the Lord Advocate, *virtute officii*, to institute the process of reduction in his own name, and without a special warrant to that effect.

The commission of the present Lord Advocate is admitted to be in general terms, granting no special powers, but that it follows the style used since the accession of Geo. I., merely bestowing the office, referring therefore to the course of practice for its powers, duties, and privileges. Whether the terms used in the commission to Sir David Dalrymple, in 1709, were intended to give more ample powers than usual, and whether even they would imply a special authority to institute any action in name and on behalf of the Sovereign, which a special mandate might warrant, I shall not say. It is enough that such are not the terms of the present commission, which bestows no special powers whatever, and I am entitled to assume that the commission of the preceding Lord Advocate, by whom this action was instituted, was in the same terms; which makes it necessary to ascertain, from the history of the office, and of the practice where he is pursuer in the civil Court of processes on behalf of the Crown, whether the instance of the Lord Advocate for the Sovereign be sustainable in the present process. Your Lordship will not be surprised that there is not much authority from our writers on law to refer to; for it is well known that Lord Stair, our greatest systematic writer on



aims any thing against the Crown, he applies by a petition of right, on right, for permission to do so. The King grants this permission, and a writ is issued for trying the question with the King. This was settled in the reign of Edward I.<sup>1</sup>

In this matter is now different, for the King does not pursue in his own right as it was otherwise at an early period.

Chief notices in our law that I am acquainted with, as to a prosecution process on behalf of the Crown, are these:—The King pursues Henry of Carnabe, as to the wardship of the lands of Granton, 16th October, 1478; the King prosecutes the persons of inquest for lands, as held blench, instead of ward, of the Crown.<sup>2</sup> The King against Mowbray and others, 17th June, 1487, is an action brought in virtue of a writ for buying goods of a prize belonging to a nation at amity with us, and redemption.<sup>3</sup> The King most frequently appears as pursuer in his own reductions of services and retours, when erroneous and against his interest. The King against the Sheriff of Fife, 2d April, 1492; Balf. p. 247. The King against the Sheriff of Air, 13th February, 1495; *ibid.* The King against the Sheriff of Perth, 15th January, 1532; *ibid.* 433. The King against Laird of 26th March, 1541; *ibid.* 291. This is stated in a case in 1541, “as on use and consuetude in sic cases.”<sup>4</sup>

Actions, however, came to be prosecuted sometimes at the instance of the King, when against the persons of inquest as *temere jurantes super assisam*. The King against Lyne, 2d March, 1542, and other cases under that title.<sup>5</sup> Officially authorized to prosecute, this must have been as prosecutor for this was a public crime, and punished as such, with confiscation of goods, imprisonment, and infamy.

As against burghs for dilapidating their common good, the King at this time appears in person as pursuer, to redress the wrongs done by the Magistrates or their officers. The King against the Burgh of Aberdeen, ult. Febru-

o. 95. have been departed from about the middle of the 16th century, probably in imitation of the practice of the courts of France; for we find the Queen prosecuting by her Advocate, the Laird of Wemyss, 1st March, 1546.<sup>1</sup> The Laird of Cockburn v. Lord Ross, 10th May, 1557. Lord Ross, 26th February, 1561; Balf. p. 426, c. 80 and 29 some of these being against persons of inquest.

I know of no instance in which the Sovereign is called as a defender in a process. On the contrary, in an old case, reported by Kerse,<sup>2</sup> the date of which is not given, it is said that, "in all matters where the King has interest, albeit his officers be not called, yet if the party be perceived to collude to the King's prejudice, the King's Advocate may cause call the cause, and get the King admitted for his interest." It is not said that he was to assist himself for the King's interest. And the King's Advocate had full means of hearing of every such process in Court; for at this time, however anomalous it may now appear, he was always one of the Judges of the Court of Session. Sir George Mackenzie mentions,<sup>3</sup> that in France the King's Advocates were at the same time Judges; "and this was so decided by the Parliament of Paris in June, 1605; and from this we probably, in Scotland, took occasion, a little after that time, to make Sir William Oliphant and of late Sir John Nisbet, both Advocates and Lords of Session." Mackenzie however, is mistaken as to this, for the practice is much earlier, and dates back to the original institution of the present Court in 1582.

Among the original fifteen ordinary Judges of this Court was Sir Adam Outburne, who was King's Advocate from 1525 to 1538.<sup>4</sup> He was also Provost of Edinburgh from 1524 to 1535; and in his commission as a Lord of Session, he is so designed.

He was succeeded as King's Advocate by Henry Lauder of St Germain's, in 1538, who became one of the Lords of Session in 1540.<sup>5</sup> He held this office till 1561, along with his office of King's Advocate, in which he was succeeded in 1558 by John Spens of Condrie.

Spens was, in 1561, appointed a Lord of Session,<sup>6</sup> and both these offices he held till his death in 1573.

Robert Creichton of Ellick was appointed joint-advocate with Spens in 1560, and he also was raised to the bench in 1581.<sup>7</sup>

On Spens' death in 1573, David Borthwick of Lochill was appointed joint-advocate with Creichton, and at the same time a Judge in the room of Spens, and retained both situations till his death in 1581.<sup>8</sup>

Creichton died in 1582, and was succeeded both as King's Advocate, and on the Bench, by David McGill.<sup>9</sup>

It is unnecessary to pursue this further, except to notice that in later times, besides the instances mentioned by Mackenzie, it appears that the President, Sir George Lockhart, was ordered, by a letter from King James VII., to officiate as advocate in the Parliament 1686.<sup>10</sup> A Judge pleading before the Court would be thought singular now; but Sir George Gilmour, when President, pleaded for his son-in-law, having been declined as a judge on account of relationship.<sup>11</sup>

<sup>1</sup> Balf. p. 9080.

<sup>2</sup> Ibid. p. 7865.

<sup>3</sup> Ibid. Works, vol. ii. p. 541.

<sup>4</sup> Brunton and Haig's Senators, p. 25.

<sup>5</sup> Ibid. p. 63.

<sup>6</sup> Ibid. p. 105.

<sup>7</sup> Ibid. p. 176.

<sup>8</sup> Ibid. p. 155.

<sup>9</sup> Ibid. p. 117.

<sup>10</sup> Fount. vol. i. p. 416.

<sup>11</sup> Ibid. vol. i. p. 500.

We find that it was not peculiar to the office of King's Advocate, for the Sovereign to sue in his name. Thus the Queen and her comptroller pursue for wrongous intromission with rents of lands excaused by James V. 28th May, 1557.<sup>1</sup> Here the Queen's Advocate appears only as counsel for the pursuers. Although the Advocate pursues, in name of our Sovereign Lady, reduction of a decree by certain cardinals, depute by the Pope, in a case with the Provost of St Geilles, if this was in the Advocate's name, the proceedings show that the Lord Governor authorized them, 1546.<sup>2</sup>

No. 95.

Dec. 24, 18.  
King's Advocate v. Lord  
Dunglas.

It thus appears that the Sovereign now did not prosecute in his own name alone, and thus early we see the way paved for the person of the Sovereign, either as pursuer or defender in a civil process, being represented by the Officers of State.

The King's advocate was authorized to act as public prosecutor of crimes in the time of James VI. This is implied in 1579, c. 78, and still more expressly by 1587, c. 77, which authorized the Thesaurer and Advocate to pursue, although the private party did not. He may have had power previously from the Sovereign to prosecute in the pleas of the Crown; but in that large class of crimes, then prosecuted at the instance of the private party, his power was confirmed and fully recognised by these statutes; so that, since the date of the latter act, his right to prosecute all crimes has been unquestioned. For after the passing of the first of these, and prior to the date of the other, this Court had refused to sustain his instance in the crimen falsi, where the private party did not also concur. King's Advocate against Chapman, June, 1583. King's Advocate against Forrest, March, 1584.<sup>3</sup> But immediately after this his title is sustained in such a case; Chalmers against Dick, Spottiswood, p. 166. Thirlestane against Durham, February, 1597,<sup>4</sup> and it has not been disputed since.

The Thesaurer's interest to pursue was on account of the single escheat, which fell to the Crown on the outlawry or conviction of a felon. The King's Advocate is first marked in the record of the Justiciary Court, as Lord Advocate, in 1598, in the trial of Arnot of Woodmiln.<sup>5</sup>

His being prosecutor in all crimes, is the origin of his right to pursue, in contravention of lawburrows, which supposes a breach of the peace, and where the penalty is divided between the King and private party.<sup>6</sup>

Also that he must concur in actions of improbation, because if the writ be improved as false, the party may be punished for forgery.<sup>7</sup>

He also prosecutes for usury, a power specially given by 1597, c. 247.

These are processes before the Civil Court.

It appears also, that when the King had made a gift of the ward marriage, &c. of any of his vassals, when the donator instituted a general declarator, besides using his own name, it was also at the instance of the Advocate for his Majesty's interest. This was to support the gift; and the subscription of the King at the gift was equivalent to a mandate to do so, if there was no special warrant in each case.<sup>8</sup>

<sup>1</sup> Mor. p. 7855.

<sup>2</sup> Ibid. p. 7896.

<sup>3</sup> Hume, vol. ii. p. 131.

<sup>4</sup> Ibid. p. 297, § 223.

<sup>5</sup> Thomson's Acts, vol. ii. p. 478.

<sup>6</sup> Mor. p. 7897.

<sup>7</sup> Bankton, p. 286, § 172.

<sup>8</sup> the Styles in Dallas, p. 240, 243, 253, and 258.

No. 95. In like manner, a summons of general declaration of single combat is at the instance of the donator and King's Advocate.<sup>1</sup>

But a summons of special declaration, after the gift is declared in general, is at the instance of the donator alone.<sup>2</sup> And still, more, to show that the King's Advocate pursued (only to support) the gift, and it may be, in virtue of it, when a general declaration is brought up, the gift, made not by the King, but by a Lord of regality, he does not pursue it, unless with the donator. Accordingly there are many instances of such instances: And King's Advocate and Donator against Lewis, 19th December, 1672; Stair, King's Advocate against Fairlie, 1st February, 1678. King's Advocate against Yeats, 25th and 28th July, 1680. A gift of recognition was also, at one time pursued by the King's Advocate and the Donator, December, 1591, the Earl of Cassilis; afterwards by the donator alone, Marston, 15th December, 1669; Lord Halyton, 29th July, 1672. When a gift had been made, it is not the Advocate alone who pursues, as in the case against Lord Colville for the annulment of his marriage, but the Lord Treasurer and the Lord Advocate jointly, 20th February, 1667; Stair.

Further, there is the style of one summons, in Dallas, p. 289, a summons of declaration at the King's Advocate's instance, which is raised in his name, for the interest, and thereby having for one use and behoof sufficient, good, and undoubted right and interest to prosecute the action of declaration and distinction, as specified. Now, admitting that, in the case of a feudal delinquency, such a declaration, it had come into practice, that the King's Advocate could prosecute, in delinquencies against the state or lieges, without a special warrant, this would be far from supporting his right to pursue in his own name in other cases; where there was no approach to delinquency against the Crown, and where no usage had sanctioned it. It may be noticed, that Dallas mentions that in such a summons the Lord High Treasurer, and Treasurer-Depute, as well as the King's Advocate, may be jointly pursuers; in other words, that it may be raised at the instance of the Officers of State.

Except the above, I really do not know of any one civil question in which the Lord Advocate was at any time authorized to prosecute in his own name, on behalf of his Majesty, without a special mandate; indeed, as to the general declaration on gifts from the Crown, it is doubtful if a special warrant was not issued, as will appear from a case afterwards to be noticed; but were this otherwise, when we consider how few of these process now are pursued, for all those following on feudal delinquencies are abolished, or in disuse, and a service is no longer challenged by a proceeding against the assize, we may see how few are the processes which the Lord Advocate can now institute in his own name.

There is a letter of the King, dated 15th August, 1632,<sup>3</sup> authorizing the Advocate to pursue a redaction where teinds are undervalued; and the Commission of 1641 expressly gives this power,<sup>4</sup> so that it is quite clear he had it notwithstanding. Further, it may be noticed that there is a letter from the King in 1634 to the Commissioners, directing that there shall be no valuation of teinds until the Treasurer, or Treasurer-Depute, is heard for the King's interest in regard to his

<sup>1</sup> Dallas, p. 289.

<sup>2</sup> Ibid. p. 13382.

<sup>3</sup> Ibid. p. 290.

<sup>4</sup> Connel, vol. iii. p. 222.

<sup>5</sup> Mor. p. 13378.

<sup>6</sup> Ibid. vol. iii. p. 294.

often expressly lays down the law thus, that "the King's Advocate is upon the King's interest for one party against another without a special mandate." This was so decided in Earl of Southesk, 20th January, 1680—a renounced in presence of the Duke of Albany, when the Court would not incline to abridge the privileges of the Sovereign or his Advocate. It, it was expressly found that he "cannot prosecute any action at the instance, tending to challenge the right of any of his Majesty's subjects, without a special mandate to that effect." Lord Advocate against Moncrieff, 2d 1693.

In Marshall's report of this case, it is mentioned that the law is so laid down and therefore when Dallas, as referred to by the Lord Advocate, who is Styles in 1697, mentions, that "there be summons of reduction, immediate declarator, at the King's Advocate, his instance, and sometimes of reversals, for his Majesty's interest, against subjects," as he does not say that in these cases is without a special mandate, it must be implied, as of this judgment such actions were specially authorized according to recognised law. For that this was quite recognised law, appears further from two following cases, not hitherto noticed on either side. The King's and Fowars of Scoone pursue a declarator against Lord Stormont as to exact certain services in their charters from the Abbey of Scoone. It is in defence, No process at the King's Advocate's instance, for he cannot sue of the King's vassals without a special mandate and warrant from his Majesty. The answer is, It is only in reduction and improbation that the Lord needs a special warrant. The majority of the Court held that the King's Advocate cannot insist alone, and refused process till the instance by the Fowars was sustained by production of their rights, 28th January, 1697.<sup>3</sup> Indeed, it is not a good title to pursue, without any aid from the Crown, whose interest does not well appear; but the defender does not venture to dispute that in a reduction a special mandate is required.

No. 95. part, this action. The answer is, the King's Advocate is empowered to pursue cases by a commission from the Lords of Treasury, which is equivalent to a date from the King. The defence was repelled, 28th December, 1698.<sup>1</sup> *King's Advocate v. Lord Dalrymple*, even where there was a donor pursuing, the King's Advocate did not appear, he had any right to join in the suit, *virtute officii*. So that it may be decided whether the *Stylus in Dallas*, already alluded to, warranted any inference that there was no special warrant in addition to the gift. Further, at a more recent period, while it was found that the nightingale declarator of boundaries, in protecting the rights of the Crown from encroachments, it was held that, in reductions of grants from the Crown, the Lord Advocate must produce a special warrant; *Earl of Breadalbane against Mackenzie*, July, 1785. In fact, in this case, he was properly supporting the grant of the Crown in favour of Lord Breadalbane.

But it is said that instances are to be found of reductions supported at the instance of the Lord Advocate alone, without any special warrant and in his office; and reference is made to the case of the reduction of the grant to *Morton of Orkney and Shetland*, 29th February, 1660;<sup>2</sup> and at the pleadings, reference was also made to Lord Advocate against *Rankin*, 15th February, 1660, the reduction of a decree of the Admiralty. There, it will be observed, as prior in date to the above cases, and therefore could not now be quoted as authority. But truly, this last was rather an unfortunate reference; for all the title of the report simply mentions the Advocate as pursuer, on reading the decision, it will be seen that it had been objected, that neither the Officers of State (observe, the Officers of State), nor the Commissioners of Prizes, he called in the process before the Admiral, and a special application had been made to the King, and he had granted express warrant to his Advocate to insist on the reduction: so adverse is this to the pursuer's plea. And I cannot but think that a similar authority, or a warrant from the Privy Council, had been given in the other case also; which, although it passed in absence, was too important a proceeding not to have been conducted by Sir John Nisbet, then King's Advocate, with all due formality. The decree, which was at the instance of his Majesty's Advocate for his Majesty's interest, was ratified in Parliament by the act c. 19, which again annexed Orkney and Shetland to the Crown.<sup>3</sup> I am therefore inclined to believe, that if the records of the Privy Council were searched, the process examined, such authority would be found, as in that reign it was so the custom, even in prosecutions for crimes, where the Advocate's power to prosecute was undoubted, to have a warrant from the Privy Council, or from the King's own hand.<sup>4</sup>

Indeed, it must not be held that in those cases in the Reports, where the Advocate is alone mentioned as the pursuer, which indeed are not many, mention is made of his warrant, as, for instance, *King's Advocate against Nithsdale*, 25th February, 1679, and *King's Advocate against Heriot*, 12th November, 1684, and 19th February, 1686;<sup>4</sup> that therefore there was none. For in the important case of the *Earl of Lauderdale*

<sup>1</sup> Fountainhall.

<sup>2</sup> Thomson's Acts, vol. vii. p. 566.

<sup>3</sup> Mackenzie's Works, vol. ii. p. 228.

<sup>4</sup> Fountainhall.

officers of the Mint, 19th January, 1683,<sup>1</sup> in which the parties were found in solidum for the sum of £72,000 sterling, the pursuer is stated to be his Majesty's Advocate. He is also pursuer in a question against the creditors of the Duke of Argyle, 29th January, 1684; and if the reports on these dates alone are considered, it might be argued that he insisted in these processes *virtute officii* for the Crown; but by a notice on 7th November, 1682, it will appear, that he is fully authorized to prosecute the first action before the Court of Session; and proceedings in the other are by special commission to the Court, and warrant from the King; see notices on 1st March, 7th April, and 24th September, 1683. However, in the recent cases of Lord Advocate against Lord Dundas, 17th May, 1836, and Lord Advocate against Lord Mansfield, same day (which are strangely enough referred to as supporting the instance in the present case), the summonses expressly bear to be at the instance of "our Advocate for our interest, in virtue of a mandate under our royal sign-manual to that effect." Yet no notice is taken of this in the reports. It is so also in the recent case of Robertson of Tullibelton. In the case in the Dictionary, the Relist of Murray, 18th February, 1502, is said to be against the King's Advocate. Adverting to the history of the office, I was surprised at this; but on looking into Balfour's Practicks, p. 237, from which this opinion is taken, it appears that this is a mistake; the defender is the King's Advocate.

No. 95.

Dec. 24, 1836.

King's Advocate v. Lord Dundas.

The King's Advocate, from his office, was of course, employed in conducting processes in which the King was concerned; and the circumstance of his being Judge also in the Civil Court, where of course he could not judge in the King's cases, will not appear so anomalous, when it is recollected that criminal causes were the province of another Court; and the Parliament and Privy Council also composed of many causes now belonging to the Supreme Civil Court.

The Lord Advocate adverts to the circumstance, that the King's Advocate was one of the Officers of State. He was, and is so; though he was not a very high officer, nor one of the earliest, nor had any peculiar powers as such. Little aid can be derived from this circumstance, in support of the title to pursue the present action, because it is not as an Officer of State, but as King's Advocate, that he insists.

The first appearance of the Officers of State as a separate and recognised body of the state, so far as I am aware of, is in the Parliament 1st October, 1487, in the time of James III.,<sup>2</sup> but the Advocate is not among them, although the King had then such an officer, as he appears previously in a process against John Ellem Butterden and others in 1479.<sup>3</sup> It is stated in a report about the precedence of these officers, given into Parliament, that the Clerk-Register is mentioned in the Rolls of Parliament as an Officer of State in 1482.<sup>4</sup> The King's Advocate (John A. Otterburne) is mentioned as one of the Commissioners, with the powers of Parliament in 1525. He was then a Member of Parliament as Commissioner for Edinburgh, of which he was also Provost.<sup>5</sup> But he is not among the Officers of State, not yet having attained that dignity. He, however, is a member of the Privy Council in March, 1525-6.<sup>6</sup>

The first appearance of the King's Advocate in Parliament as an Officer of

<sup>2</sup> Thomson's Acts, vol. ii. p. 175.

<sup>4</sup> Ibid. vol. vii. p. 200.

<sup>6</sup> Ibid. vol. ii. p. 299.



No. 96. State, and he is placed at the bottom of the list, seems to be in 1540,<sup>1</sup> which he was only an officer of the Crown, not yet raised to the rank of King's Advocate of State, or with its important duties and privileges. His salary in 1562 was £40 Scots,<sup>2</sup> and it is remarkable that the Advocate for the poor, a most peculiar and at that time, I believe, peculiar feature in our jurisprudence, had a half that sum paid by the Crown in 1557.<sup>3</sup> Nor was the deficiency of King's Advocate made up by his emoluments as a judge, for I do not know that time the judges had any salary. Their predecessors, the Lords of the Bench, were expressly required to bear their own costs; and the better to do this, to have the King's unlaw of the Court, which is £40, divided between the Clerk-Register, 1451, c. 63. Nothing is said as to salary at the institution of the present Court; and by 1579, c. 93, the King declares he will not put an ordinary judge any one who, among other qualifications for the office, "efficiently living of his awin." The act 1587, c. 43, ordains as the pains of the players, that the party against whom decree is given shall pay to the Advocate "twelve pennies of every punde" recovered before them, to be levied in any way, as the 40 shillings of ilk, decrees of before, which seems to have been only emolument previously.

If the office of King's Advocate was not very amply remunerated in the 16th century, it would appear that the King's Advocate was sometimes, in the exercise of his office, called upon to do what we should now reckon not very becoming of a State officer; for it appears that the summons of treason against James Crichton, Master Henry Lauder, Advocate to our Sovereign Lord, and three of the common people, without designations; and Lauder is actually examined on oath, along with the other witnesses before Parliament, to verify the execution of the messenger. He is not even employed where we might have expected would be; for my Lord Secretary and the Clerk of Register present a letter to the King to the Lords of the Articles in 1540, about an excambion betwixt the Abbey of Dunfermline and the Crown.<sup>4</sup>

The Officers of State, I have said, are first entered in the Rolls of Parliament in 1487, and in the next Parliament 1487—8, they are enumerated under the term clerici.<sup>5</sup> They are again termed clerici in the Parliament 3d Febr. 1489—90. But this title is dropped in 1491, and does not seem again applied to them.<sup>6</sup>

They seem first to be mentioned as officarii in the Parliament, 16th Febr. 1567, the first after Queen Mary returned to Scotland, and in which she was in person, where the Lords of the Articles are set down una cum officariis then follow six officers, the last of which is the Advocate.<sup>7</sup>

<sup>1</sup> Thomson's Acts, vol. ii. p. 355 and 368.

<sup>2</sup> Branton and Haig's History, p. 179.

<sup>3</sup> Ibid. p. 133.

<sup>4</sup> 18th July, 1539, Thomson's Acts, vol. ii. p. 354.

<sup>5</sup> Thomson's Acts, vol. ii. p. 366.

<sup>6</sup> Ibid. vol. ii. p. 180.

<sup>7</sup> Ibid. vol. ii. p. 216.

<sup>8</sup> Ibid. vol. ii. p. 547.

\* It is a singular coincidence, that in the native Courts of India, the officers of Government are designated by the plural of an Arabic word, the singular simply means a clerk.—Malcolm's Mem. of Lord Clive, vol. ii.

[ Montrose, 1641.]

a party thought himself unjustly forfeited, and wished to set aside the e did not bring it directly against the King, nor against the King's Advocate had carried on the process of forfeiture, but against those who were sion of his estate, as well as the King's Advocate.

John Stirling, sometime of Kier, raises a summons against the King's and three persons, donators of his estate, 10th May, 1527.<sup>2</sup>

manner, the reduction in 1567, of the forfeiture of the Earl of Huntly r Gordons, is brought against the Justice-General, the two Advocates of n, her Thesaurer and Comptroller for our said Soverane Ladie's interest, hers having interest.<sup>3</sup> In this case the estates had not been gifted.

her instance may be noticed, the reduction of the forfeiture of the Earls s, Huntly, and Errol, is raised against the Thesaurer, and Comptroller, cate, and against the Clerk of Register and his deputies, keepers of the f forfaultrie, and all others having interest.<sup>4</sup>

reasurer and comptroller, in these last instances, were as much the pro- f the Crown's interest as the Advocate could be.<sup>5</sup> The first of these vied the casualties of superiority and customs due to the Crown, the other and duties of the Crown lands.

licers are cited instead of the Sovereign, and to defend his interest, on the at it was thought improper to call the King personally into Court. The ver, was not extended to the Regent. Thus the Queen Regent is de- a reduction of a forfeiture in 1558.<sup>6</sup> John Duke of Albany, in 1525,<sup>7</sup> as Earl of Arran, in 1543,<sup>8</sup> along with the treasurer and advocate, or the parties having interest.

stances are innumerable, showing that the King's Advocate did not insist Crown's interest, but when he did, only in concurrence with other officers.

action is brought by one designing himself heritable few fermorar, and e tenant of lands, against the Clerk of Register, Comptroller to our a Lord, and his Highness Advocate for his Majesty's interest, in the mat-

**No. 95.** troller, and Advocate for his interest, and the Archbishop of St Andrews, are submitted by the Archbishop, and his Majesty's officers above named, 1609.<sup>1</sup> The proceedings are held by others of the King's officers, without the concurrence of the Advocate, in what may be called their own department. Thus, a question as to the right of an heir to serve to lands comprised from his father, on which service had not been taken, is tried by the Comptroller in an action against *L. Sempil*, 24th February, 1655.<sup>2</sup>

Dec. 24, 1826.  
King's Advocate v. Lord  
Dunglas.

Again, at the Treasurer's instance a case is advocated, and a compromise is charged, because the defender was fugitive for treason;<sup>3</sup> the consequence of which was, that his single escheat fell to the Crown, and was under the charge of the Treasurer.

The King's Treasurer and Advocate pursue an action for usury.<sup>4</sup> A bankrupt having died after arrestment, the creditor calls the Treasurer and Advocate for the King's interest in the forthcoming; Clerk, 26th February, 1611.<sup>5</sup> And Lord Stair b. 8, t. 8, sect. 46, says expressly, that a bastard's creditor may affect his estate after his death, so as to exclude the donator or fiek, "by adjudication contra iudicatum jacentem, calling the Officers of State and donator."

The reduction against the Earl of Strathern, 22d March, 1633, is at the instance of the King, his Treasurer, and Advocate.<sup>6</sup> The King claimed, as nearest heir, in virtue of his descent from Rob. III.

Certain Covenanters having been tried in absence by the Justice, at the instance of the Advocate, by warrant of the Privy Council, on the 15th and 16th August, 1667, and doubts having occurred as to the legality of such a proceeding, they are presented to the Lords of Session, not by the Advocate, but by the Treasurer's Depute, although drawn up by the Advocate.<sup>7</sup> The deliverance, 26th February, 1667—8, is that it was legal, and the act 1669 was passed accordingly.

Nay, so late as 1685, the Duke of Queensberry, as constable and captain of the Castle of Edinburgh, brings a reduction against the heritors and possessors of the King's stables, alleging they were annexed property, as part and pertinent of the castle.<sup>8</sup> 11th March, 1685, Fountainhall.

The act 1600, c. 14, distinctly recognises the practice of the King's officers pursuing and defending the King's causes, and provides against their negligence in doing so. According to the pursuer's argument this act should have been applicable to the King's Advocate alone.

Perhaps your Lordships will pardon me, if I occupy a few moments in pursuing this historical detail as to the Officers of State.

The Officers of State were members of Parliament in virtue of their offices, and also voted with the Lords of the Articles.<sup>9</sup> We may presume they were always members of the Secret or Privy Council, and in fact they formed what was equivalent to the Cabinet Ministers of the Scottish monarch. Hence the act 1585, c. 13, which in the general case, abolished the practice of summoning a person to answer *super inquirendis*, has this exception, unless the letters be subscribed by

<sup>1</sup> Thomson's Acts, vol. iv. p. 453.

<sup>2</sup> May 1611, Mor. p. 4698.

<sup>3</sup> Ibid. p. 778.

<sup>4</sup> Mackenzie's Works, vol. ii. p. 74.

<sup>5</sup> Thomson's Acts, vol. vii. p. 562.

<sup>6</sup> Balf. p. 424, c. 21.

<sup>7</sup> March 2, 1611, *ibid.* p. 7327.

<sup>8</sup> Durie.

See also Stair's Dec. vol. ii. p. 451.

<sup>9</sup> Mackenzie's Works, vol. ii. p. 537.

at least four of the chief Officers of State, the Chancellor, Treasurer, or Secretary, being always one. It may be noticed, that the Advocate is not mentioned here, but this probably because he was prosecutor of State crimes.

The Officers of State had an appropriate place in the Scottish Parliament.<sup>1</sup> They sat on a bench one step lower, and immediately next in front of the Throne, the Chancellor sitting in the middle, and the rest on either side of him (next to them in front, and only one step lower, sat the Lords of Session); and as the Officers of State voted both with the Lords of the Articles and in Parliament, their influence in favour of the Crown was of course great, and some jealousy seems to have occurred on this head, so that James VI. in 1617,<sup>2</sup> agreed that more than eight should never vote with the Articles, or in Parliament; and it was one of the prerogatives of the Crown which Charles I. was obliged, in 1641, to surrender;<sup>3</sup> so that the right of nominating them, as well as the Lords of Session and members of the Privy Council, was conferred on the Estates of Parliament; at least the nomination was to be with their advice, and it was to be *ad vitam aut culpam*. In 1649 this right of nomination was assumed by the Estates alone.<sup>4</sup> This was rescinded at the Restoration, and the Royal prerogative again restored, when the Officers of State came to be distinguished into the great and the lesser, and in the latter class was the Lord Advocate.<sup>5</sup> Considering the manner in which the Lords of the Articles were chosen, and the addition to the influence of the Crown, by the Officers of State voting along with them, there probably never had been occasion for the Sovereign to claim a veto upon any of their resolutions; and accordingly it does not seem to have been ascertained that he had any such privilege. It was admitted that he had a negative in Parliament, although Fountainhall says this is not very ancient with us.<sup>6</sup>

By 1690, c. 3, the Officers of State might be nominated to be present with committees of Parliament, but they were only to propose and debate, but not to vote. They continued, however, to vote as Members of Parliament. But to turn from this digression.

The custom which we have seen of summoning those Officers of State, whose departments of duty would be affected by the proceedings, might easily have paved the way for the practice of summoning the whole Officers of State to represent the Crown, in questions in the Civil Court, and will also account for their appearance on behalf of the Crown as pursuers. But perhaps the practice may be traced to the letter of the King, or at least it was riveted by the publication of this letter to the Privy Council, 13th December, 1683, by which he commissioned his seven great Ministers of State to manage the affairs in Scotland:<sup>7</sup>—The Chancellor, High Treasurer, Justice-General, Privy Seal, Treasurer-Depute, Clerk-Register, King's Advocate, and the Secretary, if in Scotland; thus leaving out the Justice-Clerk, the only Officer of State omitted, and putting the Justice-General in his place. They called themselves the Secret Committee. Fountainhall says, "They were sent to the articles to the Parliament, to be a preparatory Committee to the Privy Council, to mould, form, and prepare matters, so that the rest of the Councillors

No. 95.

Dec. 24, 1836

King's Advocate v. Lord

Dunglass.

<sup>1</sup> Spotswood's History, App. p. 33.

<sup>2</sup> Thomson's Acts, vol. iv. p. 526.

<sup>3</sup> Ibid. vol. vi. p. 421.

<sup>4</sup> Ibid. p. 152.

<sup>5</sup> Ibid. v. p. 403.

<sup>6</sup> See Parl. 1696, vol. x. p. 3 and 4.

<sup>7</sup> Fountainhall, vol. i. p. 250.

No. 95.

Dec. 24, 1832.  
King's Advocate  
v. Lord  
Dunfermline.

will have little more to do save to ratify their conclusions. There is nothing to be proposed in Council, and no account of affairs or recommendations to be transmitted to the King, but by them."

Considering the importance thus conferred on the Officers of State in the management of public affairs, it was extremely natural that they should come to be held as representing the Sovereign, being those to whom any claim by a subject upon the Sovereign was to be addressed, and whose opinion would most probably lead to its admission or rejection, so that instead of the Officer, in his peculiar department, being called as defender, or setting himself forth as pursuer on behalf of the Crown, as formerly, the Officers of State appeared as pursuers or defenders; and accordingly we find that this form, unknown before, has been invariably observed, at least from a period soon after the date of the above letter, and uniformly ever since, in all cases where the Crown is defender, and in most cases also where the Crown is pursuer. Thus the mutual declarators as to relief from a sub-ent of the Excise of Fife, on account of a supervenient law, is at the instance of the Officers of State, Crawford, 1st July, 1696, Fount. In a process of valuation of teinds in 1699, the Officers of State along with others, were called as defenders. Council, vol. i. p. 426. The Earl of Morton, in 1701, raised a reduction of the forfeiture which carried off Orkney and Shetland from his family, and directed it against the Officers of State.<sup>1</sup>

In a competition between the donator of the late Earl of Dunfermline's furniture and the creditors, not the Lord Advocate, but the Officers of State, appear to support the gift. 8th December, 1702, Fountainhall.

The change which had taken place in the offices of Treasurer and Comptroller on the institution of the Scottish Court of Exchequer, and the still further changes, which occurred in consequence of the Union, and the transfer of the Government to London, riveted this practice. And although the abolition of the Privy Council of Scotland, and of such offices as Chancellor and Secretary, may have extended the political importance of the office of Lord Advocate as an officer under the Crown, it certainly has not increased his legal powers as Advocate for the Crown, nor made him the representative of the Crown, either as pursuer or defender of its rights or property in the civil court. This he must be content to share with the other Officers of State, and as included among them. If virtus officii, the Lord Advocate was entitled to pursue in his own name, in support of the civil rights and prerogatives of the Crown, it would be equally competent for the subject to call him into the field as defender, to support those rights. But he never is so; the action has always been brought against the Officers of State.

In addition to the old cases already noticed, I may mention, that in valuation of teinds it has been uniformly so. See cases in Fol. Dict. vol. iv, p. 89. Also in disputes about patronages against the Crown; Cochrane, 4th June, 1700; Kilkerran as to patronage of second minister of Culross; Graham of Balgonie, 17th January, 1758, patronage of Monydie. Urquhart of Meldrum, 27th Jan. 1752, patronage of Cromartie; so are they in a question as to teinds in one parish drawn by the minister of another. Minister of Eymouth, 4th February, 1750; and as to reclaiming teinds mortified by the Crown to another minister. Fount.

<sup>1</sup> Thomson's Acts, vol. x. p. 272, 339.

son, 29th June, 1824.<sup>1</sup> To constitute a debt against the estate of a bastard, the Officers of State are defenders. Fergusson, 20th July, 1749, Kilkn. Also in a question as to the tenure of lands. Duke of Buccleuch, 5th August, 1768. As to the sale of a house mortified for the use of the minister. Wilson, 4th July, 1818. As to immunity from taxes on lead. Duke of Queensberry and Lord Hopetoun, 15th December, 1807. So are they in a process as to entering Crown vassals in Orkney. Sir L. Dundas, 3d February, 1779. A claim of compensation for an office abolished, is brought against the Officers of State. Hay, 11th December, 1832. The question as to aliment of a criminal, is tried with the Officers of State on behalf of the Crown. Ramsay, 1st March, 1825. Commissioners of Supply of Wigtonshire, 5th June, 1827. The claim for naturalization by a holder of Bank of Scotland stock, was tried with them. Macao, 14th November, 1820.

No. 95.

Dec. 24. 18  
King's Adv  
cate v. Lord  
Dunglas.

In like manner, when the Crown is pursuer, the action is always at the instance of the Officers of State, except in the three recent cases of patronage already alluded to, which were raised under a special mandate and authority, narrated as the title to insist, and in one other instance I am now to advert to.

In 1794, a declarator was raised at the instance of the Lord Advocate for his Majesty's interest against M'Kenzie of Cromantee, relative to the patronage of no less than thirteen churches. It was disposed of in this Court, 19th May, 1808, and in the House of Lords, 28th June, 1814. The case is not reported; but in looking into the appeal cases, and seeing nothing said as to any warrant or authority in which the Lord Advocate proceeded, I thought it possible that here there might have been a deviation and exception from the general rule, but thought it of little consequence, except as showing that on one occasion a Lord Advocate had thought himself entitled *virtute officii* to institute such an action; for it appeared that Mr Mackenzie, instead of objecting to want of title, had immediately raised a counter-action against the Officers of State, bringing them into the field. However, upon ending to examine the original steps of process, I found that a warrant under the sign-manual was produced along with the summons. The Lord Advocate probably preferred raising so serious an action as this, and where the result showed that the attempted reduction must have been reckoned very doubtful at the least, by instituting it in a form which required production of a mandate from the Sovereign, rather than simply libelling a summons at the instance of the Officers of State, which implied no higher responsibility than his own. This is the first example I have seen of this form, and it probably was what led to the more recent case. In every other instance where the Crown is to pursue, the action has always been in name of the Officers of State.

Thus to begin even with patronage. The question as to the patronage of Clunie was decided in favour of Gordon of Clunie, 13th November, 1821, was at the instance of the Officers of State. The process with Lord Haddington relative to his rights over the King's Park, was at their instance, 24th June, 1823. They presented a bill of suspension to the right of a creditor, to point in the Palace of Holyroodhouse. Lord Haddington and Officers of State v. Laing, 14th November, 1821. They are also appellants of a decree of a Presbytery, relative to a manse. Bremner, 11th July,

<sup>1</sup> Shaw's Teind Cases.



No. 95. 1825. The reduction of the set of the burgh of Brechin was at their instance, 17th May, 1827. The question about a cemetery in Arbroath Abbey against Ouchterlony, 27th June, 1823. In the ranking and sale of property, belonging to the burgh of Auchtermuchty, it is the Officers of State who appear, 22d May, 1827. Reduction-improbation against the service of the Earl of Stirling, and its warrants, is also at the instance of the Officers of State, 18th May, 1833.

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No. 24, 1836.  
King's Advocate  
v. Lord  
Stirling.

I may here just remind your Lordships, so as not to omit any case that I am acquainted with, though perhaps not perfectly analogous, of the appearance of the Lord Advocate for his Majesty's interest, in the English divorce cases in 1814. There was no contradictor in those cases, and the jurisdiction of the Scottish Consistorial Court had been sustained. The Lord Advocate claimed to be heard on behalf of the King, as entitled to restrain one of the Courts from extending its jurisdiction, and as guardian of the public, to prevent an improper assumption of power, in pronouncing judgments which would be illegal, and which therefore could not be recognised by other countries as the judgments of a court of competent jurisdiction. The instance, however, was not sustained, and the appearance of the Lord Advocate dismissed. The petition was presented in the case of Gordon or Pye v. Pye, and it is dated 1st July, 1814.

I have now brought this tedious enquiry to an end, and I think I am fully warranted in stating the result of this examination to be, that when it was laid down by the Court in 1693, that the Lord Advocate cannot prosecute any action at the King's instance tending to challenge the right of any of his Majesty's subjects without a special mandate, this was merely declaratory of the law, and that the practice since has been quite uniform, and without a single exception; so that the Lord Advocate has not, during the last century and a half, raised any such process in his own name as pursuing for the Crown, except when authorized by statute or by the Sign-manual.

Indeed, the practice is so uniform to raise civil processes at the instance of the Crown, either in name of the Officers of State, or of the Lord Advocate as specially authorized on behalf of his Majesty, that seeing the different course that has been adopted in this case, as well as in the recent cases against M'Lean, 12th January, 1836, and against Campbell, 5th March, 1836, and in particular, advert- ing to the result of the latter case, where the instance, as an instance for the Crown, was not maintained, but it was argued as being solely at the instance of the Commissioners of Woods and Forests, and now of the Lords of the Treasury in their room,—I am almost tempted to hold the statement of the defender well founded, that it was not intended, in the present case, to libel an instance for the Crown separate from that for the Commissioners of the Woods and Forests, although it has been since thought expedient to found upon the ambiguous mode in which the title is set forth to take the benefit of the right of the Crown also. For nothing could have been more easy, if so intended, than to set forth the instance of the Lord Advocate as pursuer, in name, and in behalf of his Majesty, in virtue of a special warrant; and also for the Commissioners of Woods and Forests, in virtue of the acts referred to; and concluding that the commission should be set aside at the instance of the Crown; and being so set aside, that then the defender should make payment of the bygone rents, improperly levied by him, to the Commissioners of Woods and Forests entitled to levy the same. But no such course has been followed.



be effectually tried.

re your Lordships proceed to the further advising of this cause, I am to correct an inaccuracy into which I have fallen relative to one of the referred to yesterday—the appearance of the Lord Advocate in the divorces ish marriages in 1814. The case is not reported, and I learn from Lord vbank that I was mistaken in thinking the instance was dismissed by the -it was withdrawn by the Lord Advocate, on the ground that a contradic- now appeared in some of the cases, so that the necessity of his appearance iated. Thus, at least, his appearance was not sustained by the Court. I d, yesterday, the case was not analogous, even if it had been otherwise.

o JUSTICE-CLERK.—I have no hesitation in stating fully the grounds of ion which I have formed in this case. It appeared to me, after the dis- which took place, that we had two points presented for our decision,—one to the validity of the title of the pursuers to insist in this action; and the lative to the merits of the action itself. I was a good deal surprised to see strongly disputed in the case for the pursuers; and I was led anxiously to the course of proceedings, and I came to be decidedly of the same on this point as that expressed by Lord Medwyn. I think it, however, ry to state shortly the grounds of that opinion. Your Lordships will ob- hat this action was followed by preliminary defences; and, upon the 25th , 1834, Lord Jeffrey pronounced an interlocutor in these words :—“ Hav- d parties’ procurators upon the libel, and preliminary defences, reserves ration of the first preliminary defence, on the want of title to pursue, till its of the cause come to be disposed of: Finds, that all parties are not and that the second preliminary defence is well founded; but in respect pursuer has, at the bar, intimated his willingness to call the defender’s in a supplementary action, sists process till the third sederunt day in No- next, in order that such action may be raised and brought into Court.” jection was cured by a supplementary summons. The interlocutor, as your

. 95.

H. 1836.

Advoc.

Lord

R. 1836.

pleas in law on both sides expressly refer to these objections to the title. The case was ordered to be argued, and again it came before your Lordships in cases, where the same discussion took place as to the title; and I see on the papers which I hold in my hand, an observation which I made to this effect, that it is an important and difficult question, both on the title and merits, and is a proper subject for a hearing. We ordered a hearing accordingly, and we had the whole point of the title fully discussed, as well as the question on the merits; and your Lordships, on the 9th of July, 1835, ordered mutual cases, in consequence of a note from the pursuers; and in these cases the whole question is before you. It does not appear to me that this objection to the title has been in any way disposed of. No judgment has been given upon it; but an express reservation is made till the case comes forward on the merits, and it remains now as the necessary preliminary point which your Lordships have to decide and dispose of in the first instance.

In considering the objection in regard to the title, your Lordships are aware in what shape it is presented to us. It originally was merely that the pursuers, holding them to be the Commissioners of Woods, Forests, Land-Revenues, Works, and Buildings, had no title to pursue. But the Lord Advocate stated that the defenders were in a mistake in holding it to be merely a summons in name of the Commissioners of Woods and Forests, because he was proceeding both for them and for his Majesty's individual interest. This was met by a full discussion; and it was not till after the close of the record, on the 23d February 1836, that the mandate or special warrant was produced. This is the shape in which the case is presented to your Lordships.

The first point then is, whether there is, under the summons which is now before your Lordships, a double or a single instance? Are there two parties joining in pursuing this action, or is there only one before you? On this point of the case as I humbly differ in some respects from Lord Medwyn, I think it necessary to state the grounds on which I do so. After anxious consideration of the case I have come to the opinion, that there is before you a summons at the instance only of the Commissioners of Woods and Forests. It is necessary for your Lordships to pay particular attention to the structure of the summons. It bears to be at the instance of the Right Honourable Francis Jeffrey, who was then Lord Advocate. Now it does, with great submission, appear to me, that this specification of the way and manner in which the summons sets out, is just that which is adopted to bring a challenge for and on behalf of these Commissioners; because your Lordships will observe, and the schedules to the act demonstrate, that in all their actions and proceedings, the Commissioners are said to act on behalf of his Majesty—like a board of revenue, but acting on behalf of his Majesty, and as the act of Parliament says, "They shall sue and be sued by his Majesty's Advocate." If the words that are here used, "at the instance of our Advocate, for and in name on behalf of US, and of the Commissioners of our Woods, Forests, Land-Revenues, Works, and Buildings," be correct and appropriate language,—if this is the proper way in which parties are brought into the field as pursuers, it is material to observe, that the reference made on the fourth line to these special acts of Parliament, shows distinctly, that as the persons so described refer to them as the warrant and authority, it is just a declaration that the instance raised in the summons before you is for these commissioners alone. One thing is clear, that according to the established rules applicable to all summonses, there is

complained of is to the prejudice of these Commissioners themselves, as being under the statute. Then the concluding part of the summons is as com- appropriate, for the words, "*we and the said Commissioners*," are syno- nymous with *us and* said Commissioners. And is this not plain and distinct also, as to conclusions as to payment, which can only be made to the Commissioners, and the persons entitled to collect and receive money? The conclusion is, that payment shall be made to the said pursuers. Upon a critical examination of the instrument,—and one necessary and imperative on the Court to enter into,—I am decidedly of opinion that this summons neither bears upon its face, nor does it purport to be that summons which it is now held to be by the argument in the case of the pursuers. It is clear, that, if within the four corners of the summons there was meant to be agitated the question as to an invasion of the Royal prerogative or an undue exercise of it, by an act ultra vires of the Sovereign, there have been adopted, in various parts, words, to show that there were separate and distinct interests meant to be concluded for. I apprehend that there is a circumstance, however, that removes all doubts on the subject. It is a case which your Lordships will recollect was decided in February last, in regard to the reduction of the trust-settlement of a person of the name of Mure Campbell. The case was brought before the Court by a summons of reduction of his trust-settlement: I have it in my hand, and I beg to say that, although no doubt the case was raised on the right of his Majesty as ultimus hæres, but as falling, as was decided, under the department of Woods and Forests, it will be found, that the nature of this summons is the same as that now before your Lordships. It is the summons of "the Right Honourable John Archibald Murray, our advocate, for the purpose of the reduction, for, and in name and behalf of us," &c. An objection was brought forward at the instance and calling of the summons; and your Lordships know how it was disposed of in Court. But I wish to call your attention to a minute given by the part of the Lord Advocate; that minute sets forth in the close of it, the most important,—it states, that, in consequence of the change introduced by an Act of Parliament "It therefore became necessary to assist the said Commis-

No. 95.

Dec. 24, 1836.  
 King's Advocate  
 v. Lord  
 Douglas.

stance before us in the name of his Majesty, which is a thing we never would do in any instance. This is the clear opinion expressed by the counsel for the Crown in reference to a summons, identical in language with the present; and it is quite impossible for me to put a different construction on the present summons. There is complete proof that that was the nature of the summons then before you; I do not think that the summons now before you bears to be, or professes to be, or is intended to be, any thing but a summons bearing the title to pursue to be, as supposed to exist, in these Commissioners of Woods and Forests.

In regard to the case which is now before us, I do not think it necessary, in tracing the history of the hereditary revenues of Scotland, to go further back than the statutes that were passed in the reigns of the last two Sovereigns and his present Majesty. I am fully satisfied that it is unnecessary to refer to the acts in the reigns of George I. and George II. as the whole of the Scottish hereditary land-revenues were completely reserved to all the Sovereigns of the House of Brunswick, and they were in the full right of the whole of them, down to the period of surrender made by his present Majesty. The Legislature had provided, that the land-revenues of the Sovereign, in England and Ireland, should be disposed of in different ways, and they were completely surrendered by George III,—but there were most special and pointed reservations of the rights of the Sovereign to the hereditary revenues of Scotland, which were left to be enjoyed by his Majesty, according to the constitutional law of the land as vested in him for the purposes contemplated in the statutes. By the act 1st of William IV. your Lordships know that his Majesty did surrender the whole of those rights quoad Scotland. I should here mention, that the only limitation that, in any of these acts, I can observe, in regard to the rights possessed by George III. and George IV. is in that statute of the 59th George III., and which is so far a limitation in their enjoyment. It is there declared, that with regard to the power to grant pensions, each pension shall not exceed £300 a-year; and that the total amount shall not exceed £25,000; and this the only limitation that I can discover in those acts.

The Scottish revenues were surrendered by the 1st William IV. ch. 25; but then it was a conditional surrender, "saving always to all and every person and persons, bodies politic and corporate, their heirs and successors, executors, administrators, and assigns, all such GRANTS, gifts of mortification, RIGHTS, titles, estates, customs, interests, CLAIMS and DEMANDS WHATSOEVER of, in, to, or out of the revenues, hereditaments, and others BELONGING TO HIS LATE MAJESTY KING GEORGE THE FOURTH IN SCOTLAND, as they or any of them had, or ought to have had, at the making of this act, as fully and effectually, to all interests and purposes, as if this act had never been made, any thing herein contained to the contrary notwithstanding." Here then was a complete reservation of all rights, grants, mortifications, &c., that had been granted by his Majesty George IV., no doubt subject to the general rules of law, but showing that the Legislature contemplated the existence of a variety of grants and rights of that description. That your Lordships are aware that this was followed by the act of 2d and 3d William IV., which gave the management to these Commissioners of Woods and Forests, it having been previously vested in the Barons of Exchequer in Scotland. This act gave power to take it from the Barons of Exchequer, and to give it to these Commissioners, with exactly the same powers. I would ask, at the time when by law the Court of Exchequer had the entire management, control, and direction of those funds, under the authority of his Majesty's advisers, would

have been possible,—or would your Lordships have listened to an attempt on the part of the Barons, or the Lord Advocate in their name, to bring forward such an action as that which is now brought forward? I am speaking always in reference to grants that had passed under the Great Seal, and not speaking of subordinate rights at all.

No. 9  
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Dec. 24, 1  
King's Ad  
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Then followed the act of 3d and 4th William IV. ch. 69. Unquestionably there are here important clauses in regard to this question; and first, your Lordships will observe, that it is an act “to extend and enlarge the powers of the Commissioners of his Majesty’s Woods, Forests, Land-Revenues, Works and Buildings, *in relation* to the management and disposition of the land-revenue of the Crown in Scotland.” Your Lordships will find that it professes to give the very same powers and authority which they had by law, in regard to the Crown revenues of England and Ireland. The preamble, after reciting several former statutes, sets forth, “That it is expedient that the said Commissioners should have the same powers in Scotland as is, by an act passed in the 10th year of the reign of his late Majesty King George IV. provided with respect to the land-revenues in England.” So that here, as the powers of those Commissioners had been defined by the 10th of George IV., that act declares, that every thing therein contained, as to their powers, should be held as to be extended to them in regard to Scotland. There is contained in it this important clause, “in payment and discharge of any annual sum or sums of money, or any pensions already lawfully charged, or to be charged thereon, respectively, and in the payment of any other principal sum, and the interest of any principal sum or sums of money already, or which may hereafter be lawfully charged upon the said lands and other property and subjects, and subject to the applications aforesaid, the said annual income shall, during the life of his present Majesty, be carried to and made part of the Consolidated Fund of the United Kingdom of Great Britain and Ireland; and from and after the demise of his present Majesty (whom God long preserve), shall be payable, and paid to his Majesty, his heirs and successors.” Then your Lordships recollect that the 18th section has an express proviso, “That the passing of this act shall not vacate the appointment of any chamberlain or collector of the revenues and profits of any of his Majesty’s lands, or other property or subjects to which this act relates; or vacate, render void or voidable any security given by or for such chamberlain or collector, but every chamberlain or collector who shall be in office at the time of the passing of this act, shall continue in office until his death or resignation, or until he shall be removed by the Commissioners for the time being, of his Majesty’s Woods, Forests, Land-Revenues, Works and Buildings, or until his appointment shall cease, under provisions herein contained or referred to.” So that, while it gives the whole management of these funds to the Commissioners, there is an express reservation of all existing rights and grants and a reservation that the passing of the act shall not have the effect of removing persons that are therein mentioned. As this act expressly refers to the 10th of William IV. c. 50, we are under the necessity of looking at the provisions of that act; and the 12th section has this proviso, that the Commissioners shall, from time to time, have the power to remove “any deputies, clerks, receivers, surveyors, or persons already appointed to, or exercising or enjoying any offices connected with the said possessions and land-revenues of the Crown to which the said act relates, who shall be hereafter appointed under the provisions of this act.” According to the phraseology of this section, unquestionably it confers

1836. powers; but they are powers, in my apprehension, limited to officers of an inferior description. Your Lordships see that the words are, "deputies, clerks, receivers, surveyors, or other officers;" and when you come to look to the power of appointment, and find it co-extensive with that of removal, I hold that description of officers to be officers of a lower grade. We know that there are high and important officers in England and in Ireland, and there does not appear the slightest glance of any power to remove such higher officers, particularly such as keepers and rangers. The last clause of this statute, accordingly, is an important one, for it provides that nothing contained in it "shall extend, or be construed to extend to abridge or interfere with any rights of his Majesty, his heirs or successors, or of the Lord High Treasurer, or of the Commissioners of his Majesty's Treasury, or the Chancellor of the Exchequer for the time being, or any grantees of the Crown, in respect of any appointment usually made by his Majesty, or the said Lord High Treasurer or Commissioners, or the Chancellor of the Exchequer, or such grantees, or with the right of appointment of master keepers, under keepers, or other officers of or in any Royal Forest, so long as such last mentioned right shall be vested in any warder or ranger of any such forest, or with any privileges or advantages which may be rightfully enjoyed or claimed under any letters patent granted by his Majesty, or his predecessors, of any office, bailiwick, walk, or lodge, within any of the Royal forests to which this act relates." Now this act being that which confers those powers on the Commissioners, in addition to the explanations given in the 3d and 4th of William IV., and when we see in it a clause which reserves all these higher rights, such as those of keepers and rangers, and such rights as are established and conferred by letters-patent: and when we see as complete and clear a distinction in regard to the extent of the powers of removing on the one hand, and appointing on the other, it does not appear to me to be possible, by any construction I can apply to this clause, to find that there is any power in these Commissioners to try the validity, or to contest the right of any office or grant held by letters-patent, or under a commission passing under the Great Seal. It is quite clear, however it may be spoken of, that this is a question which involves the exercise of the Royal prerogative;—it is a question to try the validity of one of the highest rights that can be exercised; therefore, as I have not been able to discover any power whatever which is directly given, it is impossible that we can imply such a power, contrary to all principles of constitutional law. A right to bring such a challenge must be conferred by the express words of the Legislature, before any one party can avail himself of such right; and I can discover no authority whatever for the Commissioners bringing these rights into challenge. I therefore agree with Lord Medwyn, that there is a complete answer to that part of the 18th section, which has been founded on, as to the continuance in office of any chamberlain and collector, "until he shall be removed by the Commissioners," as being applicable only to the powers and duty of the Commissioners, after the right to the office has been declared void by the competent authority, under a valid power to challenge it.

If your Lordships are of opinion, that there is a double instance, it only remains to see, whether his Majesty's Advocate is entitled to insist on the conclusion of this action. I am, however, free to say, that I do not find the slightest difficulty in arriving at the conclusion, that the late production of the warrant, under the sign-manual, can have no effect in this question. This was a good or bad instance before that production, which was posterior to the order for the first

to attempt to enlarge on the force of those observations, because I am according to all the authorities we have, and according to the whole stream of opinions, as far as they have been discovered, that there does not appear to be fault in the Lord Advocate *virtute officii* to insist in any such reduction as is sent. It may be difficult to ascertain what were the principles of originally obliging the Officers of State to appear as pursuers or defenders for the interests of the Crown; but, as has been hinted at, they were, from their constitution, nearly his Majesty's constitutional advisers to a certain extent, for the treasurer, clerk-depute, and secretaries, were always in the list of Officers of State, and when they appeared, it was impossible to entertain a doubt that they were entitled to sue and defend the interests of the Crown; and the way in which the Lord Advocate afterwards proceeded with the assistance of the sign-manual, was just what there the Court was entitled to hold on the face of that instrument, that he was in direct communication with his Majesty's advisers, as it must be counter-signed by the Secretary of State; and, therefore, nothing more was required as his duty. But in the decisions referred to, we have the clear indication of what was the opinion of the Court was, as to the right of the Advocate, to appear without the sanction of the sign-manual. In the case of Moncrieff, in 1693, for instance, it is of importance to attend to how the report proceeds:—"The King's Advocate debated against Moncrieff of Reidy's right of presenting one of the matters of Session, mentioned 11th January last, was decided, the Chancellor being present;"—(Here there was no attempt to do any thing behind the backs of the parties interested for the Crown)—"wherein the Lords, by several votes, found the following points:—1mo, That John Adam, the private party's right being now settled, and transacted, that the King's Advocate could not insist for the King's interest, without a special warrant from his Majesty; there being only two cases in which he could quarrel the subjects' right, either by giving his concurrence to act against one subject against another, or when he had a mandate from the King to do so; otherwise he might vex all the lieges with processes, and open their chests." I beg to say, that the subsequent part of the report is important,



95. when his Majesty's interest is involved. I agree therefore with Lord Medwyn, who has discovered that in 1794—a case calling in question the right of the family of Cromarty, to 18 or 19 patronages—there was a special mandate under the sign-manual, where the challenge was brought ten years after the restoration of that estate. We have a whole train of cases in which signs-manual are produced, and are embodied in the summonses; and I am therefore clearly of opinion that, without a special mandate, in writ, the Lord Advocate has no right whatever per se to prosecute in regard to any reduction where the King's interest is supposed to be involved. It is the most important of all challenges to reduce a grant made by a prior Sovereign to a subject, on the ground of being ultra vires; and I think that the very circumstance of the attempt made to cure that defect in the present case, is just another testimony to the fact, that when such a challenge is persisted in, this is the course the Lord Advocate is to adopt. Even supposing a double instance here, which I think cannot be found, I am of opinion that the Lord Advocate has no more title than the other pursuers had. I abstain from saying any thing as to the merits. When we have a proper pursuer before us, we must proceed in deciding the case according to the rules of law.

LORD MEADOWSBANK.—The grounds on which the judgment to be pronounced must rest, have been so fully explained and thoroughly exhausted by Lord Medwyn and your Lordship, that I feel it to be extremely irksome to occupy the time of the Court by giving a detailed opinion upon the case. But as it is set forth in the additional paper for his Majesty's Advocate, that the present is a suit raised in consequence of an address to the Crown from one of the Houses of Parliament, and as it has been pleaded by the parties, with no ordinary anxiety and talent, I deem it incumbent upon me to give such an indication of the grounds of my judgment as to exhibit, at least generally, the views I have taken of the argument upon both sides, and to point out where, although arriving at the same conclusion with both your Lordships, there may be a shade of difference between us, upon some of the matters submitted for our consideration. The time, however, which has been already occupied by the deliberations of the Court, renders it imperative upon me to abridge, to the utmost of my power, the notes which are lying before me; and I am sure that, after what has been already stated, the parties can have no reason to regret that I at least should refrain from taking an extended view of the argument, or of the matters which it has been our duty to consider. Indeed, were I to go at much length into the case, I should just have to repeat what has been already gone over, and that in a manner much less satisfactory and more imperfect than that with which the subject has already been so admirably presented to their attention.

Without preface, therefore, I shall proceed to state, in the first place, that I entirely concur with both of your Lordships who have spoken, in being of opinion, that the charge preferred against the defender by his Majesty's Advocate, of having, at this stage of the proceedings, maintained his preliminary defence against the title of the pursuers, merely from a desire of obtaining delay upon frivolous, vexatious, and incompetent grounds, is utterly and entirely unfounded. This branch of the case was specially and most properly reserved by the Lord Ordinary for subsequent determination; and considering the view which I have taken of the case, I must have deemed the advisers of the defender both negligent and culpable if they had refrained from bringing this subject fully before your Lordships.

Having no doubt, then (and upon the same grounds as those explain

y, or a commission or deputy, granted in favour of Captain Cunningham by  
er defender. This action bears to be raised at the instance " of the Right  
rable Francis Jeffrey, our Advocate, for and in name and behalf of us, and  
Commissioners of our Woods, Forests, Land-Revenues, Works, and Build-  
terms of an act passed in the 3d and 4th year of our reign, cap. 69, and  
erein recited—*Pursuers*, to whose great hurt and prejudice, as acting for  
the public, in virtue of our said acts, the warrants were granted," &c.  
ny Lords, had I considered the instance here set forth as that of two pur-  
viz. first, his Majesty's Advocate acting for his Majesty's interest ; and se-  
of his Majesty's Advocate, acting in behalf of his Majesty and the Com-  
ers of Woods and Forests, I should have had very great difficulty in  
g with your Lordship and Lord Medwyn, as to the necessity of his Ma-  
Advocate having previously obtained a special warrant under the royal  
annual, in order to have bestowed upon his Lordship power and authority to  
stituted this action in his Majesty's behalf. In other words, I should have  
eat doubt of our power in that case to have dismissed the present action, in  
as it was at the instance of his Majesty's Advocate for his Majesty's inte-  
pon the ground that the same had been raised in virtue of the powers con-  
upon him by his patent of appointment, and not upon a special warrant  
y issuing from the royal authority ; and to this subject for consideration, I  
dvert in the first place.

v, although it is necessary that I should explain, at least generally, the rea-  
pon which this doubt is founded, it is far from my intention to trouble your  
hips with any historical discussion as to the nature and powers originally in-  
in the office of his Majesty's Advocate, or to go over that great array of  
ities so ably, clearly, and elaborately detailed in the judgment delivered  
day, to all of which I have paid the utmost attention, but which have not  
e effect of entirely obviating the difficulties which I have found to be op-  
to my arriving at the same conclusion upon this point with your Lordship  
ord Medwyn. In short, I cannot find authority for laying it down, that the

No 95. which was not the case with others of the Officers of State. Accordingly they are expressly enumerated in the different commissions of council, which the Advocate is not, although he is mentioned as having been present at all the sederunts. From remote antiquity, therefore, he was *virtute officii* a confidential and responsible adviser of the Sovereign. In that respect the office was entirely different from that of the Attorney-General in England, who always has been only a law-officer of the Crown, and whose advice, before it can be followed by the King (and for which no responsibility whatever attaches to the Attorney-General himself), must be adopted and acted upon by one of Majesty's confidential servants, who himself is responsible for having made it the ground of his advice to the Sovereign; whereas the Lord Advocate was not merely the law-officer of the Crown, but the King's adviser, and counsellor in all matters in which the advice of the confidential servants of the Crown was required to be given; but more especially in those acts of the Government more immediately connected with his own department; and in this respect he seems to have stood precisely in the same situation as the Lord Treasurer or Comptroller. No doubt, his rank, with relation to the other Officers of State, as mentioned by Lord Medwyn, seems to have varied at different times; but the exact state of the precedency which this officer enjoyed, can, with great deference, afford little light as to the extent of his powers. Indeed, I think there is reason for supposing, that the rank was in some degree dependent upon that of the individuals holding at the time the other appointments of the Officers of State. Thus, if one enjoying high hereditary rank in the country held the office of Lord Treasurer, or Comptroller, or Lord-Register, he of course would be made to precede the Lord Advocate, who ranked after the dignities which they enjoyed personally, independent of their official appointments. In that order, too, their names would be entered upon the rolls of Parliament, and hence, down to a comparatively recent period, when the rank of the Lord Advocate was settled to be higher than that of the Lord Justice-Clerk, his position will be found constantly varying, both in the rolls of Parliament and in the statutes of the realm. But all this can have nothing to do with the extent of the powers of that officer, of which, however strange it may appear, little is to be found in any of our institutional writers or printed books of record. I therefore more regret that the parties have not favoured us by searching the more ancient records for the terms of the different commissions granted to those individuals, who from time to time enjoyed the office of Lord Advocate at a remote period. The oldest that is given us in these pleadings is that of Sir David Dalrymple in 1709, which places the powers of the Lord Advocate as to civil and criminal cases exactly on the same footing, and confers upon him all the powers competent to our Advocate, "*in omnibus actionibus et causis civilibus et criminalibus aliisque.*" And the same powers, although in general yet comprehensive terms, are certainly conferred on all the subsequent Lords Advocate.

Now, supposing the more ancient patents to be equally broad with that in favour of Sir David Dalrymple, and considering that the Lord Advocate was himself the confidential adviser of the Crown, in all matters connected with the discharge of the duties of his own office, it would require, in my opinion, some more direct authority than I have yet seen, for laying down as clear law, that the Lord Advocate had not the powers of originating actions for the vindication of his Majesty's civil rights, without, first, procuring, founding on, and producing a warrant under the royal sign-manual. And I should hesitate in giving the

an argument deduced from cases, however numerous, in which warrants of that description may have been occasionally obtained and founded upon; because I think the use of warrants in such cases may perhaps be explained upon other grounds than that of an inherent incapacity in that high officer of the Crown to proceed without them. The explanation which I would be inclined humbly to offer of the use of special warrants, if I were required to give one, would be this; but which under the present circumstances, I presume to offer with great hesitation and difficulty.

Your Lordships are well aware of the unsettled state of Scotland, from the earliest times down to the period of the Revolution—of the numerous factions into which its aristocracy was divided, and of the jealousies which almost constantly prevailed, not merely between these factions, but between the very officers of the Crown by which the Government was administered. In this way, a sense of personal danger, and of the prudence of exerting their utmost endeavours, to secure their own preservation, must necessarily have induced those confidential servants of the Sovereign, whatever their powers might be, to take as little responsibility upon themselves individually as they possibly could, and to follow out the measures which were determined on under the joint authority of the Privy Council, by which means the responsibility of the particular office, under whose authority each measure was to be carried into execution, was only shared with his other colleagues. By adopting this precaution, there was avoided the risk of giving individual offence to the persons whose rights might be compromised by the measures resolved on, and the hazard of any one servant of the Crown, being either marked out as an object of revenge, or of his being made a sacrifice by others for their own particular security, was effectually provided against.

In applying this to the case of the Lord Advocate, it occurs, that wherever he brought a suit, either civil or criminal, for his Majesty's interest in his own name, he necessarily and inevitably took the whole responsibility of that particular act solely and exclusively upon himself. But, when a warrant issued under the sign-manual, giving authority for any particular proceeding, then the measure, be it what it might, became the act of the Government, for which the King's Advocate was no more responsible than any other of the King's confidential servants. Accordingly, I find this view of the matter strongly confirmed, by a fact which was mentioned yesterday by my brother Lord Medwyn. At no time was it ever questioned that his Majesty's Advocate possessed the full power of raising and pursuing, by his own authority, and without any special warrant, criminal prosecutions for the banishment of offenders of all kinds and descriptions; yet it is an unquestioned fact, and as such my brother stated it, that, at various times, more particularly during the seventeenth century, and under the reign of Charles II. and James VII., special warrants were actually applied for and obtained, authorizing his Majesty's Advocate to prosecute individuals for crimes even before the Court of Justiciary. In particular, such warrants were obtained in most of the prosecutions raised against the Covenanters, and a variety of others. Now, in all these cases the powers of the Lord Advocate were ample, and the use of the special warrants can in them, I apprehend, only be explained by the unwillingness of the person holding the office at the time, to incur the responsibility of the individual from the very natural anxiety which the nature of most of those prosecutions, and the state of public feeling at the time, produced, that the obloquy

No. 95

Dec. 24, 18

King's Adv

cate v. Lor

Dunglas.

No. 95.  
 —  
 Dec. 24, 1836.  
 King's Advocate v. Lord  
 Douglas.

might be shared with the rest of the servants of the Crown. In the same way, I suspect that the introduction of the case of special warrants in civil causes, may be accounted for, and I regret that more enquiry has not been made into, and light thrown upon this part of the subject, of which I have no doubt it is very susceptible.

Two reported cases, however, have been referred to as having occurred previous to the Union, in which our predecessors are said to have held, that without a special warrant the Lord Advocate had no right to pursue in vindication of the civil rights of the Crown. The first of these is the case of Southesk<sup>1</sup>—the other is that of the King's Advocate against Moncreiff, decided in 1693. As to the first of these, I must state that it certainly does not appear that the Lord Advocate was in any way a party to the suit, except as having given his concurrence to the action between the parties. Certainly he was neither pursuer nor defender; and although the report bears, "that the Lords would not allow the Advocate to insist on the King's interest without a special writ," that point does not appear to have been raised for discussion, and the judgment could only have had reference to the right of his Majesty's Advocate to give his concurrence to the actions (and that too apparently to both parties, who each founded upon a grant from the Crown), without a special authority from the King. But the principles which might operate in such a question are quite different from those which must regulate cases having reference not to the concurrence of his Majesty's Advocate, but to cases where the King's own interest is immediately and necessarily involved. But besides, Lord Medwyn mentioned that this was a case which was decided when his Royal Highness the Duke of York and Albany (afterwards James VII.) thought fit to honour the Court with his presence, an honour which, we all know, was seldom or never conferred, except when some undue purpose was in contemplation, and some act of tyranny and oppression meant to be carried through. The very circumstance of the Duke's presence therefore would, in truth, lead me to suspect that undue means were resorted to in order to obtain the decision; and it would be something more than the bare announcement of a proposition, on a point of constitutional law given by the Court under such superintendence, when the subject was not argued, nor the matter particularly in issue, which it certainly was not, that would induce me to listen to it as an authority to be held as conclusive.

With respect to the other case, it is assuredly more directly in point. But even that is one not decided in the ordinary course of justice, for the report bears that it was determined in presence of the Lord Chancellor; and when I consider the principles on which our predecessors in that case seem to have proceeded, I cannot join with your Lordship in conferring upon it that praise to which you have just said you thought it was entitled. On the contrary, the views of the Court, as I find them explained in the Report, have certainly not tended to exalt my opinion either of the dignity or the independence exhibited by our predecessors on that occasion. It seems to have been debated among the Judges, whether a special reference should not have been made to the Crown, to know the ground on which his Majesty had proceeded in making the two pretended grants then under discussion, and the proposal was only overruled, because it was deemed wrong to

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<sup>1</sup> 1680.

able the King with points of law, "and that it would reflect on the secretaries, the King should say, that one or both were impetrate from him, without making an understand the state of the case." No. 95.

Now, considering that this judgment was pronounced only five years after the evolution, I must suspect that our predecessors had not then had time to shake themselves free from the state of dependence and subserviency under which they were kept during the arbitrary, tyrannical, and profligate reigns of the House of Stuart, or had got their minds disencumbered of that fear of giving offence to the King or the members of the Cabal, by which, for so many years, they had been so gracefully restrained. Dec. 24, 1836  
King's Advocate v. Lord Dundas.

But these decisions, in whatever light they may be considered, are, I think, more or less counterbalanced by the fact, that there is no form of summons to be found in any ancient style-books, as far as I know, and particularly, there are none in Dalrymple's Collection (which was not given to the world till some years after the decision in the case of Moncrieff), in which the Lord Advocate, as suing for his Majesty's interest in a civil process, is made to libel on a special warrant; and I must believe, considering the great and acknowledged accuracy of that author, that if such warrant had, in all civil causes in which his Majesty's Advocate pursued for the King's interest, been required to validate the proceeding, it would not have been found particularly set forth.

But I fairly acknowledge, that this matter may be considered as coming now under our consideration under different circumstances from that in which it was presented to our predecessors, in the case of Moncrieff, and if the numerous cases which were detailed yesterday, as having occurred since the Union, in which special warrants, under the Sign-manual, have been founded upon by the Lord Advocate, and held necessary by the Court, cannot be otherwise explained, I should, for all, be inclined to hold, that the safest course for us to follow now would be to determine that such warrants were requisite to entitle the Lord Advocate to appear for the Crown in a civil process. I believe that the King has occasionally limited the powers of the Lord Advocate, by the terms of the commission conferred upon him, and it is very possible that it is competent for the Crown to do so again; but I can have no doubt that, by a long train of practice, and a series of judgements, in which it has been found, that particular powers are not vested in the Lord Advocate, such, though originally inherent in his office, may be altogether taken away. At the same time, I would speak with hesitation in reference to those cases, because one of them, rested on by Lord Medwyn, in which the necessity of a special warrant, to authorize the appearance of the Lord Advocate, was supposed to have been at least partially settled, has been otherwise explained; and I am satisfied, that nothing can be inferred from the rights of patronage conferred upon his Majesty's Advocate by the statute relative to the forfeited estates; for by it, in truth, the Crown was divested of its legal rights, in favour of Commissioners, and therefore it was necessary to confer those special powers upon the Lord Advocate, without which undoubtedly he could have no right to appear for his Majesty's interest.

I therefore am desirous of giving no decided opinion as to the necessity of the Lord Advocate founding on a special warrant, until I shall have an opportunity of considering the matter more at large in a case in which the point shall be more fully brought before us, and in which his Lordship shall appear as prosecutor for his Majesty. But I can have no doubt upon this other point, that if, in this

No. 95.  
 Dec. 24, 1836.  
 King's Advocate v. Lord  
 Douglas.

case, the summons should be held to be so drawn, that, according to Lord Medwyn's opinion, the instance as set forth is to be taken as that of the King's Advocate for his Majesty's interest, as well as for the Commissioners of Woods and Forests, and that a special warrant was requisite for authorizing his Majesty's Advocate to appear in the former of these two characters, the subsequent production of a warrant, with the view of validating what had gone before, is a proceeding utterly and entirely inept. In that view of the matter, the summons, if it is to be taken as at the instance of his Majesty's Advocate for his Majesty's interest, must be held to have been from the beginning void and null, and by no subsequent proceeding on the part of the Crown could that original nullity be cured.

I cannot, however, allude to this warrant without observing on the singular terms in which it is drawn. The King is made to declare his royal will and pleasure, and "does hereby ratify and confirm the whole proceedings in the said action prior to the date thereof:" and thereafter follows the authority to the Lord Advocate, to carry on such action or actions as may be necessary for setting the right of the defenders aside. Now I deny that the King had any right or power to ratify and confirm one of those proceedings, and the terms employed with that view bring the document in question as nearly as can well be imagined to the style and nature of those letters and warrants which were condemned in the claim of right, when James VII. forfeited the Crown; and my learned friend, the Lord Advocate, will find, that in that very case of Moncrieff, which was mentioned, that when it was proposed, "that the King's Advocate might apply to see if his Majesty would give him a warrant to quarrel Ready's right, the plurality of the Lords thought it of dangerous example, and infringing on the claim of right, to stop justice either by letters to or for from the Session."

(The Lord Advocate here rose to explain, that the letter only confirmed and ratified the acts of the Advocate, in regard to the relation between him and the Crown).

LORD MEADOWBANK (in continuance). I rather think my friend the Lord Advocate is mistaken, for the warrant in the first place contains a direct ratification of all that had been previously done, and it is after that ratification that it is made to apply to the proceedings of his Majesty's Advocate; but it is of little importance, for it is impossible to suppose, and I certainly do not, that any thing improper was intended to be done by the proceeding in question.

I am, however, of opinion, that we have no opportunity here of pronouncing any judgment as to the necessity of a special warrant in this case, or of the effect of that warrant which has been granted; for I am very clearly of your Lordship's opinion, and upon the grounds which you have so fully explained, that there is here only one instance set forth in the summons, that of the Lord Advocate in behalf of his Majesty, as having an interest in the rights conveyed to his Commissioners of Woods and Forests—and I agree also with your Lordship, that it was only intended, when the action was raised, that his Lordship should appear as pursuer in that, and in no other character.

I shall not repeat what has been stated by your Lordship upon this point (and in which I entirely concur), but I shall add that I have no doubt, that had it been intended by the Lord Advocate that his interest should have been used for the interest of the King, as separate from the rights of the Commissioners of Woods and Forests, and for the rights which his Majesty enjoyed *jure coronæ*, he would have adopted that style and form which he follows every day in the criminal



court—which has been invariably pursued by his predecessors in all civil actions, when they were pursuers for the King—and which is to be found in the books of styles from the earliest times (including Dallas), down to the present day. That form, your Lordships are aware, was one which could have called the defenders (even if both pursuers were to be included in one action) to answer at the instance of “our trusty and well-beloved Francis Jeffrey, our Advocate for our interest, and of the said Francis Jeffrey in behalf of us, and of the Commissioners, &c. in terms of an act,” &c. “and to our, and to whose great hurt and prejudice, as acting for us in virtue of the said acts,” &c. This is the nature of the style which has been uniformly followed, without any exception, from the earliest times. It is the style given in Dallas, and I cannot believe that there was any intention whatsoever to alter or to change it upon the occasion.

We have, however, all heard of the great powers of his Majesty’s Advocate, many more than there is any authority for, many which I do not believe to exist, and many which, I am sure, my Right Honourable Friend will never think of exerting. But there is one power which most assuredly the Lord Advocate does not possess. He has no power to alter the forms of proceedings in this Court, established either by special enactment, or by a course of practice followed for centuries; and were I not satisfied that the form which has been adopted is one applying solely to the case of the Lord Advocate, suing in behalf of the Commissioners of Woods and Forests, I would have been against sustaining his instance for the interest of the King, merely because it was set forth in a new and unprecedented form.

I would only observe farther upon this point, which I do not think your Lordship adverted to, that the meaning as to who are the parties forming the instance in this action, is explained by the words following the annunciation of the name of the Lord Advocate, and for whom he pursues. These words are, “pursuers, to whose great hurt and prejudice, as acting for us and the public, in virtue of the said acts.” Now, to say nothing of the want of the words “for our interest,” which are here omitted, there is here an express limitation of the term pursuers, to those who had rights conferred upon them by the act of the 3d and 4th of his present Majesty, a limitation totally inconsistent and incompatible with the suit having been raised by his Majesty’s Advocate for his Majesty’s interest, as connected with the high and patrimonial rights of the Crown.

But this part of the case does not rest here. Both your Lordships have referred to the case of Campbell, one which I concur in thinking is most material in the present. That, it will be attended to, was one of the first cases brought after the accession of the King. It originated under new and special legislative enactments, by which particular boards were authorized to litigate through the means of the Lord Advocate. Upon that occasion, therefore, it was incumbent upon the law officers in Scotland to consider well the form of the writs under which said actions were subsequently to be raised, and it cannot be doubted that much pains were taken to render it perfect. Accordingly, for the purpose which was then in view, namely, to set forth the instance of the Lord Advocate, as suing in behalf of the Boards, then supposed to be vested with those rights of the Crown involved in the case at issue, I think the form adopted was sufficiently correct. But the question considered is, whether the parties, his Majesty’s Advocate, under the summons was framed, or the defender, or the counsel at the Bar,

No. 95

Dec. 24, 18  
King’s Adv  
cate v. Lor  
Dunglas.

or your Lordships, ever for one moment imagined that in that summons was, comprehended not only the instance of the Lord Advocate for the Lords of the Treasury (and afterwards for the Woods and Forests), but also the instance of his Majesty's Advocate for his Majesty's interest. Now, upon this point, the report of the case is perfectly decisive, for it is made to conclude with the observation of the Dean of Faculty, to the effect that he craved expenses, because the case was, with a Board. "If his Majesty had been a party," he is made to add, "then I could not have asked expenses;" and this observation was not only not contradicted by the pursuer, but not observed upon by the Bench. On the contrary, it was acquiesced in upon all sides, as an observation justly and properly applied to the case. I certainly do not know if his Majesty's Advocate was himself present, when these proceedings took place, but the Solicitor-General undoubtedly was, and if he had not known that it was a suit raised at the instance of his Majesty's Advocate, as pursuing for the Commissioners of Woods and Forests, and altogether conclusive of that of representing the interest of the Crown, there can be no doubt that he would not have suffered the remark of the Dean of Faculty to have escaped his animadversion, or your Lordships to have decided upon the ground that the Crown was not a party, when he himself knew and believed it to be otherwise.

Now, the summons in that case is in the precise form and terms of the summons in the present; and when, on the one hand, your Lordships have an old and inveterate form of summons when the King's Advocate pursues for his Majesty's interest, not followed, but abandoned, and another form, under new enactments, drawn up with a view to the constitution of an instance, under which his Majesty's Advocate has been held to pursue, not for his Majesty's interest, but for the Commissioners of Woods and Forests, it would be a most extraordinary proceeding to hold that the latter form was to be so interpreted now, as to include the former, as well as the instance to which alone it had been determined to refer.

I am very clear, therefore, for rejecting the present as a summons raised at the instance of his Majesty's Advocate for his Majesty's interest; and it would now have been incumbent upon me, had your Lordship not gone so fully into this part of the case, to have shown the grounds upon which I have arrived at the conclusion that the Lord Advocate, as pursuing on behalf of his Majesty, as represented by the Commissioners of Woods and Forests, has no title to pursue this action. But, subscribing to every thing stated by your Lordship upon this part of the case, I shall confine myself to a very few general observations regarding it.

And, first, in my humble opinion, it is plain that, down to the accession of the present King, the patrimonial right of the Monarch to these revenues was continued in the same situation as they were held by James the Sixth and his descendants, including King William and Queen Mary, and Queen Anne, as well as the first Princes of the House of Hanover. At the accession of none of those monarchs was there any abandonment of these rights, either express or implied. Each King just succeeded, *jure coronæ*, to his predecessor, as former Kings of Scotland had done from the earliest times; and although, in some of the more recent instances, statutes are no doubt to be found in which mention is made of the revenues being reserved "for the life" of the monarch, there is not a syllable to be found from which it can be inferred that that life-interest was either made, or intended to be made, at all different from the interest enjoyed by those monarchs who possessed them in the fullest and most ample manner.

But, at the commencement of the present reign, a great change was certainly made in relation to the hereditary revenue of the Crown in this country. His Majesty then abandoned to the disposal of Parliament those revenues, and the first statute passed after that event upon this subject, authorized a transference of the powers which had been possessed with reference to these revenues by the Court of Exchequer to the Commissioners of Woods and Forests. But the only right in the Court of Exchequer was that of advising his Majesty respecting the disposal and collection of that revenue, that Court having come into the place, and being vested with many of the powers of the Lord High Treasurer of Scotland. Accordingly, the very grant in favour of the noble defender, bears to have been made by and with the advice "of the Lord Chief Baron, and others the Barons of his Majesty's Court of Exchequer." Hence it is plain, that the Barons had no *persona standi* for suing out any process in behalf of the King; and, therefore, nothing can be founded on the statute just referred to as conveying any corresponding right to the Commissioners of Woods and Forests, and the Lord Advocate suing on their behalf.

No. 9:  
Dec. 24, 1  
King's Ad  
v. 1st  
Dunglass.

We come, therefore, to consider the effects of the statutes of the 3d and 4th of his present Majesty, as well as the enactments of 10th Geo. IV. cap. 50, which were therein embodied, and which I shall content myself with saying, were most clearly limited to matters connected with the management of the revenue, and conferred upon them no powers to remove officers of a condition different from those whom they were thereby authorized to appoint. On the contrary, I am clear that, by the clauses to which your Lordship referred, all power of challenging appointments of a higher nature, such as that now in question, were specially and distinctly reserved from the powers conferred upon the Commissioners; and, therefore, I have no doubt that the Commissioners of Woods and Forests, and the Lord Advocate suing for them, as acting in behalf of the Crown, has no right to insist in the present action.

In delivering this judgment, I beg leave to add, that, although I think his Majesty's Advocate has in this case fallen into two errors, 1st, In thinking that this action of reduction was competent at the suit of the Commissioners of Woods and Forests, and of himself acting in their behalf; and, 2dly, In thinking that an action, first raised by these Commissioners in his name, could be divided into an action brought by him for the interest of the Crown, and into another as brought in his name for the interest of the King and of the Commissioners of Woods and Forests, I entertain no doubt, that if it was *ultra vires* of the Crown to grant the present commission, there can be no difficulty in finding a form of action by which it may be competently reduced and set aside; and if the advisers of the Crown shall think fit to bring the matter again before us, they will find all those difficulties they have hitherto had to encounter easily removed, simply by adopting those forms of action which their predecessors have in former cases followed out without objection or difficulty. But if that course should be followed, I trust I may be allowed to express a hope, that they will afford us some further information, on which very little light has been thrown in the present discussions; and, in particular, I would venture to recommend, that a search should be made through the Record of the Great Seal, in order to ascertain what has been the nature and extent of the ~~rights~~ with respect to the other hereditary, as well as what are termed ~~revenues~~ of the Crown of Scotland. I have great reason to believe, : on the main subject more immediately in question will be there

15. obtained, as there can be no doubt that few years have elapsed since the Revolution without some part of that revenue having been dealt with by the Crown, and grants of it conferred, either to one extent or another, by the different monarchs who, during that period, have exercised the rights of the Crown.

At present I am, on the different grounds to which I have referred, for sustaining the objection to the title of the Lord Advocate, as pursuing for the Commissioners of Woods and Forests, and finding that, as with respect to the Lord Advocate's claim to be held as a pursuer for his Majesty's interest, the same has not been set forth in such terms as to authorize your Lordships to entertain him as a pursuer in that character.

LORD GLENLEE said, that on the whole facts of the case, he concurred with their Lordships, that it was a case merely at the instance of the Commissioners of Woods and Forests, and there was consequently a want of title to pursue a reduction. There was not a sufficient title in the Commissioners, nor was it ever intended to give any such title. He was disposed also to agree in the view taken by their Lordships, and say that the Signal-manual was necessary.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of this process, with the cases for the parties, and heard counsel thereon, sustain the objection to the title of the pursuers to insist in these actions; dismiss the same accordingly, and decern; find the Commissioners of Woods and Forests liable to the defenders in the expenses of process; allow the accounts to be given in, and thereafter remit to the auditor to tax the same, and to report."

RODERICK MACKENZIE, W.S.—GIBSON and HORN, W.S.—Agents.

No. 96.

BRITISH LINEN COMPANY, Petitioners.—*R. Bell—Ivory.*

MARQUIS and MARCHIONESS OF CHANDOS, Compearers.—

*Sol.-Gen. Cuninghame—Monteith.*

BREADALBANE TRUSTEES, Respondents.—*D. F. Hope—Outram.*

MARQUIS OF BREADALBANE, Respondent.—*Rutherford—Baillie.*

*Process—Multiplepoinding—Consignation.*—Circumstances in which a petition, by a claimant on a riding interest in a multiplepoinding, to have the fund in medio consigned and the raisers interdicted from withdrawing it from the jurisdiction of the Court, refused.

a. 24, 1836. THIS was an incidental application in the cause reported ante, p. 48, Division, and XIV. p. 313.

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At the commencement of the process of multiplepoinding there mentioned, the raisers (trustees of the late Lord Breadalbane) lodged a condescendence of the fund in medio, as to which the usual interlocutor was pronounced finding them liable in once and single payment. The fund consisted principally of Bank of England and Government stock, and was allowed to remain invested as before. The Marquis and Marchioness of Chandos made a claim for a very large share of the fund in

medio. In 1834 the British Linen Company advanced to them £20,000, and obtained an assignation to Lady Chandos's claim of legitim, and to every other claim competent to her and Lord Chandos against the trust-funds. The claim of legitim was disposed of by the judgment of January 20, 1836, which was affirmed on appeal, and on 19th November the Court granted interim decree in favour of Lord and Lady Chandos for a payment of £70,000, which decree was extracted. The trust-funds were attached by arrestments at the instance of Lord Chandos; immediately after which proceeding an injunction from the Court of Chancery in England was intimated to all parties, prohibiting the Marquis and Marchioness of Chandos from receiving, and the trustees from making, any payment under the judgment of 20th January. This injunction had been obtained in consequence of the dependence of certain proceedings in the Court of Chancery for having the contract of marriage between Lord and Lady Chandos "reformed" so as to exclude her ladyship's claims of legitim, on the ground that such was the real intention of the parties to the marriage-contract, though in framing it this had not been effectually carried into execution.\*

The British Linen Company thereafter lodged a riding claim in the process of multiplepoinding as creditors and assignees of Lord and Lady Chandos to the extent of £20,000, and forthwith presented a petition, referring to the proceedings recently commenced in the Vice-Chancellor's

No. 91  
Dec. 24, 1  
British Lin  
Company's  
Breadalban  
Trustees.

\* The following statement of the general nature of these proceedings is given in the answers for Lord Breadalbane:—"While the question formerly raised in this present process, whether the respondent was entitled to legitim or not, was in dependence before the House of Lords, the respondent discovered certain documents having reference to the marriage-contract of Lord and Lady Chandos. This latter deed, as your Lordships know, was strictly an English deed, and one which could therefore be interpreted only according to the law of England. The respondent was advised, that by the law of that country, this deed was not conclusive as to the rights of the parties thereto, if it could be shown to be, by omission of important clauses, drawn in violation of or contrary to the intention of the parties. He was further advised, that the documents and other evidence he had recently discovered were sufficient to prove that the deed had not been so drawn.

"The chief parties to this deed, and the parties truly interested in the question, were Lord and Lady Chandos, and the trustees of the late Marquess. The respondent, therefore, filed a bill in Chancery against these parties, praying that Court to reform the contract of marriage, so as to make it consistent with the intention of the parties, and in the mean time to grant injunction against Lord and Lady Chandos from receiving, and against the trustees from paying to Lord or Lady Chandos, any part of the funds under your Lordships' judgment in the multiplepoinding. That was, and is, the whole amount of the proceeding which the respondent has adopted. It was not a rash or unadvised proceeding, because it has been a successful one; the injunction (which the respondent understands is a strong probable case is made out) has been granted by the Court, and the question having been appealed, has been thought worthy of consideration by the Lord Chancellor, who has not as yet pronounced

1. 26. Court, praying, 1st, To have the Breadalbane trustees ordained  
 N. 1836. to consign the fund in medio, or part thereof, in manibus curiæ; and, 2dly,  
 & Linen To have the trustees and the Marquis of Breadalbane interdicted "from  
 May v. removing the same, or any part thereof, out of your Lordships' jurisdic-  
 albanu tion, or from adopting and following forth any proceedings or measur-  
 vs. whatsoever or wheresoever, directly or indirectly, whereby your Lon-  
 ships' jurisdiction and control over the same, or your right and power  
 dispose thereof, as the admitted fund in medio in the said multiplepoin-  
 ding, may be in any respect interfered with or infringed upon."

The trustees and Lord Breadalbane gave in answers opposing the prayer of the petition. On the petition and answers being put out to be advised, Lord and Lady Chandos, without having put in a minute, made appearance to consent to the prayer.

On the part of the British Linen Company a proposal was made to have the advising of the petition superseded till January, on the ground of certain notes having been printed by the respondents, and appended to their papers, professing to be a report of proceedings in the English Court of Chancery, but this proposal was not acceded to.

The interim-decree for £70,000 having been pronounced and extracted before the company had lodged their riding claim on Lady Chandos' interest, the Court intimated that, in the present application for consignation of the fund, the consignation of this sum was out of the question.

In support of the prayer of the petition it was contended for the British Linen Company and for Lord Chandos, that the effect of the recent proceedings instituted in Chancery might be to withdraw the fund in medio from the jurisdiction of the Court and place it under the control of a foreign tribunal—that it was necessary for the protection of the interests of all parties that it should no longer be left in jeopardy but consigned in Court—that after a condescendence of the fund had been lodged in a process of multiplepoin ding any claimant was entitled to insist for consignation, and that this was competent at any stage of the proceedings—that the present petitioners were justified in their demand by the course of practice and in the circumstances of the case, and that the Vice-Chancellor's injunction did not affect them, however it might affect Lord Chandos, with whom they were no way identified.

It was answered for the trustees and Lord Breadalbane, that this application, which was entirely a matter for the discretion of the Court, was uncalled for and inexpedient, no objection whatever being stated against the sufficiency of the trustees or the propriety of their management—that not only would it be inconvenient and prejudicial to the interests of all parties to interfere with the management or mode of investment of the trust funds, but the present application to that effect was moreover incom-

<sup>1</sup> Wallace v. Campbell, June 20, 1822 (ante, I. 508, new ed. 471); Darling's Practice, pp. 351, 352.

petent, as it was made by a party who had a mere riding interest on the interest of Lord Chandos, claimed upon at a late stage of the proceedings, and which had not yet been seen or answered, far less sustained by a decree in the process, and that the proceedings in Chancery threatened no removal of the trust-funds from the jurisdiction of the Court or interference with that jurisdiction.

No. 5  
Dec. 24,  
British L  
Company  
Brudalba  
Trustees.

On the part of the trustees it was stated in addition, that they had not in any way made themselves parties to or acknowledged the Chancery proceedings in England—that they considered themselves amenable to the Scotch courts, and should take no step which could make it be assumed against them that they were doing any thing to aid the removal of the trust-funds out of the jurisdiction of those courts.

**LORD JUSTICE-CLERK.**—I think the petition ought to be refused in toto. The interim-decree in favour of Lord Chandos has been extracted, and arrestments have been laid on the fund in medio to the extent of £70,000, which will effectually secure the petitioners. As to the prayer for an interdict against the funds being removed, the trustees show no intention of withdrawing them from our jurisdiction. The funds are virtually already in manibus curiæ.

**LORD GLENLEE.**—I am of the same opinion.

**LORD MEADOWBANK.**—I am rather inclined either to remit this petition to the Lord Ordinary, before whom the process is depending, or to delay advising. I concur with counsel in thinking that nothing can be more inexpedient than to have the proceedings of courts misrepresented to each other. I cannot hold these notes to be the proper mode of bringing the proceedings in Chancery before us. I throw them out of view altogether. Judicially I do not know, and am not bound to believe, that such proceedings have taken place, no authenticated record of them or judgment of the Court of Chancery being produced to us. Until a definitive judgment of that Court is laid before us I can pay no attention to its proceedings. In regard to the present case, the only proceedings with which we have to do are the judgment of the Lord Ordinary in the multiplepoinding, the judgment of this Court, and that of the House of Lords. We have granted an interim-decree for £70,000, which is all that the trustees say they can afford to pay over; but they have still extensive funds in their hands, as to which Lord Chandos has got a finding that they are due to him. In the exercise of our judicial discretion I should not willingly in this case give an order for consignation, yet I would rather postpone consideration of the petition or remit it to the Lord Ordinary.

**LORD MEDWYN.**—I cannot hold that the nature of the present process precludes a claim for consignation, as I think such claim is competent, if properly brought forward. I confess I do not like this appearance of Lord Chandos. Who is it that asks for consignation? The petitioners are merely creditors of Lord Chandos. They make their claim as his special assignees, and I cannot understand how they can be free of him. As to the £70,000, their claim as a riding interest on that is out of the question. In regard to its effect otherwise, it has only been given in the other day, and has not even been seen or answered, and I do not see what ground there is to justify this secondary claimant demanding an order for consignation. We assure the trustees that they consider the fund in their possession as a British fund, and that they have no intention of withdrawing it.



- o. 96. Although consignation has not been granted, the fund may still be said to be in the hands of the Court. It is so in reality. In the general case there is no doubt that consignation in a bank is usually ordered on the motion of a claimant; but here we are not asked by a primary claimant to have the fund consigned; and I cannot listen to the secondary party asking consignation of what is virtually already in manibus curiæ and quite safe. Besides, no particular ground is alleged for the demand, as that the trustees are insolvent or likely to be so, or incapable of managing the funds. As to the prayer for an interdict, I think it indecent even to suppose any proceeding being adopted in a foreign court, with the view of removing the funds from our jurisdiction.

THE COURT accordingly refused the petition, with expenses.

HUNTER, CAMPBELL, and Co., W.S.—DAVIDSONS and SYME, W.S.—W. B. CAMPBELL, W.S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—Agents.

## JURY SITTINGS.

- o. 97. JOHN AITCHISON, Pursuer.—*M'Neill—Henderson.*  
ALEXANDER PATRICK, Defender.—*Robertson—Wilson.*

*Proof—Deposition to lie in retentis—Witness—Infamy—Messenger's Execution.*—1. The deposition taken to lie in retentis of a witness who was not proved to be dead or permanently disabled from attending the trial, not allowed to be read, although the witness had been seen two months before in bad health, and the party proposing to read the deposition had made an unsuccessful search for him. 2. A conviction on a confession entered on the record of a crime inferring infamy, followed by sentence, has the same effect in regard to the disqualification of a witness as a conviction after trial by jury. 3. A party proposing to adduce a witness who had been convicted of forgery and sentenced to imprisonment must, in order to make the witness admissible, prove that the sentence has been undergone; but this it is competent to do by parole evidence. 4. In a simple reduction of a decree of suspension the party who had as messenger signed the execution of intimation of sist, but was subsequently deprived of his office, allowed to be called as a witness to disprove his own execution; but observed that his evidence required to be scrupulously considered.

- 28, 1836. IN June 1833, the defender, Patrick, presented a bill of suspension of a charge on a bill of exchange given by the pursuer, Aitchison, whereupon the Lord Ordinary pronounced the usual interlocutor granting assist, and ordering intimation and answers within fourteen days. The messenger employed to intimate the sist was one William Dinning, who returned to the Bill-Chamber an execution of the intimation bearing, that on 12th June, 1833, he served on Aitchison the interlocutor of the Lord Ordinary, "a full double whereof, with a just copy of intimation for, and directed to the said John Aitchison, thereto attached, I delivered to himself personally, apprehended at Bauton, before these witnesses, John Honan and James Ewing, both residents in Glasgow, and hereto with

22d January, 1834, decree in absence was pronounced, suspension-charge, and finding Aitchison liable in a sum of expenses amount-  
16. Of this decree, Aitchison brought a suspension and also a  
, alleging, as the grounds thereof, that the sist on Patrick's bill  
sion had not been validly served on him, but had been sent in  
y post, and had not reached him till the 15th of June, the exe-  
turned by Dinning being thus inconsistent with the fact; that  
f suspension was consequently passed before elapse of the requi-  
for lodging answers; and finally, that the letters of suspension  
on the passed bill had not been regularly executed.

efence was, generally, that the proceedings in question being  
d regular, and improbation of the executions not being proponed,  
ns of suspension and reduction were groundless and untenable.

duction having been conjoined with the process of suspension,  
ord made up, the following issues were sent to trial.

ing admitted that, in the month of June 1833, the defender pre-  
bill of suspension of a charge given by the pursuer on a bill of  
, and that in the suspension a sist was granted on the 11th, and  
assed on the 28th day of the said month: It being also admitted  
he 22d day of January 1834 decree in absence was pronounced,  
ig the letters simpliciter, and finding the pursuer liable in expen-  
nting to £26:

Whether the said sist was not duly and regularly intimated by the  
er?

Whether the said bill of suspension was not duly and regularly

Whether the letters of suspension following on the passing of the  
were not duly and regularly executed?"

1. 97. The Court allowed the question, as having reference to a circumstance of evidence in the case.

18, 1836.

1836 v.

18-

The question was subsequently departed from, the witness's knowledge of the handwriting appearing to be insufficient.

The pursuer proposed to read Honan's deposition, which had been taken to lie in retentis, upwards of two years ago, when he was in bad health. Honan had been seen about two months ago in bad health, since which time the pursuer had caused a search to be made for him, but unsuccessfully.

*Robertson*, for the defender, objected, that as Honan was neither dead nor permanently disabled from attending the trial, it was incompetent to read the deposition; what was alleged by the pursuer being no sufficient reason for allowing this, however good ground it might have been for delaying the trial.

The Court refused to allow the deposition to be read.

The pursuer proposed to call *Dinning*, the messenger above-mentioned, as a witness.

*Robertson*, for the defender, objected to *Dinning's* admissibility; 1st, that he had been convicted of forgery before the Circuit Court of Justiciary at Glasgow, in April 1834; 2d, that it was incompetent to call a messenger to disprove his own execution.

In support of the first objection, he produced certified copies of the conviction, which proceeded on the pannel's confession, and of a sentence of imprisonment for 12 months in Bridewell, following thereon.

*M'Neill, for the Pursuer*.—I do not concede that a conviction on confession, no jury intervening, is sufficient to disqualify. In the present case, the sentence is for imprisonment for 12 months from April, 1834, and we are now here in 1836; the period of *Dinning's* punishment having expired, he becomes a competent witness, in terms of the statute 1 Will. IV. c. 37. We shall prove, by the books of the Glasgow Bridewell, that his time has been served out.

*Robertson*.—According to the old rule of law, the witness is clearly incompetent; the statute referred to has introduced an exception, which the pursuer is bound to prove in the most authentic way. The books ought to have been lodged eight days before the trial.

*M'Neill*.—The requisite period from the date of the sentence of imprisonment having elapsed, the presumption is, that the law has taken its course. The Bridewell books may be produced to meet the defender's objection, but, independent of them, I can prove by parole that *Dinning* underwent his imprisonment.

**LORD JUSTICE-CLERK**.—I hold that a pannel's confession of a heavy crime entered on the record, and followed by the sentence of the Court, has the same effect in regard to his disqualification, as if a trial had intervened. The pursuer is bound to prove that this party has undergone his sentence of imprisonment, but it is competent for him to do so by parole evidence.

it be competent to call a messenger to disprove his execution, and lify the whole proceedings, and thus shake the security of land-  
? Or could a notary, who had put his name to a notarial act, be  
ned to impugn the facts attested in the instrument? The mes-  
r cannot be called to perjure himself, and we are not in a reduction-  
bation.

*Neill.*—Messengers are witnesses competent to be examined to  
on executions, and they are the ordinary and the best witnesses;  
wise there would be no evidence at all to impugn an execution. In  
ce, it is common to call instrumentary witnesses to disprove what  
ted in the testing clause of a deed, which is equally solemn with  
ecution. A messenger may be called to support an execution,<sup>2</sup> and  
not to impugn it? Dinning is properly the defender's witness,  
as an interest adverse to the side on which he is called. Besides,  
presumption of law is in favour of the admissibility of a witness, and  
must be clear authority for rejecting him.

*THE JUSTICE-CLERK.*—I cannot reject this witness. It is said that he per-  
an important duty, and cannot be allowed to disprove his own statement.  
s true; but an instrumentary witness, when he certifies in the testing clause  
ook place at the signing of a deed, is, as much as any messenger, discharg-  
important duty. Now it is admitted that such a witness may be brought  
d to disprove what he has so stated; and on this principle, in the absence  
authority, either by statute or decision, against his admissibility, I must re-  
the witness, though his evidence may be liable to observation.

ning was accordingly examined, and deponed to the statement in  
ecution of 12th June, 1833, being inconsistent with the fact.

**No. 97.** *Dence* scrupulously weighed;<sup>1</sup> that the second issue depended on the first, as did also the third, for if it appeared that the sist had been duly and regularly intimated, then there was no necessity for executing the letters of suspension.

Dec. 20 & 31,  
1836.  
Dempster v.  
Poole.

LORD JUSTICE-CLERK directed the jury, that the evidence of Dinning ought to be scrupulously considered, and without they believed it there was no ground for finding for the pursuer on the first issue; and that the second and third issues hinged upon the first, and the findings on them must be regulated accordingly.

VERDICT for the defender on all the issues.

D. FISHER, S. S. C.—WILLIAM MERCEY, W. S.—Agents.

**No. 98.** WILLIAM DEMPSTER, Pursuer.—*D. F. Hope—H. J. Robertson.*  
WILLIAM POTTS, Defender.—*Rutherford—Robertson—Sandford.*

*Minor—Reduction.*—In an action to reduce certain bonds and a bill of exchange, on the grounds of facility and circumvention, and minority and lesion—Verdict for the pursuer on the second of these grounds.

D. & 30 & 31,  
1836.  
2d Division.  
Lord Justice-  
Clark.  
R.

THIS was a reduction-improbation of certain bonds granted to the defender by the pursuer over the property of Mossend-green, belonging to him, and of a bill of exchange, on the grounds of facility and circumvention, and minority and lesion. The defender denied the first of these reasons of reduction, and pleaded as to the second, 1st, That the pursuer had taken upon himself the management of his own property, and was engaged in carrying on the business of a farmer on his own account, and that the defender was therefore entitled to transact with him as a person sui juris; 2d, That the money had been in rem versum of the pursuer; 3dly, Homologation since majority.

The following issues were sent for trial:—

“Whether, at the time or times at which all, or any, of the bonds and bills of exchange, Nos. 18, 20, 22, 360 and 3 of process was or were granted by the pursuer, he was a minor, and granted the same to his lesion?

“Whether all, or any, of the said bonds, or the said bill of exchange, was or were, by fraud or misrepresentation, obtained by the defender from the pursuer?

“Or,

“Whether at the time that the said bonds and bill, or any of them, was, or were granted, the pursuer had the management of his own affairs, and followed the occupation or business of a farmer, and granted the same in the course of his said management, occupation, or business?

<sup>1</sup> Lord Chief Commissioner, in *McDougall v. Wighton*, Jan. 5, 1830, & 115.

Whether, after the pursuer attained majority, he homologated and No. 98.  
ed of the said bonds and bill, or any of them?"

Jan 17, 1837.

Neilson v.  
Cochrane's Re-  
presentatives.

THE JURY found for the pursuer on the first issue, except as to the sum of £157, which they found had been laid out for his advantage on the property of Mossend-green; for the defender on the second issue; and for the pursuer on the two alternative issues.

HUMPHREY GRAHAM, W.S.—ALEX. M. ANDERSON, S.S.C.—Agents.

## COURT OF SESSION.

JAMES NEILSON, Pursuer.—*Rutherford—Donaldson.*  
COCHRANE'S REPRESENTATIVES, Defenders.—*Sol.-Gen. Cuninghame—  
Penney.*

No. 99.

*cription Vicennial of Retours—Act 1617, c. 13.*—1. Found that the act . 13, establishes an absolute protection of retours against challenge by pur-  
gising themselves to be the true heirs after the lapse of twenty years. 2.  
stances ineffectual to prevent the currency of the prescription.

late John Neilson, a workman in the employment of the late Jan. 17, 1837.

Cochrane, farmer at Linwood, in the county of Renfrew, in 2<sup>D</sup> DIVISION.  
1802, executed a disposition and settlement conveying all his Ld. Cockburn.  
ty, including certain heritable subjects, to his employer, Cochrane.  
ed in the following month of April, within sixty days of the date  
deed, and certain parties named Brock, his nearest relations on the  
r's side, on the allegation that he had died without heirs, obtained  
Exchequer a gift of the King's right as ultimus hæres, in virtue of  
they instituted a reduction, ex capite lecti, of the conveyance of  
ritage to Cochrane. After some litigation, the Court, by a judg-  
dated February 3, 1809, sustained the reasons of reduction, and  
d accordingly, and on the 24th May they adhered to this judg-  
refusing a reclaiming petition for Cochrane. On the 17th of the  
month, Cochrane, in consideration of a sum of £65, obtained a  
tion of the deathbed deed from one James Neilson, now deceased,  
ng the heir-at-law of John Neilson, and this person, on the 20th  
hereafter, expedite a general service as John Neilson's heir. The  
ity alleged in this service was that James Neilson, the claim-  
grandson of the deceased John Neilson in Brownside (the  
father, son of this person, not being specified), which John  
to be brother of Matthew Neilson in Southbar, the  
deceased. The service was duly retoured, and

17. 7, 1837.  
Cochrane v.  
Neilson's Re-  
sidual.
99. Cochrane immediately thereupon instituted a reduction of the gift of ultimus haeres in favour of Brock, &c. in which the latter were allowed to repeat a reduction of James Neilson's service and retour. In this process, decret in absence was pronounced against Brock, &c. of date February 4, 1814. Subsequently, however, these parties raised a reduction of that decree, and also of the service, in which reduction, after some litigation, decree of absolvitor was pronounced by the Lord Ordinary in 1820, and his Lordship's judgment was not reclaimed against. Some time before this, the present pursuer had, in 1811, purchased a brieve for having himself served heir to John Neilson, granter of the deathbed deed, which having come on for trial before the Bailies of Renfrew, appearance was made for Cochrane, who objected, on the ground of the subsistence of the previous service in favour of the James Neilson from whom he had obtained the deed of ratification. To this objection the pursuer answered that his service was necessary to enable him to set aside the other, which he alleged to be erroneous, and the bailies allowed the service to proceed. To establish his propinquity, the principal witness offered by the pursuer was the James Neilson who had been already served. After an examination in initialibus, however, this proposed witness was rejected, and the pursuer intimating an intention to advocate "abandoned pursuit of the service at this time until the result of the advocacy." No further steps, however, were taken by the pursuer till 1833, when he expedie before the Bailies of Canongate a service as nearest lawful heir of line and conquest to John Neilson, and this he followed up by an action of reduction, concluding to have the conveyance to Cochrane reduced and set aside on the head of deathbed, and also concluding for reduction of the service of James Neilson, and of the deed of ratification granted by him. Besides founding on his service as a title, the pursuer set forth his propinquity to the granter of the deathbed deed, stating himself to be descended of John Neilson of Brownside (brother of the granter's grandfather), by *Matthew* Neilson, his eldest son, while James Neilson, who had been formerly served, was, as the pursuer alleged, descended from him by *James* his second son. The ground of reduction applicable to the service was in these terms:—"The foresaid retour of a service in favour of the said deceased James Neilson, the granter of the said deed of ratification, is utterly void and inept, not only in respect that the brieve upon which the said retour proceeded, was not regularly proclaimed by the proper officer, in presence of witnesses, at the proper place of publication, and upon the proper and legal induciae, but also in respect that the character of heir to the said deceased John Neilson, the granter of the foresaid disposition and settlement, did not belong to the said deceased James Neilson, the granter of the foresaid deed of ratification; and accordingly the evidence which was adduced in the service upon which the said retour proceeded, did not, and could not establish that he was entitled to claim that character, which belonged



id, as evidence of James Neilson being the true heir, must be held  
itate. And, if so, the present action is thereby entirely  
d.

cord having been made up, the Lord Ordinary ordered cases on  
rd preliminary defence, and these his Lordship subsequently  
d to the Court.

*led for the Pursuer—*

is totally inconsistent with the provisions of the immediately pre-  
statute 1617, c. 12, to hold that by the act 1617, c. 13, a simple  
without infestment, and after the lapse of twenty years only, was to  
an absolutely unchallengeable title against the true heir. The for-  
these statutes required forty years' possession resting on infest-  
equally whether these proceeded on charters, retours, or precepts  
constat, and it is impossible to suppose that in the immediately  
ling statute the legislature intended to supersede this enactment,  
or as it regarded retours, and to sustain a title in a party not having  
e right, founded on a retour after the lapse of only twenty years,  
it without the necessity of infestment or even, it would appear, of  
ion. The act c. 13, must therefore be construed as intended to  
e not challenges by the true heir, but processes of error importing  
es against the inquest; or at all events, even if it should be held to  
her than this, as only excluding challenge of the identity of the  
as established by the retour, and not as excluding reduction by the  
ir claiming through a different line or series of links which do not  
rily run counter to that fixed by the service sought to be reduced.  
lingly in the many questions of prescription, where all challenge  
have been excluded by the operation of the act 1617, c. 13, if it  
11 / 2 11 / 2 11 / 2 11 / 2 11 / 2 11 / 2 11 / 2 11 / 2 11 / 2 11 / 2

No. 99. 2. The prescription in this case has been interrupted by the service of the pursuer commenced in 1811, and also by the proceedings at the instance of Brock, &c., and which were in dependence down to the year 1820.<sup>1</sup>

an. 17, 1837. Wilson v. Dochrane's Representatives.

*Pleaded for the Defenders—*

1. The words of the statute 1617, c. 13, are absolutely exclusive of the construction attempted to be put upon it by the pursuer. It sets forth the act 1494, c. 57, which had established a *three* years' prescription of retours, and declares that that act was not intended to prejudge the right of the true heir, but only to protect the inquest from a process of error; and then, while it provides that the inquest shall still have the benefit of this triennial prescription, it further enacts that the true heir should not thereby be prejudged of his right to seek reduction of the service "within the space of twenty years," but that, "if the said summons of reduction be not intended, executed, and pursued before the expiry of the said twenty years, that the said action of reduction of the said retour and service, shall prescribe in the selfe, and no party to be heard thereafter to pursue the same reduction."

In conformity to the clear and undoubted meaning of this enactment, all our institutional writers without exception (M'Kenzie having retracted his original opinion to the contrary) hold the exclusion of challenge after twenty years to be absolute;<sup>2</sup> and in the case of Bargany (although the obiter dicta of the judges are doubtless in favour of the pursuer's view), the question was not involved, the retour proving on the face of it that the party served was not the heir, and the *judgment* expressly found that the vicennial prescription was "not applicable to the case." Nor is there any inconsistency in this construction with the provisions of the act 1617, c. 12, since that act is establishing a protection against all objections by every party, to which effect forty years' infestment and possession was deemed necessary, while the statute enacting the vicennial prescription of retours had reference only to one particular objection, an alleged erroneous retour, brought by another party claiming the character of heir, or some one as in his right, which, considering the perishable nature of the evidence on which services necessarily proceed, it was not unreasonable to limit to a shorter period.

2. As to the alleged interruption, the shorter prescriptions are not subject to interruption properly speaking, but the actions being limited to a certain period the summons in which decree is sought must have been brought within that time, otherwise, whatever previous proceedings may have taken place, it must necessarily be inept.<sup>3</sup> But besides, in regard to the proceedings

<sup>1</sup> 3 Ersk. 7, 41; Wilson v. Innes, Feb. 2, 1705 (10974 and 11330).

<sup>2</sup> 3 Ersk. 7, 19; Mackenzie's Obs. p. 350; Stair, 2, 12, 15, and 3, 5, 45; Forbes' Inst. 66; Bayne's Notes, 117; 3 Bankton, 5, 94; 3 Ersk. Pr. 7; 7 Bell's Pr. 563.

<sup>3</sup> M'Laren v. Buik, Feb. 27, 1829, VII. ante, 483.

EFFREY, and COCKBURN.—We have considered the cases given in by the  
, and the interlocutor of the Second Division of the Court, of date 14th May,  
and we consider that the conclusion in favour of the defenders is unavoi-

act 1617, c. 13, “ statutes and ordains that the said Act of Parliament (re-  
to the act 1494, c. 57) shall noways hurt nor prejudice the nearest of kin to  
duction of the saids retours and service to be past and expedie in time coming,  
at within the space of twenty years immediately following the date of the  
retours and services ; and if the saids summons of reduction be not intended  
ed and pursued before the expiry of the said twenty years, that the said  
of reduction of the said retour and service, shall prescribe in the self, and no  
to be heard thereafter to pursue the same reduction.”

terms of the act appear to be clear and unambiguous, particularly when  
red in reference to the act 1494, to which it alludes.

very difficult to conceive that the framers of the act 1617, c. 12, intended  
act, c. 13, both passed, it may be said, on the same day, to alter, vary, or  
any thing inconsistent with the object of the other statute.

act, c. 12, declares, that where a title is produced, followed by infestment,  
ad with possession for forty years, the same shall create a good, valid and  
ent right. The title referred to is either a direct conveyance or a retour, or  
ept of clare.

act, c. 13, relates solely to one of the titles referred to in the act, c. 12, and  
appears to be no inconsistency in declaring that a particular title shall be held  
certain period of time unobjectionable and unchallengeable. This forms but  
ement of the act, c. 12. And the other requisites must concur before the  
t of the act can be obtained.

en the difficulty of establishing propinquity is considered, which in most  
depends upon human testimony, it does seem highly expedient and just to  
he period within which a service can be set aside, and the party of new called  
to undertake a probation. And we are persuaded that this was the view of

- o. 100. DONALD HORNE, W.S., Suspender.—*G. G. Bell—Patton.*  
 — ARCHIBALD HILL RENNIE, Respondent and Pursuer.—*D. F. Hope—*  
 17, 1837. *Rutherford—Sandford.*  
 10 v. WILLIAM M'DOWALL and OTHERS, Defenders.—*G. G. Bell—Patton.*  
 11c.

*Entail—Clause.*—In a deed of entail certain acts were expressly prohibited, and, inter alia, selling or alienation of the estate ; the irritant and resolute clause commenced with a general declaration—"in case the heirs of tailzie shall contravene or fail in performing any part of the premises"—then went on to specify the prohibited acts—"particularly by neglecting to assume," &c., "or by possessing," &c., and concluded with a repetition of the previous general declaration ; in the special enumeration the prohibition against alienation was omitted ;—Held, notwithstanding, that the heirs of entail were not entitled to sell, and that the prohibition so omitted was protected by the general declaration.

- 17, 1837. In the year 1780, the Rev. Archibald Rennie executed a deed of  
 — entail of the lands of Balliliesk in favour of himself in liferent, and, after  
 Division. his decease, of Archibald Hill, and other heirs-substitute. The deed,  
 d Jeffrey. after specially providing that the heirs succeeding to the estate should  
 R. be obliged to assume the name of Rennie, contained the following prohibitions :—"With this limitation and restriction, that it shall not be lawful to, nor in the power of the said Archibald Hill, nor any others of the heirs of tailzie aforesaid, to alter, innovate, or infringe this present tailzie, and the order and course of succession before mentioned ; or to sell, alienate, or burden the lands and others above disposed, or any part thereof, or contract debts, or grant bond, or any other right or security whatsoever, which may any ways burden or affect the said lands and estate, or do any other fact or deed, civil or criminal, directly or indirectly, whereby the said estate, or any part thereof, may be adjudged, confiscated, forfeited, or any ways evicted, in prejudice of the succeeding heirs of tailzie ; and with this limitation also, that it shall not be in the power of the said Archibald Hill, or the other heirs of tailzie aforesaid, to set tacks of the said estate, or any part thereof, for longer space than nineteen years, nor the park in which the principal house and office-houses stand, nor the park lying immediately on the west side thereof, neither the said principal house and offices, longer than the lifetime of the setter, without any diminution of the rental, except in the case of evident necessity, in which case the said tacks are to be set up by public roup, after intimation thereof three several Sundays preceding the roup, at the parish church where the lands lye."

The irritant and resolute clauses were as follows :—"And in case the said Archibald Hill, or any of the heirs of tailzie before mentioned, shall contravene or fail in performing any part of the premises, particularly by neglecting to assume, use, and bear the surname of Rennie, or by possessing the foresaid estate in virtue of any other title than the present tailzie, or by omitting to engross in the whole rights, charters, re-

tours, and infeftments, the order of succession and whole conditions, No. 100 provisions, and declarations herein contained, or by altering the order and course of succession above set down; or if they or any of them shall contract debt, or do any deed whereby the said estate or any part thereof may be burdened, evicted, confiscated, or forfeited, or shall set tacks otherwise than as before directed, or shall contravene or fail in any part of the premises; then not only all such acts and deeds of contravention, and debts so to be contracted, shall be, and are hereby declared void and null to all intents and purposes, in so far as the same may affect, burden, evict, or forfeit the said lands and estate, but also the contravener, for himself or herself only, shall ipso facto amit, lose, and forfeit all right, title, and interest in or to the said lands and estate, and the same shall become void and extinct; and the said estate shall devolve, accresce, and belong to the next heir of tailzie appointed to succeed, although descended of the contravener's body, in the same manner as if the contravener were naturally dead, and to establish his or her right in any legal way, free from all debts and deeds of the contravener."

Jan. 17, 183  
Horne v.  
Rennie.

The entailor died in 1786, and was succeeded by Archibald Hill, the institute, who took infeftment under the entail, and obtained confirmation from the superior. The entail was recorded the same year. This party was succeeded by the respondent, Archibald Hill Rennie, who entered into minutes of sale of the estate of Balliliesk with the suspender, Donald Horne, W.S., and bound himself to deliver to him a valid disposition to the lands.

Horne then brought a suspension of a threatened charge for payment of the price, on the ground of the seller's inability to give him a valid disposition, having no power to alienate. A record was made up on reasons of suspension, the respondent pleading, that he was entitled to grant a disposition, as the irritant and resolute clauses of the entail, which professed to enumerate the particular prohibitions mentioned in the preceding clauses, made no mention of the prohibition against alienation, and were therefore defective.

The Lord Ordinary pronounced the following interlocutor, with the note subjoined:—"In respect that the prohibition against selling con-

"There is a shade of distinction between this case and that of Tillicoultry, 15th January, 1799 (Mor. 15539), inasmuch as the defective enumeration in the resolute clause begins in *that* case with the words, 'either by not assuming the name and arms,' &c., and in *this* case with the words, 'particularly by neglecting to assume the name,' &c. But they coincide in that cardinal defect on which the Lord Ordinary has always understood the case of Tillicoultry to have proceeded, and the law to have been settled ever since the affirmance of the judgment in the House of Lords, viz. the total omission of any express reference to the prohibition against selling, in an irritant and resolute clause, framed on the principle of disavowing and enumerating the several prohibitions, and not on that of a general reference to them, as detailed in a preceding part of the deed.

**No. 99.** to indicate an acquiescence of the profession and of the public, in the opinion given out by the professed authors on the law, in so clear and in so decided a manner.

**17, 1837.**

**Ilson v. Stair's Re-constituted.** The case referred to by M'Kenzie, 22d November, 1665, *Younger v. Johnston* was not then decided, but it was finally determined 28th November, 1665, *Stair's Decisions*, vol. i. p. 315, and there the Court were of opinion, and found 'the reduction of retours to prescribe sooner than other rights.'

We consider the case of *Bargany* to be in no ways applicable to the present. It was a very peculiar and circumstantial case. The retour in that case was of a singular nature as to bear in gremio a complete explanation.

Upon the whole, therefore, we are of opinion, that in a question with heirs, the act 1617, c. 13, applies, and that the defender is entitled to plead the benefit thereof.

We may add in conclusion, that as to all the consequences that may be deducible from this unavoidable interpretation of the law, we cannot prejudicate; that must be left, if required, to legislative interference.

**LORD MONCREIFF.**—Though it is not without considerable difficulty, I concur in the result of the above written opinion. But, as I cannot concur in the view taken in it of the statute 1617, c. 13, I think it proper to explain the ground of my opinion.

The institutional writers have been greatly at a loss to determine what is the precise meaning and effect of the act 1617, c. 13, so as to render it not inconsistent with the immediately preceding statute 1617, c. 12. This last act provides that men shall not be disturbed in the enjoyment of their estates, who have bruik or possessed them by virtue of infeftments made to them by the King, or other superior or author, 'for the space of forty years,' provided they can produce either a charter preceding the entry of the forty years' possession, with seisin on it, or, where there is no charters, instruments of seisin, 'standing together for the space of forty years, either proceeding upon retours, or upon precepts of clare constat;' which rights are declared to be 'valid and sufficient rights, being clad with the said peaceable and continual possession of forty years, without any lawful interruption,' &c. The act 1617, c. 13, on the narrative of the act 1494, by which summonses of error against the determinations of inquests were declared to prescribe, if not pursued within three years, provides that that act shall not prejudice the nearest of kin to seek reduction of such retours within twenty years, and that if the summons "be not intended, executed and pursued within the space of twenty years," &c. the action of reduction shall prescribe, and no one be heard to insist in it.

I cannot think that the second of these acts has an indiscriminate application to all retours, or to all grounds of challenge, or that the two acts can be reconciled simply on the ground that the last relates only to one of the titles mentioned in the first. For to say that two or more infeftments, proceeding on a retour of service, and clad with forty years' possession (as equivalent to charter and seisin with forty years' possession), shall secure the party against every challenge of his title, and to say that a retour alone, with or without seisin, by the mere lapse of twenty years, shall in every case secure a party against any challenge of that title, appears to me to involve a contradiction in principle, which the framers of the first act cannot be supposed to have intended. And it farther appears to me, that such a construction of the act is not reconcileable with the opinions delivered in the case of *Bargany*.

In general, I think that the act, in the restraining part of it, was intended to protect the parties once served against the necessity of again producing, after twenty years, the proofs of their propinquity in blood to the deceased. Taking this to be the effect of it, though it may also protect against irregularities in the proceedings, I think, though with difficulty, that it must secure the retour in this case against the particular ground of challenge brought against it. My cause of difficulty is this:—The pursuer does not object to the statement of James Neilson's propinquity to John Neilson in Brownside, from whom he drew his descent; he only says that that descent was through the second son of John, while the pursuer is descended of Matthew, an elder son; and if the direct case be put, that A obtained a service as heir of his father, and that after twenty years B, stating himself to be an elder son, absent perhaps at the time, challenged the retour, I should have hesitation in saying that the door was shut against his plain right by the vicennial prescription. I am aware, however, of the case of *Younger v. Johnston*, 22d November, 1665, and what Mackenzie has said on it in his supplementary note, and only mean to express a doubt on the principle.

But I am of opinion, that, in this case, the retour of James Neilson is of such a nature, according to the statement in the record, as necessarily to bring it within the statutory prescription. He is served nearest heir as being the grandson of John Neilson. In this it is implied, that his father was either the eldest son or the eldest who has left descendants; and as the name of his father does not appear, the ground of challenge set forth in the summons and record is truly an impeachment of the propinquity on which he has been served. I therefore concur with the other Judges in thinking that, in this case, the action is barred by the statute.

LORD JUSTICE-CLERK.—I concur with the majority.

LORD GLENLEE concurred.

LORD MEADOWBANK.—That is also my opinion.

LORD MEDWYN.—If a retour be followed by possession, I can understand the prescription being applied to it. But as to latent general services, I cannot suppose it was ever intended that these should prescribe by mere lapse of 20 years. The two acts I look upon as parts of the same law, and I conceive the retours mentioned in the second act are retours of the kind mentioned in the first, as forming part of a title of possession. Here I think there was possession as validating another title. I also conceive interruption would apply to such a case. I concur, however, in the result, though I would wish to guard my opinion.

THE COURT accordingly sustained the third preliminary defence.

ANDREW SCOTT, W.S.—JOHN COURT, S.S.C.—Agents.

No. 9  
Jan. 17, 18  
Neilson v.  
Cochrane's  
presentativ



o. 100.

DONALD HORNE, W.S., Suspender.—*G. G. Bell—Patton.*

17, 1837.

ARCHIBALD HILL RENNIE, Respondent and Pursuer.—*D. F. Hope—Rutherford—Sandford.*

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WILLIAM M'DOWALL and OTHERS, Defenders.—*G. G. Bell—Patton.*

*Entail—Clause.*—In a deed of entail certain acts were expressly prohibited, and, inter alia, selling or alienation of the estate; the irritant and resolute clause commenced with a general declaration—"in case the heirs of tailzie shall contravene or fail in performing any part of the premises"—then went on to specify the prohibited acts—"particularly by neglecting to assume," &c., "or by possessing," &c., and concluded with a repetition of the previous general declaration; in the special enumeration the prohibition against alienation was omitted;—Held, notwithstanding, that the heirs of entail were not entitled to sell, and that the prohibition so omitted was protected by the general declaration.

17, 1837.

DIVISION.

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IN the year 1780, the Rev. Archibald Rennie executed a deed of entail of the lands of Balliliesk in favour of himself in liferent, and, after his decease, of Archibald Hill, and other heirs-substitute. The deed, after specially providing that the heirs succeeding to the estate should be obliged to assume the name of Rennie, contained the following prohibitions:—"With this limitation and restriction, that it shall not be lawful to, nor in the power of the said Archibald Hill, nor any others of the heirs of tailzie aforesaid, to alter, innovate, or infringe this present tailzie, and the order and course of succession before mentioned; or to sell, alienate, or burden the lands and others above disposed, or any part thereof, or contract debts, or grant bond, or any other right or security whatsoever, which may any ways burden or affect the said lands and estate, or do any other fact or deed, civil or criminal, directly or indirectly, whereby the said estate, or any part thereof, may be adjudged, confiscated, forfeited, or any ways evicted, in prejudice of the succeeding heirs of tailzie; and with this limitation also, that it shall not be in the power of the said Archibald Hill, or the other heirs of tailzie aforesaid, to set tacks of the said estate, or any part thereof, for longer space than nineteen years, nor the park in which the principal house and office-houses stand, nor the park lying immediately on the west side thereof, neither the said principal house and offices, longer than the lifetime of the setter, without any diminution of the rental, except in the case of evident necessity, in which case the said tacks are to be set up by public roup, after intimation thereof three several Sundays preceding the roup, at the parish church where the lands lye."

The irritant and resolute clauses were as follows:—"And in case the said Archibald Hill, or any of the heirs of tailzie before mentioned, shall contravene or fail in performing any part of the premises, particularly by neglecting to assume, use, and bear the surname of Rennie, or by possessing the foresaid estate in virtue of any other title than the present tailzie, or by omitting to engross in the whole rights, charters, re-

tours, and infestments, the order of succession and whole conditions, No. 100 provisions, and declarations herein contained, or by altering the order and course of succession above set down; or if they or any of them shall contract debt, or do any deed whereby the said estate or any part thereof may be burdened, evicted, confiscated, or forfeited, or shall set tacks otherwise than as before directed, or shall contravene or fail in any part of the premises; then not only all such acts and deeds of contravention, and debts so to be contracted, shall be, and are hereby declared void and null to all intents and purposes, in so far as the same may affect, burden, evict, or forfeit the said lands and estate, but also the contravener, for himself or herself only, shall ipso facto amit, lose, and forfeit all right, title, and interest in or to the said lands and estate, and the same shall become void and extinct; and the said estate shall devolve, accresce, and belong to the next heir of tailzie appointed to succeed, although descended of the contravener's body, in the same manner as if the contravener were naturally dead, and to establish his or her right in any legal way, free from all debts and deeds of the contravener."

Jan. 17, 182  
Horne v.  
Rennie.

The entailor died in 1786, and was succeeded by Archibald Hill, the institute, who took infestment under the entail, and obtained confirmation from the superior. The entail was recorded the same year. This party was succeeded by the respondent, Archibald Hill Rennie, who entered into minutes of sale of the estate of Balliliesk with the suspender, Donald Horne, W.S., and bound himself to deliver to him a valid disposition to the lands.

Horne then brought a suspension of a threatened charge for payment of the price, on the ground of the seller's inability to give him a valid disposition, having no power to alienate. A record was made up on reasons of suspension, the respondent pleading, that he was entitled to grant a disposition, as the irritant and resolute clauses of the entail, which professed to enumerate the particular prohibitions mentioned in the preceding clauses, made no mention of the prohibition against alienation, and were therefore defective.

The Lord Ordinary pronounced the following interlocutor, with the note subjoined:—"In respect that the prohibition against selling con-

\* "There is a shade of distinction between this case and that of Tillicoultry, 15th January, 1799 (Mor. 15539), inasmuch as the defective enumeration in the resolute clause begins in *that* case with the words, 'either by not assuming the name and arms,' &c., and in *this* case with the words, 'particularly by neglecting to assume the name,' &c. But they coincide in that cardinal defect on which the Lord Ordinary has always understood the case of Tillicoultry to have proceeded, and the law to have been settled ever since the affirmance of the judgment in the House of Lords, viz. the total omission of any express reference to the prohibition against selling, in an irritant and resolute clause, framed on the principle of distinctly reciting and enumerating the several prohibitions, and not on that of a general reference to them, as detailed in a preceding part of the deed.

No. 100. tained in the entail under which the lands of Balliliesk are held by the  
 . 17, 1836. charger, is not properly fenced or secured by the irritant and resolute  
 rne v. clauses thereof, finds that the minutes of sale of the said lands entered  
 nie. into between the said charger and the suspender was a lawful transac-  
 tion, and such as may and ought to be enforced at the instance of either  
 of the parties ; and therefore repels the reasons of suspension : Finds the  
 letters and charge orderly proceeded, and decerns ; but finds no expenses  
 due."

A reclaiming note having been presented against this judgment, it was considered expedient to call the heirs of entail into the field by a summons of declarator. Appearance was made accordingly for the defender M'Dowall, and other substitute heirs, and the processes of declarator and suspension were thereafter conjoined, and the cause appointed to be argued in Cases.

*Pleaded for Archibald Hill Rennie—*

Entails are strictissimi juris, and, to render the prohibitions effectual, each of them must be brought under the operation of both the irritant and resolute clauses ; these clauses may be drawn in two forms, either in general terms applying to all the prohibitions, or on the principle of distinctly enumerating every prohibition, and applying to each act separately ; but if the latter form be adopted, and any one of the prohibited acts be omitted in the enumeration, the entail is held to be defective, and the heir in possession is free in respect to the prohibition which has not been recited, whether the enumeration of particulars be accompanied with a general declaration of irritancy or not.<sup>1</sup> If the entailer think fit to depart from his general declaration, and to enter into a specific detail of the different prohibitions, that specification will derogate from or govern the effect of the general terms already used, and be held as comprehend-

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" The case of Prestonfield (14th January, 1812, Fac. Coll.) is less precisely in point, though in two respects it is even stronger than the present ; 1st, Because the defective enumeration occurs there in a second or supplementary joint irritant and resolute clause, following immediately upon certain special provisions (including that as to leases, which was there no question), and evidently intended mainly to secure their efficacy ; and, 2d, Because the enumeration itself is not, so far as it goes, in the full or precise terms of the original prohibitions (as is the case here), but is to a certain extent in the nature of a general reference, though containing the names of several of the acts that had been prohibited ; leases, however, not being of the number. The authority of the case of Tillicoultry was held, however, very clearly to extend to such a case."

<sup>1</sup> Bruce v. Bruce (Tillicoultry case), Jan. 15, 1799 (Mor. 15539) ; Scott Moncrieff v. Cunningham, not reported ;<sup>1</sup> Breadalbane v. Campbell, 1812, not reported ; Dick v. Drysdale (Prestonfield), Jan. 14, 1812, F.C.

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<sup>1</sup> In this case, which regarded the Bonnington entail, the clauses were framed as in the Tillicoultry case.

the whole prohibitions against which the penalty of forfeiture is No. 100.  
 held;<sup>1</sup> and the law will not recognize a combination of the two modes  
 which the clauses in question may be drawn.

Jan. 17, 1837.

Horne v.  
 Rennie.

*decided for Mr Horne and the heirs of entail—*

The respondent assumes that the maker of the present entail professed  
 forth in the irritant and resolute clauses, all the cases in which the  
 penalty and forfeiture should operate, and holds it to be settled law that  
 these clauses profess to contain a complete enumeration which in  
 fact is defective, the entail is bad; but neither the clauses in  
 question, nor the law as resulting from the decided cases, bear out this

The general reference in the resolute clause, though accompa-  
 nyed by an enumeration of most of the prohibitions, is entirely indepen-  
 dent of the subsequent specification, and the use of the term “particu-  
 lar” so far from limiting its operation, necessarily implies the existence  
 of prohibitions not specified; there being no ground for a construction  
 to the result, that the mere expression of a special or particular  
 reference as to some of the prohibited acts, should be held as a total aban-  
 donment of the other; and the effect of the general reference remaining  
 though the anxiety of the framer of the entail, as to some of the  
 prohibitions, may have led him to superadd a specification of certain par-  
 ticulars falling within it; such a construction is besides excluded by a  
 comparison of the general reference after the particular enumeration of the  
 prohibited acts. The present question is not within the rule of the case  
 of *Tillicoultry*, for there all the modes in which the heir could incur for-  
 feiture were evidently intended to have been specifically set forth, and the  
 general reference is qualified and restricted by the subsequent special  
 enumeration; nor yet of the case of *Prestonfield*, in which the irritant  
 contains no general reference to the antecedent provisions, farther  
 than characterising those enumerated acts which are to be brought  
 under the nullity, and is from its structure limited to those acts.

The cause was this day put out for advising.

JUSTICE-CLERK.—I entertain the same difficulty which was felt by the  
 ordinary in distinguishing between the principle which ought to rule this  
 case and that upon which the *Tillicoultry* case was decided. I am aware that the  
 facts in that case and in the present are not exactly the same, the enumeration

No. 100. of particulars in which the prohibition against alienation is not included, I cannot but hold that there is a palpable defect in regard to that prohibition; and I do not feel myself warranted in going against the judgment of the Lord Ordinary.

19, 1857.  
Lockhart v.  
Macdonald.

LORD GLENLEE.—I have no idea of going against the Tillicoultry case, which is just to adhere to the principle of strict interpretation. We are not to begin with a lax interpretation of the words used, in order to bring the cases within the same category, and then resort to the doctrine of strict interpretation. By the use of the words “either” and “or,” as in the Tillicoultry case, the entailer expressly limits the resolution to the acts specified in the clause. In that case a great part of the argument was that the general clause applied to the prohibition omitted in the special enumeration; on that point the Court had differed. But here the case is perfectly different, as there is a general clause irritating the right by doing this or that. A general declaration in the resolute clause annexed to particulars will not apply to others of a different kind; but when it precedes them, then it bears “in case the heirs of tailzie shall contravene in any part of the premises,” and without prejudice to the generality, certain things are afterwards specified. So here, according to the strict meaning of the words, I cannot doubt that the entailer meant to irritate and resolve the heir’s right, if any one thing before prohibited was done. I incline, therefore, to alter the interlocutor, but in so doing I think I confirm the case of Tillicoultry.

LORD MEADOWBANK.—I agree entirely with the opinion of Lord Glenlee.

LORD MEDWYN.—I concur; and if I did not think I was following out the case of Tillicoultry, I should not be for altering.

THE COURT accordingly altered, and sustained the reasons of suspension, but found no expenses due.

HORNE and ROSE, W.S.—SMITH and KINNEAR, W.S.—Agents.

*Revised on appeal 14th March 1858.*

No. 101. SIR NORMAN M'DONALD LOCKHART, Pursuer.—*M'Neill*.  
MISSES MARY JANE LOCKHART MACDONALD, and EMILIA OLIVIA  
LOCKHART MACDONALD, Defenders.—*Keay*.

*Entail—Succession—Clause.*—A party executed an entail, and granted procuratory to resign the estate for new infeftment, “to myself, and the heirs-male to be procreate of my body, of my present marriage, and the heirs whatsoever of the bodies of the said heirs-male; whom failing, to the heirs-male to be procreated of my body in any subsequent marriage, and the heirs whatsoever of the bodies of the said heirs-male; whom failing, to E. M., my only daughter, and the heirs-male of her body of her present marriage with C. L., and the heirs whatsoever of the body of the said heirs-male; whom failing, to the heirs-male of the said E. M. in any subsequent marriage, and the heirs whatsoever of the bodies of the said heirs-male; whom failing, to the heirs-female of the said E. M. of her present marriage:” E. M. took the estate, and was succeeded by a son and grandson, descending of the marriage with C. L.; the grandson died, leaving daughters:—Held, that these ladies were called to the succession before the younger brother of their father.

...or my only in any subsequent marriage, and the heirs what-  
of the bodies of the said heirs-male; whom failing, to Mrs  
Macdonald, my only lawful daughter, and the heirs-male of  
of her present marriage, and the heirs whatsoever of the body  
d heirs-male; whom failing, to the heirs-male of the said Mrs  
Macdonald in any subsequent marriage, and the heirs what-  
of the bodies of the said heirs-male; whom failing, to the heirs-  
the said Mrs Elizabeth Macdonald of her present marriage;  
ing, to such other heirs as I have nominate, or shall think pro-  
minate" by any writing; failing which nomination, then, "to  
st and lawful heirs-male whatsoever; which failing, to my  
assignees whomsoever."

Macdonald executed a deed of nomination, in which, among  
number of different families of the clan Macdonald were called,  
s deed of nomination, heirs-male of these several families were  
ed. On the death of John Macdonald, his daughter, Mrs Lock-  
[acdonald, succeeded to the estate. On her death, her eldest  
s, succeeded, and died without issue. On his death, his brother-  
alexander succeeded, who again was succeeded by his eldest son  
who died, leaving two daughters, Misses Mary and Olivia Lock-  
donald, but no sons. A question arose between these ladies and  
er's brother, now Sir Norman Macdonald Lockhart, regarding  
ective rights of succession, under the destination of the Largie  
There was a subordinate question also between the daughters  
s. Three declarators of their respective claims were raised by  
eral parties, and were conjoined; but the action which was first  
of by the Court was the declarator at Sir Norman's instance,  
if he prevailed, there was no question left to determine between

**No. 161.** **his heirs whomsoever,"** the destination to the heirs can only open, on the failure of the party himself, though the precedence of the party is not marked by inserting the words "whom failing" between him and his heirs, but, on the contrary, the word "and" is alone interposed between them. In such cases, the word "and," has the same legal effect as "whom failing," and it was so held in construing a similar clause in the destination of the Polwarth Peerage, when recently considered by a Committee of Privileges of the House of Peers.<sup>1</sup>

**Jan. 19, 1887.**  
**Lockhart v.**  
**Macdonald.**

The defenders answered. Even on the pursuer's construction, the heir whomsoever of the body of a son of Mrs Macdonald, by her first marriage, would have excluded her son by a second marriage, if she had entered into such second marriage. Accordingly her grand-daughter by a son of the first marriage, would have excluded her son by a subsequent marriage. But as all her sons, by any marriage, were equally near relations to her, it was difficult to discover any reason for preferring such grand-daughter to a son by the second marriage which was not equally strong for preferring her also to any younger son by the first marriage. And such was the plain intention of the entailer, which could not be lost sight of without leading to much incongruity in extricating the order of succession.

The Lord Ordinary reported the cause.

**LORD GILLIES.**—I think the question involved here is of much importance, but I do not consider it to be attended with any difficulty. The heir-male of the body of Mrs Macdonald by Mr Lockhart, was first called, and then the heir whomsoever of the body of that heir-male. I do not think that all the heirs-male of Mrs Macdonald's body, required to be exhausted, before the heir whomsoever of the body of any of these heirs-male was called. The defenders have put the proper construction on the destination, and they ought to be assoilzied from the declarator at Sir Norman's instance.

**LORD PRESIDENT.**—I am exactly of the same opinion. The deed does not appear to have been very accurately drawn, but the true construction is that which has now been stated. And I think the same, or a very similar clause in the destination of the Rothes estate, was so construed in the House of Lords.

**LORD MACKENZIE.**—I am of the same opinion. The descendants of every heir-male of the body of Mrs Macdonald are called before the collaterals or ascendants of such heir-male. I do not think the whole heirs-male of her body by the marriage with Mr Lockhart, were to be taken first, as one class, requiring to be completely exhausted, before the succession could open to the heir whomsoever of the body of any one of them. And had it been so, it might have been difficult to say, in such a case, who was to take, upon the failure of the last heir-male, whether it was the heir whomsoever of the first heir-male of the body of Mrs Macdonald or the heir whomsoever of the last. But besides, the destination, as construed by Sir Norman, would lead to results of great incongruity. It would first call nothing

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<sup>1</sup> Shorthand Writer's Note of Speeches; produced in process.



heirs-male of the body of Mrs Macdonald by her first marriage, as one class; No. 101.  
 nothing but heirs whomsoever of the bodies of that class of heirs-male; then  
 ing but heirs-male of her body by any subsequent marriage, or marriages, as Jan. 19, 1837.  
 her class; then again, nothing but heirs whomsoever of their bodies, as ano- Craigie v.  
 class; and then heirs-female of Mrs Macdonald. I think the construction Hoggan.  
 which is put upon the destination by the defenders is incomparably more probable  
 than this. There is nothing in our style books or decisions to prevent the clause  
 destination from being legally susceptible of their interpretation. And I am  
 satisfied it is according to the true meaning and intention of the entailer.  
 LORD BALGRAY was absent; but it was intimated by the Lord President that  
 his Lordship concurred with the rest of the Court.

THE COURT pronounced this interlocutor:—"The Lords having advised the  
 three conjoined actions of declarator, find that the succession to the estate  
 of Largie, under the deed of entail thereof, descends to the heirs whatso-  
 ever of the late Sir Charles Macdonald Lockhart, in preference to Sir  
 Norman Macdonald Lockhart claiming as heir-male, and therefore sustain  
 the defences to the action of declarator at his instance; assoilzie the de-  
 fenders from the whole conclusions thereof, and decern; but reserve all  
 questions between the daughters of the said Sir Charles Macdonald Lock-  
 hart relative to the said succession; and remit the processes of declarator  
 at their instance to the Lord Ordinary, to proceed therein as shall be  
 just."

CUNINGHAMS and BELL, W.S.—A. STORIE, W.S.—Agents

ELIZABETH CRAIGIE, Pursuer.—*Robertson—J. Anderson.*  
 EDWARD HOGGAN, Defender.—*Rutherford—Pyper.*

No. 102.

*Proof—Marriage—Witness.*—1. In a declarator of marriage, held, that the  
 father and sister of the pursuer were admissible witnesses for her, in respect of  
 special circumstances of the case; the defender having wilfully destroyed do-  
 cumentary evidence regarding the footing on which the parties stood in relation to  
 each other; and having held personal conversation with the pursuer's sister in refer-  
 ence to some of the disputed facts; and having repeatedly sanctioned the pursuer's  
 communications with her parents, respecting the nature of their mutual intercourse,  
 he enjoined the strictest secrecy as to all others. 2. Circumstances in which  
 objection to a witness, on the head of agency, was repelled by the Lordordi-  
 nary and the interlocutor was acquiesced in. 3. The pursuer of a declarator of  
 marriage got up from her agent at his office, the papers forming the evidence of her  
 marriage; the defender was waiting for her in the street, near the office, and he got  
 the papers from her, on giving her a note containing the conditions on which he  
 would hand them: in a subsequent declarator, the pursuer alleged, with some pro-  
 of, that this note was one of those documents destroyed by the defender;  
 and was at issue as to the conditions specified in the note: in the new  
 declarator, the pursuer employed a different agent;—Held competent, in the cir-  
 cumstances, for the pursuer to ask her former agent "on what ground, or for what  
 purpose, he refused him to give up the documents to her."

**No. 102.** **ELIZABETH CRAIGIE**, daughter of George Craigie, bather at Clack  
 Grigor Castle, resided with her mother, who lived in Edinburgh, and  
 kept a lodging-house in Albany Street. After Edward Hoggan, W.S., had  
 spent several years there as a lodger, Elizabeth Craigie, in September, 1830,  
 raised a declarator of marriage against him, alleging that in consequence  
 of a promise of marriage she had yielded to his embraces in December,  
 1831; that Hoggan desired to keep the marriage secret for family reasons,  
 and she complied with this request; and that after much intermediate  
 intercourse and correspondence, it had become necessary for her to  
 raise her action.

Jan. 19, 1837.  
 Craigie v.  
 Hoggan.  
 1st Division.  
 Ld. Fullerton.  
 D.

The defender alleged that the connexion was of an illicit nature.  
 A record being made up, and a proof allowed, the following circumstances  
 appeared. Hoggan had written a letter to the pursuer in these terms:—  
 “DEAR ELIZABETH,—Under existing circumstances, I feel anxious to  
 provide for you after my decease, as far as in my power; and with this  
 view I shall, at my decease, leave a declaration, acknowledging you as  
 my lawful wife, which will secure to you the annuity payable from the  
 widows’ fund of writers to the signet. It is of the utmost importance  
 that this intention should not be made known, as utter ruin, in that event,  
 must fall on me; and were I to show or give you possession of the declaration,  
 I would then be compelled to announce the fact to the collectors  
 of the widows’ fund, within three months, under forfeiture of the annuity.  
 The declaration, therefore, shall only be delivered at my decease, in the  
 event of the most strict secrecy being adhered to regarding this communication;  
 and I hereby declare, that in the event of the contents of this letter  
 being made known to any other person or persons, except your father and  
 mother, the letter shall be of no avail, and shall, in no manner of way,  
 be held as binding, or used as a document against me or I am,” &c. This letter  
 was dated, ex facie, January 25, 1834. The pursuer alleged that its true  
 date was March 8, 1834, but that it was ante-dated for the purpose of  
 legitimizing the child of which she was pregnant. Hoggan admitted that  
 the letter was ante-dated, which he said was done at the pursuer’s request;  
 and he did not recollect how long after its apparent date it was really  
 written. He denied the alleged purpose of ante-dating it. The pursuer  
 wrote a letter to Hoggan, which she alleged to have been dated March 8,  
 1834, and to have been in these terms:—“DEAR EDWARD,—I do hereby  
 declare to take you for my lawful husband, in terms of the document which  
 you have made out, and that I will not make it known to any but my father,  
 mother, and those friends which I wish to be on terms of intimacy with.  
 But should the fact become known, and I have no hand in it, I will not hold  
 responsible nor forfeit my claim. I will do all to conceal it. Yours,” &c.  
 Hoggan denied that he ever accepted, or retained such a letter; but he  
 stated that he had received a letter from the pursuer, which he ultimately  
 admitted to be of the import above quoted, which appeared to be given to

a sinister purpose, and which he therefore instantly burnt in the No. 102.  
 r's presence. The pursuer alleged that her father was ignorant of Jan. 19, 1837.  
 sole transaction until 9th March, 1834, when it was communicated Craigie v.  
 by her mother. The pursuer farther alleged that she afterwards Hoggan.  
 ed a message to her father, by the defender's desire, stating that  
 defender was willing to grant any written declaration of marriage  
 might be desired, besides the letter of January 25th. This was  
 l by the defender.

out the 25th of March the pursuer and her father took the opinion  
 counsel as to the pursuer's legal claim to the status of a wife, and  
 ed a favourable opinion.

e pursuer alleged that on 28th March her sister told Hoggan, her  
 were not satisfied at the marriage being kept concealed, as the  
 er might be rendered destitute by his going through the public cere-  
 of marriage with another woman; and that next day Hoggan had  
 red to her the following letter:—" March 29, 1834. DEAR ELI-  
 TH,—It is most assuredly my intention to provide for you to the  
 st extent my means will permit, during the remainder of your life,  
 we are separate from each other. If I made any statement last night  
 our sister to the contrary, it was not my intention. Whatever allow-  
 is made is gratuitous on my part, and any abuse or attempt to com-  
 me to increase these payments, will be attended with a contrary  
 t. I propose giving you £50 this year, in full of all expenses of  
 tenance, payable at two terms, and the remaining years to be regu-  
 l by circumstances. The doctor and nurse expenses to be paid.  
 is, truly." In the first paragraph of this letter the words " while  
 re separate from each other," originally were " while unmar-  
 " The pursuer objected to these words, and the defender then  
 k them out and inserted the others in their place. He stated that  
 ad delivered this letter to her that she might shew it to her parents,  
 d that the alteration in the letter was made to please her."

he pursuer alleged that on her now telling Hoggan that his reasons  
 eeping the marriage private were unsatisfactory, he had consulted a  
 d, and afterwards on 1st April, delivered to her the following letter  
 tify her and her advisers:—" I hereby declare most solemnly before  
 ighty God, that I never granted a letter to any one, such as I have  
 to you, and cannot now grant any letter with such an obligation to  
 her person, as I consider myself bound by my letter." The de-  
 of the letter was admitted.

e pursuer alleged that she had shown this letter, that night, to her  
 who were resolved to have her marriage published, before her  
 born, and who desired her to employ Robert White, W.S., as  
 to get under the advice of the counsel already consulted as to her  
 April 2, she employed White, who immediately wrote to  
 him to solemnize the marriage, and at Hoggan's de-

**No. 102.** **Jan. 10, 1837.** **Craigie v. Hoggan.** **sire,** sent him copies of the letters and the case which had been laid before counsel. After much correspondence, and repeated recourse on both sides to the opinion of counsel, a summons of declarator of marriage was drawn by White and revised by counsel. On April 22, the pursuer went to the office of her agent White, and got up her letters and papers; she then went to Hoggan, who was waiting for her in the street, in the vicinity of White's office, and he called a hackney-coach, in which they were both driven straight to South Queensferry. The pursuer carried her whole papers in her reticule, and in the inn at South Queensferry she gave them all up to Hoggan. He looked over them, and it occurred to him that there might still be some papers in the hands of White; he therefore prepared the following draft of a mandate addressed to White, which the pursuer copied:—"SIR,—As Mr Hoggan and I have now arranged the matter, I withdraw all proceedings, and request you to deliver the whole papers, originals, copies, and drafts, still in your possession, connected with this business, to the bearer, who will settle your account. I am, sir, your obedient servant. (Signed) ELIZABETH CRAIGIE."

Hoggan at this time wrote a note, addressed to the pursuer, and put it into her hands. Her mandate was sent immediately by Hoggan to his friend in Edinburgh, who called and got up all the papers from White, which it referred, and at the same time, paid his business account. In the mean time Hoggan put back into the pursuer's reticule, those papers which she had with her, and they crossed the Forth in the afternoon to North Queensferry, where they slept, at a respectable inn, in the same bed. Next forenoon they drove to Burntisland and dined there. After dinner, Hoggan again took the papers out of the reticule, looked them over, and then threw into the fire the letters of 25th January, 29th March, and 1st April, and also the summons of declarator. Next day the parties returned across the Forth to Newhaven.

In regard to the destroying of these papers the parties were directly at issue whether it was done with the pursuer's consent or not, and whether none but the papers above enumerated were destroyed. They were also at issue respecting the contents of the note delivered by Hoggan to the pursuer on first getting possession of the papers at South Queensferry. He averred that it merely contained a provision, for life, settling on the pursuer: She averred it contained an explicit acknowledgment of her as his wife, and that it was destroyed by him along with the other papers at Burntisland. After this the parties lived together for some time, in various places, and about May 1st, at a time when Hoggan had taken the pursuer to Glasgow and left her there, he wrote a letter from Dumfries enclosing a letter from the pursuer's mother to the pursuer, and after mentioning that his Edinburgh friend, formerly noticed, had informed him that the pursuer's sister had written to his (defender's) sister, "communicating the whole of our intimacy;" he added that he enclosed a bundle

from the pursuer's mother to her, which had been forwarded to him by his friend. He added, "Your own sense and feelings must guide you to answer the letter enclosed. I think you ought merely to state whether you feel yourself comfortable or not;—your determination of not seeing them for some length of time, and that your present absence is from your own choice, with my approbation."

No. 102.  
Jan 19, 183  
Craigie v.  
Hoggan.

In the month of August, Hoggan took a house in Warriston Crescent, and, while it was in preparation he wrote this note to the pursuer's mother:—"Mrs Craigie will receive herewith the keys of a flat in No. 4, Warriston Crescent. It will be obliging if Mrs C. will give the enclosed £2 to the servant to purchase coals, and other materials requisite for cleaning the house."

The pursuer alleged that Hoggan then took her to that house as his home, and introduced her to the servants as his wife, on which occasion her mother was in the house. Shortly afterwards the pursuer returned to her mother's house, alleging that Hoggan's conduct had rendered this necessary, and she raised her declarator.

In the course of the proof, the pursuer tendered as a witness Robert White, W.S., who had acted as her agent in the manner already mentioned, but who had not been employed at all in reference to the present process. An objection on the ground of agency was taken, after examining him in initialibus, and the Commissary directed his deposition to be sealed up.

Parties were heard before the Lord Ordinary on the right of the pursuer to open up the sealed deposition.

The pursuer pleaded, that, as White was not agent in this cause, he was admissible, leaving his credibility to be observed upon, in respect of his prior agency. And, as the pursuer was entitled, in support of her present action, to prove the nature of his previous employment, and his actings under it, all which was of essential importance to her, White was the best witness to prove this.

The defender answered—

White was the pursuer's agent in a cause which had the same conclusions as the present, and in which every plea that was set forth was equally set forth in this action. The objection of agency therefore applied, although a new summons had been raised and a new agent was employed, and some additional facts were founded on. White still had acted as agent regarding what was the subject-matter of the present action. The Lord Ordinary repelled the objection to the examination of Mr White, and ordered his sealed deposition to be opened up. In this judgment the defender acquiesced.

Upon opening up the deposition, it appeared that he had been asked by the pursuer, in reference to her getting up the letters and papers out of his hands on 22d April, "On what ground, and for what purpose, the defender requested him to give her up the documents?"

No. 102. The defender objected that the question was incompetent, and the Commissary sustained the objection.

Jan. 19, 1837.  
Draigie v.  
Loggan.

The pursuer then asked, "On what ground, and for what purpose did he (White) so give the documents to the pursuer?"

To which the defender objected that it was just, in substance, the first question in another shape, and was equally incompetent.

The Commissary sustained the objection.

The pursuer's right to put these questions, and also his right to have the sealed depositions of the pursuer's father and sister opened up, which had been allowed to be taken to lie in retentis,\* was now argued, in minutes of debate, before the Lord Ordinary.

\* NOTE by the Lord Ordinary to the interlocutor directing the deposition of the pursuer's father and sister to be taken, and to lie in retentis.

"Had the form of procedure been so peremptory as to oblige the Lord Ordinary instantly to decide the point in dispute, he would have been disposed to find, that in the special circumstances of this case, these witnesses were not inadmissible. The rule against the admission of near relations is not absolute. It confessedly suffers one exception, that arising from *penuria testium*; and in the latest case which occurred, that of *Stewart v. Menzies*, and in which the objection was sustained, it seems to have been admitted by the Court, that even there, circumstances might emerge in the course of the proof which would ultimately warrant a recourse to the testimony of the rejected witnesses. Now here, and even with the information at present afforded by the admissions of the defender, there are very strong grounds for holding that there is a *penuria*, and that too, imputable to the defender himself. It is admitted by him, that between the 8th March and 1st of April, 1834, inclusive, certain letters, of which the contents are also admitted, were addressed by the defender to the pursuer. The true import and object of these letters, form one of the principal subjects of averment and denial on the record. The first of these letters expressly cautions the pursuer to keep the contents strictly secret, except from her father and mother. It is not denied that the parties were living in the same family, and that negotiations or conversations were taking place in regard to the subject of the letters; and indeed, in the defender's letter of the 9th of March, of which the copy is admitted, he refers to a 'statement made last night to your sister.' In addition, it must be considered that he admits that one very important letter—that of the 8th March, 1834, from the pursuer to him—was by him thrown into the fire; though he adds, this was done in her presence. Whatever may be the truth of that statement, the fact is, the letter was destroyed by him; and he does not admit the accuracy of the copy kept and produced by the pursuer.<sup>1</sup> And again, he admits that at a later period he got possession of and destroyed a number of papers, of which neither the description nor the contents can now easily be identified. In these circumstances there does seem to be a strong case on the part of the pursuer for dispensing with the general rule, and for allowing the examination of the proposed witnesses on those points (such as the negotiations and communications connected with the above-mentioned correspondence, &c.), on which they alone can possess any information.

"The Lord Ordinary however is perfectly sensible, as the Court seem to have been in the case of *Stewart v. Menzies*, that in the course of the proof, circumstances may arise capable of affecting very materially the question of the admis-

<sup>1</sup> It was at a subsequent stage that the admission, already mentioned in the narrative of the report, was made.



In reference to the depositions of her father and sister, the pursuer No. 105 pleaded—

1. The circumstances of the case were extremely peculiar. Hoggan's letter, dated 25th January, while enjoining the strictest secrecy as to other persons, allowed its contents to be communicated to the pursuer's father and mother: and that letter promised to make the pursuer his widow, at his decease. Hoggan's letter of 29th March, in reference to a provision for life on the pursuer, referred to a "statement last night to her sister," regarding this subject, which showed that he had been communing with the sister as to their intimacy, and the footing on which they stood towards each other. In these peculiar circumstances, as the defender himself had done so much to render the pursuer's relations necessary witnesses, he was barred from pleading the general rule against their admissibility. But besides this he had wilfully destroyed many of the documents founded on by the pursuer, and, though he admitted the accuracy of copies of several of these, he denied the import of the important note of 22d April, which he gave to the pursuer on getting up the papers. As his own improper act had thus narrowed the pursuer's means of proof, she was entitled to peculiar favour in pleading penuria testium as a ground for admitting her relations. And they might the more safely be admitted, being called to prove, not an isolated contract, or mere exchange of matrimonial consent, but facts and circumstances which formed part of a train of proceedings, and as to the truth of which there thus existed various collateral checks. The later authorities, including that of Stewart, recognized the admissibility of such testimony in cases where the circumstances warranted it: and this was such a case.<sup>1</sup>

2. In reference to the questions put to White, the pursuer pleaded, that they ought to have been allowed. Any statement made by the pursuer to her agent as to the object or purpose of getting up her papers, being made at the time, and when the defender was waiting for her in the street, was part of the res gesta, and should be put in proof before the Court; especially considering that the defender denied what she alleged to have been the true import of the note which he gave her, on that same day, at the time of getting her papers from her.

of these witnesses; and as the forms of Court afford the means of obtaining additional light on the subject, without any risk of the loss of evidence to the pursuer, he has thought it his duty, in a question of such delicacy and difficulty, to avail himself of these forms on the present occasion."

Alison Crim. Pract. 460; 2 Hume, 385; Barber, July, 1732 (16742); Craig, Dec. 8, 1738 (16743); 4 St. 43, 8; 4 Bankt. 30, 15; 4 Ersk. 2, 26; Craig, July 11, 1704 (16708); Cumming, March 5, 1748 (16756); Boyd, Dec. 20, 1770 (16770); Nicolson, Dec. 6, 1770 (16770); Martin, Feb. 8, 1816; Bell, April 14, 1819; 2 Murr. 130; Spence, July 12, 1819; 2 Murr. 167.



10. 102. The defender answered:—  
 1. By the general rule of law, relations of nearness are excluded in every civil case, even where the most important interest was at stake, because it was feared they were too much identified with the party to bear true and trustworthy testimony. But in such a case as this, where the fame and status of a daughter or sister was at stake, the rule was peculiarly applicable, because the temptation to suppress or distort facts, and to give false testimony, would generally be found too strong for human nature to resist. And such accordingly had been the distrust expressed felt by the Court, regarding such testimony, in the most authoritative judgments on the subject.<sup>1</sup> Besides, the exception of *penuria testium* never applied where such *penuria* was imputable in any degree to the party pleading the exception; and as the alleged transaction could neither have been clandestine or irregular without the pursuer's concurrence, she could not now avail herself of that irregularity as a means of letting in suspicious testimony, which must have been inadmissible if nothing had been clandestine. The defender's admission was the sole proof of his having destroyed any of the documents, and it was qualified by the statement that the pursuer had consented to this. And besides, he had admitted the copies of almost all the documents.

2. It was incompetent for the pursuer to put in proof against the defender any mere statement of her own to her agent, which was not made in his, the defender's, presence, even supposing that it could be proved by testimony which was wholly free from suspicion, which that of White was not.

The Lord Ordinary, "in respect of the special circumstances of this case, as established by the documents in process, and the proof already taken, repelled the objections offered by the defender to the admissibility of the pursuer's father and sister as witnesses; and also repelled the objection to the question put to the witness, Robert White, and appointed the sealed packets referred to in the minutes to be opened, and to form part of the process." \*

<sup>1</sup> Stewart, Feb. 5, 1835 (ante, XIII. 408); Tait on Evid. 375; Dalziel, Jan. 10, 1790 (16780); Bell, Jan. 21, 1797 (16786); Dodson's Report of Dalrymple's case, p. 179.

\* "NOTE.—The Lord Ordinary, upon again considering the objection to the examination of the pursuer's father and sister, is rather confirmed than otherwise in the opinion expressed in his former note. The general rule unquestionably is that witnesses so circumstanced must be rejected; and the Lord Ordinary fully concurs in the opinion, that actions like the present do not necessarily demand an relaxation of that rule. When a pursuer founds upon an alleged private and irregular marriage, it would be most dangerous to permit her to urge as a matter of right the secrecy of the transaction, as in itself a sufficient ground for obtaining the testimony of her near relations, the very persons who have the strongest motive for colouring or perverting the truth; and who, on the supposition of her own

Hoggan reclaimed, and, inter alia, objected, that the note of the Lord Ordinary, indicated an intention of not only admitting the pursuer's father and sister, but also allowing a line of examination to be pursued, which

No. 102.

Jan. 19, 183

Craigie v.

Hoggan.

ments being unfounded, are presumably the very persons with whose assistance the measures of the pursuer have been contrived. But the rule is not without exception. Even in the latest case, mainly founded on by the defender, that of *Smart v. Menzies*, the Court, in expressing their opinions, took for granted, that circumstances might emerge in the course of the proof, warranting the examination of the witnesses objected to, on the ground of relationship; and accordingly, on the strength of such circumstances, a brother of the pursuer was afterwards examined.

"Now, it does appear to the Lord Ordinary, that the present case falls within the exception.

"It is established by the documents in process, at least by copies of which the accuracy is admitted, that the defender did address several letters to the pursuer, which, to say the least of them, are of a very equivocal character. Independently of the sense attached to them by the defender, by profession a man of business, the construction put upon them by the pursuer, the comparatively inexperienced individual to whom they were addressed, especially if that construction was known to the defender, is a point which may be of very great importance. In this view, it is essential to ascertain the whole circumstances relative to the acceptance by the defender of the pursuer's letter of the 8th of March, the terms of which are, for the first time, admitted in the minute. The defender, in his deposition as a haver, admits that he received that letter and burnt it; but the addition to that testimony that it was so burned in the presence of, and with the consent of the pursuer, is clearly not conclusive evidence. The only information attainable upon all those matters, is to be sought for in the examination of the pursuer's nearest relations, to whom, by the most positive injunctions of the defender himself, the pursuer's confidence was to be confined. In these circumstances, it does appear to the Lord Ordinary, that their testimony cannot be rejected, without the greatest injury to the pursuer; while, on the other hand, the defender has, by his own acts, placed himself in a situation, most justly barring all attempts on his part to shut out the only light which can be obtained on the subject. In canvassing the weight due to the testimony of those witnesses, regard will of course be had to the peculiarity of their situation, but in the mean time the Lord Ordinary cannot refuse their testimony.

"The second point relates to the question put to Mr Whyte, as to the pursuer's reasons for asking from him the letters and documents; or, as the question is put in another form, his reason for re-delivering them. In general, a statement made by a party would be inadmissible; but this is not exactly a fair mode of stating the point. It is admitted that those papers and documents were got up from Mr Whyte by the pursuer, for the purpose of being delivered to the defender, who was waiting in the neighbourhood of Mr Whyte's office. It is admitted by the defender, that the delivery of those documents to him was not gratuitous or unconditional. He avers, that the condition was, the conveyance to her of a provision for life; while the pursuer avers it to have been the granting of a letter explicitly declaring her to be his wife, and thus superseding the necessity of the first action of declarator, and of the various documents on which it was founded.

"Both parties aver, that a letter was written, binding the defender to the condition, such as it was. That letter is not forthcoming. The defender has not admitted the pursuer as a haver, and on the other hand she states, that it was along with the other documents, which the defender admits he put into the hands of the pursuer; and in the absence of any proof of its existence, there does not seem to be some probability in this statement. The parties then being at issue in regard to the condition on which these papers and documents were to be delivered

No. 102. might involve many individual questions of the utmost delicacy, in point of competency, and as to which he ought not to be now prejudged. He therefore moved the Court to alter, or at least to insert a reservation if they adhered.

**LORD GILLIES.**—I think the interlocutor of the Lord Ordinary is well founded in the special circumstances of this case, and that the reasoning in the note sufficiently supports the interlocutor. But, in adhering, I think nothing should be decided as to the father and sister of the pursuer, except that they are admissible witnesses. The interlocutor finds nothing more than this, and neither do we, if we merely adhere, as I think we should.

**LORD PRESIDENT.**—I quite concur in adhering to the interlocutor. The general rule as to the inadmissibility of so near relations as these witnesses is perfectly fixed, but it suffers exception in special cases, and the circumstances of this case are very peculiar indeed: The defender's own conduct lets in these witnesses. In adhering, however, it is very proper to observe that we only determine the point of the admissibility of these witnesses. The particular questions which may be put to them are not now before us, and it would be premature to foreclose either party now, on the competency of any of these questions. But it is unnecessary to insert any reservation, on this subject, in our interlocutor, as we merely decide that the witnesses are admissible.

**LORD MACKENZIE.**—I am very suspicious of testimony like this, in ordinary cases, but the circumstances of this case are of the most special and peculiar character. It is admitted that there was a treaty between the pursuer and defender, to which treaty the pursuer's parents were parties. The defender gives a very odd account of this treaty, when he says that the object of it was to make the pursuer his widow, without making her his wife. Making her his widow must imply that he first made her his wife, for, assuredly, if no marriage existed before he was dead, it could not begin afterwards. Our judicial records do bear evidence, it is true, that there have been times when the bodies of traitors, after they were deceased, have been brought into Court, and that a trial has been held, and sentence pronounced and executed on them; but I never heard of any form, at any time, by which a marriage-contract was held to be entered into with a corpse. Yet this would be the only way of making a woman the widow of a man who died before she became his wife. It is, therefore, a very odd account which the defender gives of this treaty with the pursuer. And, in addition to this, he has destroyed a number of the letters and papers which were calculated to throw light upon it; in which proceeding, I cannot perceive that he was actuated by any motive but the wish to destroy evidence. Then it appears that the pursuer's father and sister have knowledge in reference to the very matters which the defender has tried thus to conceal. He permitted the pursuer to make communications on the subject, to her parents, while he enjoined the strictest secrecy towards others, and he was him-

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up, it rather appears to the Lord Ordinary that the expressions used by the pursuer to her agent, on asking for the papers, while the defender was waiting on the street to receive them, fall to be considered as part of the res gesta; as a circumstance taking place in the course of the transaction, which may be competently received."

self a party to a conversation with the sister respecting these matters. In these very unusual and remarkable circumstances, I think that the pursuer's father and sister cannot be objected to by him as inadmissible, but ought to be examined. In regard also to the question put to White, I concur with the Lord Ordinary, and have nothing to add to his Lordship's observations on that point.

LORD BALGRAY was absent.

THE COURT accordingly adhered.

DAVIDSONS and SYME, W.S.—A. DUNLOP, W.S.—Agents.

W. L. EWING and OTHERS, Pursuers and Suspenders.—*D. F. Hope—* No. 10  
*H. J. Robertson.*

GLASGOW COMMISSIONERS of POLICE, Defenders and Respondents.—  
*Rutherford—G. Napier.*

*Title to Pursue.*—Commissioners under a Burgh Police Act having authorized the payment of a certain sum out of the funds under their management in liquidation of the expenses of opposing a bill in Parliament, and having imposed an assessment for the current year, proceeding on consideration of an estimate of the expenses of the preceding year, in which this sum was included, and certain rate-payers having brought an action for setting aside the resolutions of the Commissioners as in violation of the statute, and for having them ordained to pay back the sums so voted away by them into the funds of the police establishment, and also to have them interdicted from including these sums in any assessment to be imposed or levied by them—Held that the pursuers had no such direct or immediate interest as to entitle them to insist in these conclusions.

By the police act of the city of Glasgow, passed in 1821, a Board of Commissioners are appointed for the management of the whole matters embraced by the act, with power to levy an assessment on the inhabitants, which, with certain other funds forming part of the revenues of the Board, it is enacted shall be applied to the purposes specified in the act, "and for no other purposes whatever;" and any surplus in one year is directed to be applied to the same purposes in the next year. After some provisions (§§ 123-4-5) as to proceedings for recovery of fines and penalties, &c., and for an appeal to the Circuit Court of Justiciary, it is enacted (§ 133) "That no action shall be commenced against the said magistrates and other commissioners, or any other person or persons, for any thing done in the execution of this act, after three calendar months from the time the act is committed; and the defender or defenders in such action or process may produce this act, and plead that the said things were done by authority, and in virtue thereof; and if they shall appear to be done, then and in that case the said defender or defenders shall be absolved from such action or process, and the pursuer or pursuers in such action shall be found liable to pay the said defender or defenders, the expenses of process incurred by the said defender or defenders: and it is always, that it shall be competent to the Town-Council, Mer-

No. 10  
Jan. 19, 18  
Ewing v.  
Glasgow C  
missioners  
Police.

Jan. 19, 18  
2d Division  
Ld. Cockburn  
K.

Ed. 183.

1. 18. 1837.

1. 18. 1837.

1. 18. 1837.

1. 18. 1837.

1. 18. 1837.

Shant's House, and Trades' House of the said city, or any one of them, to bring actions against the said Board of Commissioners, or to the Board of Commissioners for the time being; to bring actions against their predecessors in office, before the Courts of Session or Exchequer in Scotland, for embezzling, squandering, or misapplying the funds vested in them by this act; and that at any time within twelve calendar months after the offence for which such action may be raised, shall be alleged to have been committed."

In the year 1834, a bill having been introduced into Parliament for the union of two water companies which had for some time subsisted in Glasgow, containing powers that were considered injurious to the public interests, as creating a monopoly of the supply of water, on unduly advantageous terms to the promoters of it, considerable opposition was raised by various classes of the inhabitants and several public bodies in the city. Joint measures were taken to resist the passing of the bill, for which purpose a deputation was sent to London by the opponents of the scheme. Among other bodies, the Commissioners of Police co-operated in these measures. On the 6th February, 1834, a meeting of the Board passed a series of resolutions condemnatory of the bill, and agreeing to petition Parliament against it; and a subsequent meeting on the 13th resolved by a majority of 21 to 4, "that the committee be authorized to co-operate with other public bodies in giving effect to the resolutions of the Board, by opposing the proposed monopoly in the supply of water, and to contribute a proportional expense of the opposition."

Against this resolution two of the minority entered their protest. The bill was successfully opposed, an expense being incurred, amounting in all to £857, 19s. 2d. At a meeting of the Board held on the 17th July, accounts were laid before them, in which there was an item, under the head of incidental charges, of £47, 7s., for "opposing the water bill in part. The following report by the Committee of Finance was at the same time laid before the meeting:—"There was laid before the committee, copy minute of meeting of the joint committees from the public bodies for opposing the water bill, containing a statement of the expenses, incurred in the opposition. The total amount is £2065, 18s. 5d., of which the proportion claimed from the police establishment, is £857, 19s. 2d.; but it is supposed that some deductions from the accounts may be obtained, and the police establishment will be entitled to one-half the benefit of whatever deductions may be made. The whole accounts are in the hands of the clerk, for the inspection of all concerned; and the committee recommend, in the meantime, an interim grant of £600 to account, as that much has already been advanced by the city incorporation."

The meeting approved of the accounts containing the item of £47, 7s., and directed the consideration of the report to stand over till next meeting.

ing. At the next meeting, held on the 24th July, the Board having "con-  
sidered the report of the committee of finance upon the expenses of the  
opposition to the water bill," it was moved and carried "that as therein  
proposed the board do now order payment of £600 of these expenses;"  
and at a subsequent meeting on the 25th August, "the board having con-  
sidered the estimate of income and expenditure presented at last meeting,  
and which is herein below engrossed, approved thereof, and now laid on  
an assessment for the current year, at the rate of one shilling per pound  
on the highest class of rents, and at lower rates on lower rents, in terms  
of the statute."

In the estimate here referred to, there was included among the items of  
expenditure the sum of £810 for "opposing the Water Company's bill."  
On the 13th of October following, the pursuers, Ewing and others,  
seventeen in number, and designing themselves "residents in Glas-  
gow, or occupiers of property there, and rated in the police books as liable  
in payment of police assessments under the police act after mentioned,  
and who have hitherto been assessed accordingly, for themselves, and for  
all those who adhere to them, and whose names and designations will be  
specified in a minute in the proceedings that may follow hereon," pre-  
sented a bill of suspension and interdict, narrating the resolutions of 17th  
and 24th July, and 25th August above recited, and the provisions of the  
police act, in contravention of which they alleged this application of the  
funds to have been made, and praying to have the commissioners prohi-  
bited and interdicted. "*Primo*, From appropriating or applying, directly  
or indirectly, any sum or sums levied or to be levied by assessment, under  
or by virtue of the said police act, in or towards the payment, in whole or  
in part, of any expense incurred or to be incurred in opposing the said  
bill introduced into Parliament by the said Water Companies, or of any  
expense, incurred or to be incurred, in relation to any plan, survey, report,  
or other proceeding for the formation of a new water company, or for the  
supply of the city of Glasgow with water, or for any other purpose what-  
ever, than those specified in the said police act: And, *Secundo*, From  
including in the estimate for any assessment to be levied under or by vir-  
tue of the said police act, any sum or sums to be applied or appropriated  
in or towards the payment of any such expenses: And, *Tertio*, From  
levying, by assessment or otherways under the said police act, the said  
sum of £810, stated in the said estimate of expenditure for the current  
year for opposing the Water Company's bill, or any part of that sum, or  
any other sum for that purpose. *Quarto*, Or if any of the sums voted at  
the meetings of the 17th and 24th days of July last have actually been  
paid out of the police funds, from levying by assessment for the ensuing  
year, under the foresaid resolutions, money to the extent of the sums so  
paid away, inasmuch as funds to that extent ought to be in the hands of  
the police commissioners and their treasurer." At the same time these

No. 10

Jan. 19,

Ewing v.

Glasgow

commissioners

Police.



10. 103. parties, designing themselves as above mentioned, also raised an action of reduction and repetition, concluding to have the resolutions of 17th and 24th July set aside, as in contravention of the statute, and to have the commissioners who attended the meetings held on these days respectively ordained "as individuals, conjunctly and severally, to repeat and pay back, or to procure to be repeated and paid back into the funds of the said police establishment," the respective sums of £47, 7s. and £600, "which they illegally and wrongfully authorized, sanctioned and ordered to be paid away out of the said funds, as before mentioned, for the purpose of defraying the expense, in part, of opposing the said Water Company's bill, to the effect that the said funds belonging to the said police establishment, may be in the same state as if the said resolutions had not been passed, and the foresaid sums had not been paid away."

The bill of suspension having been passed and the letters expedite, the two actions were conjoined and a record made up, in which the commissioners of police maintained a variety of pleas both on the merits and on the title of the pursuers to pursue. With reference to these the Lord Ordinary pronounced the following interlocutor, adding the subjoined note :—"Sustains the title of the pursuers; repels the objection to the

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\* "None of the principles or authorities about popular actions apply to this case. There can scarcely be conceived to be a better title and interest than that which a person who is taxed illegally has to resist that tax, at least in so far as relates to his portion of it. The 133d section of the statute confers a right of action on certain *public bodies*. But giving these a statutory title, does not take away any title belonging by law to individuals. And even as to these bodies, their right is confined to cases affecting the misapplication of *funds vested* in the commissioners, whereas part of the objection here is, that the defenders went beyond their powers, and assessed for sums, which, for this reason, could not be legally vested in them.

"Section 124 makes an appeal to the Circuit Court *lawful*; but the clause plainly does not apply to questions like this; and, at any rate, the ordinary jurisdiction of the Court of Session to protect against excess of power, is not taken away. The two sections which precede, and which follow this one, make it clear that the 124th only applies to proceedings in which the person aggrieved was *judicially a party*.

"Section 133 limits actions for things done '*in execution of this act*' to three months, but this does not apply to cases where the complaint is that the defenders went out of the act; and besides, the act specially challenged took place on the 17th and on the 24th of July, and the action was raised on the 13th October. There were resolutions, no doubt, of February before, *to do these acts, which* prospective resolutions are not brought under reduction. But it was unnecessary for the pursuers to challenge, not merely the act which injured them, but all the votes by which it may have been preceded. If it were, every act might be saved from objection, by being preceded by a resolution above three months before, which, *in itself*, may do no harm, and of which the party hurt may never hear. In this very case, it does not appear how there was any personal interest in any body to interfere, for nothing *actually touching* any individual *was done*. There was merely a barren, general and revocable resolution that at some future time an *unnamed* proportion of the expense *would be paid*.

"On the merits, the Lord Ordinary has abstained from deciding anything at



jurisdiction of the Court of Session. Finds that the action is not cut off No. 108  
by the statutory limitation of three months: Finds that the defenders had  
no right to levy or apply the sums in question, or any part thereof, in

Jan. 19, 1893  
Ewing v.  
Glasgow Co-  
missioners of  
Police.

present except the first conclusion of the reduction, because the other matters cannot very well be extricated till the general principle be fixed; and if his view of this principle be wrong, it is needless to compel the parties to go minutely into the rest of the case.

"He is not moved in deciding the reductive conclusion by any considerations of expediency. He goes upon the statute alone, and his general opinion is, that the defenders, as police commissioners, have no particle of power except what they can show that they possess in virtue of the act of Parliament which creates them, and that he cannot discover, by any legal reading or construction of that act, that they are authorized to assess for the purpose of opposing or of advancing any Parliamentary bill whatever.

"The case of the defenders rests on the averments that the bill in question was hurtful to the inhabitants, and interfered with the existing Police Act, and that, without their official co-operation, could not have been defeated. It is, and always must be, one of the misfortunes of permitting such applications of the funds, that any court, in judging of their propriety, must consider the truth of such averment, and that these are scarcely capable of being judicially ascertained. It appears from this process, that there are persons in Glasgow who hold that the bill was of a beneficial tendency for the people—that any obnoxious clauses might have been given up or arranged—that it could have been thrown out without the defenders' help—and that, at any rate, their expenditure in obstructing it was extravagant. If the defenders are not to get *unlimited* credit, these points must be laid before the propriety of what they did can be determined by this Court; and how they are to be determined the Lord Ordinary does not know. They are, to a great extent, matters of mere opinion. However, he *assumes*, in argument, that they are all clear in the defenders' favour. Still, he cannot discover that legislation was any part of the Commissioners' business, at least at the expense of the police funds.

"The general import of the statute is, that the Commissioners are to keep up a proper establishment of officers, and are to see that the city be *watched, cleaned, and lighted*, and that they may levy funds *for the purposes herein directed*, 'and for the other necessary purposes of this act, and for no other purposes whatever.' This gives them ample authority to do any thing, such as even raising or defending actions necessary for the fulfilment of these objects. But, in opposing bills in Parliament one of them? If the new bill contained clauses injurious to the public, and repugnant to the existing Police Act, this may have excited the public to resist; but what part of the act says or implies that the Commissioners may not only *enact for administering* the statute, but for *perpetuating all* its parts by obstructing Parliamentary change? If a bill were to be introduced for repealing the Police Act, or for altogether abolishing the police, the Lord Ordinary has no idea that such an extreme proposal could be lawfully opposed at the expense of the ordinary funds. The Commissioners had *no property* in the police funds or privileges so as to be entitled, like many other public trustees, to take all measures calculated to maintain or to extend their interests. They were the mere official servants of the public under this single and temporary act, so that their preventing change of the statute could never be part of their implied duty of putting the statute as it stood into execution. If such a power was meant to be conferred, it would how it was not mentioned, especially as minuteness is the principle on which the statute is constructed. There are about 50 or 60 sections, specifying what the Commissioners may do. They are not even allowed to fill up dangerous holes in the street without a clause. It is difficult to believe that, amidst such jealous restrictions, it was intended that so peculiar and irresponsible a power as that of



**Np. 19**  
**Jan. 12, 18**  
**Ewing v.**  
**Glasgow, C.**  
**Commissioners &**  
**Police.**

e pursuers, on the other hand, pleaded—

The limitation in the 133d section does not apply to actions of this kind founded on matters done, not in execution of the Act, but in connection of it; but, besides, the wrong done to the pursuers was not by abolition in February, but by those in July and August, whereby they could be affected, by including the sums in question in the amount to be levied from them.

**Purposes of Inventory v. The Magistrates, Dec. 14, 1820 (F.C.); Trinity  
of Leith v. Magistrates of Edinburgh, Feb. 6, 1829 (ante, VII., 374); 2  
de Comp. 19.**

No. 103.

19, 1837.

Glasgow Com-  
missioners of  
Police v.  
Glasgow Com-  
missioners of  
Police.

**LORD JUSTICE-CLERK.**—Your Lordships are aware, that, independent of the question on the merits, there is a very important question on the objection to the title, which I think is deserving of grave and impartial consideration. The pursuers describe themselves as “all residenters in Glasgow, or occupiers of property there, and rated in the police books as liable in payments of police assessments under the Police Act after-mentioned, and who have hitherto been assessed accordingly,” and add that they appear “for themselves, and for all those who adhere to them, and whose names and designations will be specified in a Minute in the proceedings which may follow hereon.” Then it is important to look to the nature of the conclusions in the reduction, and to the interdict. The pursuers conclude for reduction of the minutes specified, and that the individual Commissioners who attended the meetings be decerned “to repeat and pay back, or to procure repeated and paid back, into the funds of the said police establishment, the foresaid sum of £600, which they illegally and wrongfully authorised, sanctioned, and ordered to be paid away out of the said funds, as before-mentioned, for the purpose of defraying the expense, in part, of opposing the said Water Company’s bill, to the effect that the said funds, belonging to the said police establishment, may be in the same state as if the said resolutions had not been passed, and the foresaid sums had not been paid away.” Now it is plain there is no direct or indirect conclusion for payment or repetition to any one of these pursuers. It may be said they have an indirect or remote interest to have the funds restored. But there is no conclusion for repayment to any of these parties. It is not stated that a higher rate has been laid on them which ought to be repeated, and there is no patrimonial interest brought into view. Then is there such an interest set forth as to warrant our sustaining their title to insist in these conclusions? This would certainly have deserved grave consideration, if it could have been shown that, but for such an action, there could have been no redress otherwise. A very strong case of misapplication of funds might be imagined, but then the 133d section provides, that it is competent to the Town-Council of the city—to the Merchants’ House and to the Trades’ House, within 12 months of the wrong done, to bring an action against the Commissioners for embezzling and squandering, or misapplying the funds. The improper application of funds raised, or an undue assessment made for wrongful purposes, would come under the terms misapplying, and the Commissioners would be liable to a suit at the instance of any of these bodies. Here there is a complete remedy for any wrong. I lay no stress on the limitation of three months, which applies to another class of cases, but under this 133d section there is a complete answer to the plea, that there is no remedy if an action like this be not sustained. Then we are driven to their title at common law. It is settled law, that no party can conclude for behoof of a community, or general body of individuals not incorporated. This point was clearly decided in the case of *Lauder*. Then can they maintain it on individual interests? I cannot doubt that the principles of the case of *Inverury* are applicable here, and that the individual interest rested on will not afford a title for such actions. The decision in that case was rested on the ground, that there was no direct interest, as the acts complained of were not in prejudice of the pursuers themselves individually, but only to the prejudice of the burgh funds; and, though so far indirectly affected, that was not held to afford a sufficient interest. The principle there given effect to is not a rule applicable to burghs only, but a general rule, that a party must set forth a

and immediate interest. It may be that the pursuers could have framed No. 103.  
 summons differently ; but we must take it as it is, and the principle applies.  
 also given effect in the case of the Leith Dock Commissioners. I am, Jan. 19, 1837.  
 re, of opinion that the objection to the title should be sustained. Ewing v.  
 D GLENLEE.—I think the pursuers have no title to insist in the conclusions Glasgow Com-  
 missioners of  
 Police.  
 action as laid.

D MEDWYN.—It strikes me in the same light, and so I am not called on to  
 the merits farther than to see what the conclusions are in which the pur-  
 sist. They set forth that they are rated in the police books, and have  
 assessed. That is their title, and they conclude for reduction of the minutes,  
 repetition, where the only interest can lie ; but repetition is concluded for  
 the pursuers, but into the fund, and there is no conclusion as to the indivi-  
 dually interests of these parties. There are various clauses of the Police Act referred  
 to on both sides, which do not appear to me to bear on this question. Section  
 30 does not apply at all, as it refers to the sort of cases mentioned in the pre-  
 clause. As little does sec. 31 apply. I agree with the Lord Ordinary that  
 the pursuers may object to an illegal tax so far as regards their own portion of it.  
 The pursuers do not raise the question here as to the tax on themselves.  
 They have no interest but their own. They cannot appear for the community or  
 as rate payers—they are only to be looked on as seventeen individuals for their  
 own interest ; but they do not seek repetition to themselves, but into the fund.  
 Their right benefit by next year's assessment being less, but that is just the sort  
 of direct interest which does not give a title to persons of a class having com-  
 mon interests. This is not a question of levying, but of misapplying funds levied  
 for other purpose ; and the levy for next year is not objected to. It falls, there-  
 fore, under sec. 133, which gives right to certain bodies to call the Commission-  
 ers to account, and the clause is just put in to meet the difficulty arising from  
 the want of interest on the part of individuals, except to the extent of their own assess-  
 ment, which is too trifling to ensure a check. Also the Board of Commissioners  
 at any time being might sue their predecessors. I am therefore satisfied this  
 supplies any difficulty. Consequently, it is unnecessary to enter upon the  
 merits, as there are no proper parties before us, and we must sustain the objection  
 to the title.

THE COURT accordingly altered, sustained the objection to the title, and dis-  
 missed the action.

CAMPBELL and MACDOWALL, S.S.C.—MOWERAY and HOWDEN, W.S.—Agents.

No. 104. *Chancery—Nobile Officium.*—On the demise of the Director of Chancery, the court made an interim-appointment of a Director, in order to prevent any public inconvenience during the interval, prior to the completion of a permanent appointment; and their Lordships directed the interim appointment to be recorded in the Books of Sederunt.

No. 20, 1837. *John Dundas*, clerk to the signet, presented a petition stating, that in consequence of the recent demise of James, Earl of Rosslyn, the office which his Lordship had held, of Director of his Majesty's Chancery in Scotland, fell to be regulated by the provisions of 57, Geo. III. c. 64; that no appointment had yet been made under this act, in relation to the office of Director, and that it was necessary for the conduct of public business that an interim appointment of a Director in Chancery should be immediately made; that he, the petitioner, had held the office of Deputy-director since 1831, under the deceased Earl, and that in 1830, his Lordship had granted an appointment to Lord Loughborough, now Earl of Rosslyn, and to the petitioner, jointly and severally during their joint lives, and the life of the survivor of them, to be clerks of Chancery. The petitioner prayed the Court "to nominate and appoint him to be Director of his Majesty's Chancery in that part of Great Britain called Scotland, ad interim only, and until such time as the place of the said Earl shall be supplied, and the duties of the office provided for, in terms of the said Act of Parliament; with the same rights, powers, and privileges as those enjoyed by the said deceased James Earl of Rosslyn; and particularly with power to appoint substitutes to act for him during the subsistence of the interim appointment to follow hereon."

THE COURT, without ordering any intimation, granted the prayer of the petition, and directed the petition and their deliverance to be recorded in the Books of Sederunt.

Dundas and Wilson, W.S.—Agents.

No. 105.

WILLIAM COWAN, Claimant.—*Cowan*.  
MRS JANE RONALD CRAWFORD, Claimant.—*Whigham*.  
WILLIAM CRAWFORD, Claimant.—*McNeill*.

*Trust—Testament—Vesting.*—1. A trust held not to have been vacated by the death of one trustee, the departure of another from the country, and the bankruptcy of the remaining trustee, though a curator bonis had been thereafter appointed by the Court at the instance of parties beneficially interested. 2. Circumstances in which held that certain provisions only vested subject to a power conferred on trustees of regulating their investment and destination; and that the power, though for a long time neglected to be exercised, had not become inoperative.

11 The deed contained the usual power to appoint factors and to and dispose of the trust subjects. The purposes of the trust were, the payment of debts and expenses.

The investment of funds to provide an annuity of £40 in favour of the truster's wife, and of a sum of £200 for her behoof in liferent, and to the use of the truster's children or grandchildren in fee as she might nominate, failing which nomination, the trustees were to hold this sum in or for the use of certain of the grandchildren.

The investment of a provision of £4000 for behoof of two granddaughters, failing whom, it was to return to the trustees for the use of the truster's grandchildren in life.

A provision of £50 to a certain grandchild.

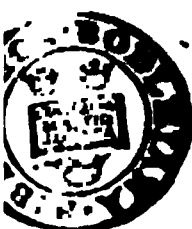
The 5th purpose was as follows:—"I hereby ordain and appoint the free residue or remainder of my estate, real and personal, after discharging the before-mentioned burdens and provisions, to be divided into four equal shares, as soon after my decease as circumstances will permit; and that being done, I authorize, ordain, and appoint my said executor or trustee to lay out and invest on undoubted security, one of the four shares for the use and behoof of my son, the said Charles, in liferent, for his liferent use only, and to his children lawfully begotten or to be procreated, and in fee at his death, in fee, equally amongst them, share and share alike; declaring always, and hereby providing, that the part or share falling to each of the children of the said Charles Angus shall remain under the care and management of my said executor or trustee, until said children shall respectively attain the age of twenty-one years complete, or be married with the approbation of the majority of my said trustees then acting, and to whom I hereby grant and



No. 105. In the event the said Janet Hornell (one of the children), who is appointed of John Nish in Edinburgh, shall survive me, and be then in life, that her share, in virtue hereof, shall be laid out and invested on undoubted security by my said trustees or trustee for her use and behoof in herent, for her life only, during all the days of her lifetime, and for that of her children lawfully procreated or to be procreated, in life at the time of her death, and their executors, in fee, under the express stipulation that the said John Nish, her husband, shall have no interest or concern in her said interest; hereby expressly excluding his jus mariti and powers of administration; and declaring that no debts or debts of the said John Nish, her husband, shall anyways affect or burden her said interest, but that the same shall remain to her an alimentary fund, free of all impositions. And the deed further declared, that my said trustees or trustee shall take charge of the interest of the children of the said Janet Hornell, whether she survives or predeceases me, in the same manner as I have appointed them to take charge of that of the children of the said Charles Angus; and I hereby commit to them similar powers to secure and establish the interests of the said Janet Hornell, that their shares may be equally useful and beneficial to each of them. The remaining share of the residue was to be paid to the truster's daughter, Jane Biggam, &c.

It was further provided, that all and every sum or sums which shall in virtue hereof lapse and return to my said trustees or trustee, during the continuance of this trust, shall pertain and belong to my lawful grandchildren then in life, share and share alike; and to that effect I hereby convey and make over the same to them and their executors accordingly, on the same conditions and stipulations annexed to the other provisions before written conceived in their favour; and generally, I provide and declare that my said acting trustees or trustee shall have the full power and option, in all cases which may occur respecting my said grandchildren, either to make to them respectively unconditional payments of what shall arise to them in virtue hereof, on their respectively attaining the age of twenty-one years complete, or being married with approbation foresaid, or then to settle and establish the same upon each of them, and their heirs and executors, with and under such conditions and stipulations as my said trustees or trustee shall then, in existing circumstances, deem expedient to render the same most useful and beneficial; with power also to my said trustees or trustee to make such advances to each of them while minors, as may be deemed expedient to accomplish their education, and bring them forward with advantage.

The testator's son, Charles Angus, had three children, the eldest, Mrs Jane Ronald Crawford, who was married in 1820 to Dr William Crawford, Maria, who still survives, and a son, who died soon afterwards without issue. By an antenuptial contract entered into between Dr and Mrs Crawford, and to which Charles Angus was a party, considerable



sums were settled upon them by the latter, and it was declared that "the provisions in favour of Miss Angus will not preclude her from what she may receive at the death of her father or grandfather." Dr Crawford's *jus mariti* was not excluded as to any part of his wife's fortune. No. 1  
Jan. 20, 1831  
Cowan v.  
Crawford.

In 1822, William Angus, the testator, died, having been predeceased by his son, Charles Angus. Of the trustees named three accepted and acted in the trust. Shortly thereafter, one of them having died, another having become bankrupt, and the third having left the country, an application was made to the Court by the testator's widow and others interested in the succession, for the appointment of a curator bonis, and Mr Charles Morland, agent for the Paisley Bank at Stranraer, was appointed accordingly to that office.

Dr William Crawford died in 1826, leaving an only child of the marriage, the claimant, William Ronald Crawford. Mrs Crawford was constituted by deed of settlement his general disponee and sole executrix, and the residue and produce of the estate was, after payment of his debts, to be laid out for behoof of her in liferent and of his heirs in fee.

Neither at the time, nor during the subsistence of the marriage of Dr and Mrs Crawford, was any payment to these parties or division of the trust-estate made by Angus's trustees, nor did they exercise the powers committed to them of settling the shares of the estate falling to the truster's grandchildren under such conditions as they should think proper.

In the course of the years 1827 and 1828, Morland, the curator bonis, made a payment to Mrs Crawford of £400 out of the residue of the estate provided to her, and invested £1500 thereof in bonds. Having been advised that her right under the succession of William Angus had opened during the subsistence of Dr Crawford's marriage, and vested in him *jure mariti*, as falling under the goods in communion, the bonds bore that the sums therein stated were borrowed from Mrs Crawford, as general disponee and sole executrix appointed by her deceased husband, by the hands of Mr Morland, to whom they were taken payable in trust for behoof of Mrs Crawford in liferent and William Ronald Crawford in fee.

William Angus's widow, for whom provision had been made in the trust-deed, died in 1830.

In December, 1831, and February, 1832, the two surviving trustees, who, though they had ceased to act had never given up the trust, wrote letters respectively to Morland, calling on him to lay out on good available security Mrs Crawford's share of the trust-funds in his hands, the bonds to be taken in her name, to herself in liferent and to her child or children in fee.

In these circumstances, a creditor of Dr Crawford's having used arrears of the funds in his hands, Morland raised a process of multiple-petition to ascertain how the residue of William Angus's estate was to

¶ 105. be disposed of, the balance of the share provided to Mrs Crawford, amounting to about £1800.

William Cowan, banker in Ayr, as a creditor of the deceased Dr Crawford, and of his representatives, claimed to be preferred to that part of the fund in medio which fell to Mrs Crawford under her grandfather's trust-settlement, or at least to so much of it as should appear to be the amount of interest falling due on her share of the residue during the subsistence of her marriage with Dr Crawford.

Mrs Crawford claimed to be preferred to the balance of her share, to be laid out and invested agreeably to the directions given by the surviving trustees of William Angus in the exercise of the powers conferred on them to that effect.

William Ronald Crawford claimed the fee of his mother's share of her grandfather's trust-estate, or at least that the same should be laid out agreeably to the directions given by the surviving trustees.

For Cowan it was pleaded:—

Mrs Crawford's interest in the residue of the estate vested in her on the death of the testator, and, as personal property falling to her during the marriage, it became subject to her husband's *jus mariti*, and is now liable for his debts. With reference to the discretionary powers conferred on the trustees, it is material to observe that the fee of his share of the residue is expressly conveyed to Charles Angus's children, under which conveyance the beneficial interest could not but vest in them immediately; and the proceedings of the curator bonis tend likewise to show that these powers had been considered inoperative. But these discretionary powers were never capable of being exercised in regard to Mrs Crawford's share, for the words of the deed by which they are conferred do not apply to such of the grandchildren as might at the testator's death be either major or married, and cannot be extended to the situation of a grandchild married, as Mrs Crawford was; the principle of construction applicable to cases of this sort being that "where a testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, the Court will not rectify the omission by implying or inserting the necessary clause." And where the limitation and control of an already vested interest by means of the exercise of certain powers is in question, the precise words of the deed are to be especially regarded.\* Even if intention should be taken into view in construing the settlement, the wish of the testator, looking to the other provisions of the deed, and to the peculiar notice of the bequest to Mrs Crawford, most probably was that the regulation of the rights of his grandchildren attaining majority or becoming married

\* 2 Roper on Legacies, 407.

\* 2 Williams on Executors and Administrators, 794, and cases there cited.

during his lifetime should be retained in his own hands, and that the discretionary powers of the trustees should be exercised in no other cases than those embraced by the express words of the deed. There is, moreover, no authority to be found in the special terms of the deed for holding that the trustees might delay the exercise of their discretionary power beyond the date of the actual marriage; and, therefore, their proposal, *post tantum temporis*, to put it in force is inadmissible. Besides, from the bankruptcy of the one surviving trustee,<sup>1</sup> and the permanent residence abroad of the other, the trust management must be held to have so lapsed as to render the exercise of this power inept and incompetent, and it is questionable if the Court could validly interpose to support the alleged objects of the trust.

For Mrs Crawford and W. R. Crawford it was maintained:—

Although the succession of William Angus opened previously to Dr Crawford's death, the share of the residue thereby provided to Mrs Crawford and her children did not vest or form part of the goods in communion, or fall under her husband's *jus mariti*, in respect the discretionary powers conferred on the trustees in relation to the provisions to the testator's grandchildren, were not exercised during the subsistence of the marriage; and, therefore, no creditor of Dr Crawford's can legally claim or attach the fund *in medio* in payment or security of his debts. Angus's trust-settlement being a *mortis causa* deed, it was only after his death that these powers could come into operation; and their exercise was made a condition of the complete vesting of the interest in the estate in the persons of his grandchildren. No absolute right of property in any sum or subject was conferred on Mrs Crawford, on the death of the truster. If any claim could be said to have vested in her, it was a claim of a peculiar kind, the full and complete establishment of which was made to depend on the will of third parties. The only right that did vest being in this way conditional, it could neither voluntarily nor otherwise be transformed into an absolute and unconditional right in favour of any creditor or other person deriving right through Mrs Crawford's husband.<sup>2</sup> Besides, according to the terms of the deed, the period of the ascertainment and division of the residue is made contingent on the death of the truster's widow, who survived till 1830, while the marriage of Dr and Mrs Crawford was dissolved in 1826; no right, therefore, could be so vested in Mrs Crawford anterior to those events as to fall under her husband's *jus mariti*. This view is consistent with the intention of the testator as it is to be gathered from the terms of the fifth provision of the trust-deed, and the general declaration following thereon. There is finally no ground for holding that

<sup>1</sup> *McDowal*, Nov. 20, 1789, M. 7453.

<sup>2</sup> *Burden v. Smith*, April 27, 1738, *Craigie and Stewart*, p. 214; *Burnside v. Smith*, June 10, 1829, ante, VII. 735; *Buchanan v. Downie*, Feb. 12, 1830, ante, VII. 516.

No. 105. the trust was evacuated or the powers conferred on the trustees extinguished by the bankruptcy of the one trustee, and still less by the absence of the other.

iii. 20, 1837.  
DOWAN v.  
CRAWFORD.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note \* :—“ Finds that the power of regulating the investment

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\* “ 1. It is very clear to the Lord Ordinary, that the power and duty of the trustees, to attend to the interest of Mrs Crawford, as a daughter of Charles Angus, and of any child she might have, as opposed to the interest of her husband, were not at all superseded by the circumstance of her having been married before the testator's death. On the contrary, according to the evident intention of the testator, it rendered the call on them to do so more imperative. Such a question cannot be determined by a rigid construction of the word ‘*then*,’ used demonstratively only, with a reference to events, which at the date of the deed, were prospective, and might be after the testator's death. He made no deed subsequent to Mrs Crawford's marriage, and therefore nothing can be inferred as to the construction of the words, from his surviving that event. But his real meaning is to be found in the whole clauses of the deed, and is made manifest by the provision in the case of Janet Hornell, compared with the clauses, special and general, affecting the shares of the children of Charles Angus. Janet Hornell was married at the date of the deed; and the testator first provides expressly, that, if she survives him, her share shall be invested *by the trustees*, to her, in life only, and her children in fee, excluding the *jus mariti*; and then he declares that if she predeceases him, her share shall belong to her children, but that, whether she survives or predeceases, the trustees shall take charge of the interest of her children ‘*in the same manner as I have appointed them to take care of that of the children of Charles Angus*,’ and gives power accordingly to *secure and establish* such interests in both cases. It is after this, that the general clause on page 7 occurs; and the Lord Ordinary can have no doubt of the true meaning of it. In the event which occurred, the powers of the trustees came into operation *at the testator's death*: And the Lord Ordinary has no idea, that such a power as this was evacuated, because it was not instantly exercised, or that it could be so, as long as the money was not either paid, or expressly demanded. Neither of these things did, or could take place here; because the money was necessarily locked up till long after Dr Crawford's death in 1826. But if it had been otherwise, Dr Crawford could have made no demand on the trustees, but *either* to pay the money, *or* to invest it under the power given to them.

“ The provision as to the £200 left to the widow, also shows, that the real meaning could not be, that the trust was to cease in the manner contended for.

“ 2. The Lord Ordinary is of opinion, that the trust was not extinguished, or evacuated, by the appointment of Mr Morland as factor loco tutoris, or by the circumstance which rendered that appointment necessary. A question was much discussed before him, how far the Court could interpose to support the objects of such a trust, where all the trustees had failed by death or otherwise, so as to be incapable of exercising a discretionary power given to them. The Lord Ordinary thinks, that he is not called upon to decide any such question in the present case; though he is not prepared to hold, that *in no case*, the Court would interfere to preserve the ultimate interests of a trust, notwithstanding that the later practice has been adverse to their doing so, *without necessity*.—See Bell I. p. 35. But here there were two surviving trustees. One of them, Mr Boyd, had become bankrupt; and if the matter rested upon him, it would be necessary for the Court to decide whether bankruptcy *extinguished* the trust, *in a case where the interests of the parties concerned required its continuance*. In the case of *McDowal*, Nov. 20, 1789, the Court did find that a trust had fallen by the bankruptcy of the trustee. But it is evident from the report, that the Court did not intend to lay down a rule, that in all cases bankruptcy would produce an absolute incapacity in the

and destination of the share of the residue of the funds of the late William Angus, falling to the claimant, Mrs Crawford, as a daughter of Charles Angus, which was conferred on the trustees, named by the said William Angus in his deed of settlement, and on the acceptor and survivor of them, did not become inoperative, in consequence of the marriage of the said Mrs Crawford in the lifetime of the testator: Finds that the trust, and the power of appointment vested by it, were not evacuated by the death of one trustee, the departure of another from this country, and the bankruptcy of the third; nor by the appointment of the pursuer as curator bonis: Finds, that notwithstanding the arrangement so made for the custody and management of the property, the trust still subsisted, for the protection of all the interests involved in it: Finds, that it was still competent for the surviving trustees, to exercise any power, vested in them by the trust-deed, in so far as their situation enabled them to do so, and the interest of those for whose benefit it was given, required it: Finds, that, in the circumstances of the case, and the fund ascertained as the share due to the claimant, still remaining under the trust, though in the hands of the curator bonis by authority of the Court, the surviving

No. 30  
Jan. 20, 1  
Cowan v.  
Crawford.

trustee to do any thing, even where it was necessary for the objects of the trust, that the powers should not perish. Accordingly, Mr Bell, in referring to that case of *McDowal* (Bell I. p. 32, note), distinctly explains it as not importing any such rule. And in such a case as the present, though it might be necessary for the Court to take the funds out of the hands of the bankrupt trustee, it does not follow, that he might not still be in full capacity to attend to the interest of children, in the ultimate investment of the money as authorized by the deed.

"But even this question does not properly occur. For Mr William Angus, the other trustee, *was and is still alive*. He went to the West Indies no doubt, and thereby became unable to take the actual charge of the funds; and the legal remedy for his absence was obtained by the appointment of Mr Morland as curator bonis. But Mr Angus was in no way divested, and was under no other incapacity. If he had returned to this country, he might have resumed the whole management, and called on the Court to supersede the temporary appointment of the curator bonis as no longer necessary. But a curator bonis could not exercise the discretionary powers of a trust; and Mr Angus, though residing abroad for a time, was not thereby disabled from exercising any such power, consistently with the objects of the trust, and for the benefit of parties interested in the settlement. The Lord Ordinary thinks, therefore, that he at least had full power to give the instruction which he has given.

"The letter of Mr Boyd was necessary even in this view; because he is a surviving trustee, and there is more than reasonable doubt whether he has not also power to act. It cannot hurt the instruction by Mr Angus, but it may be necessary to it, and at any rate corroborates it.

"The other points in the interlocutor do not require any particular explanation. There may be doubt whether the letters are sufficient in point of form, the curator bonis having no power to act by his own title. But they are at least sufficient to warrant the Court to authorize the investment, or otherwise to hold the fund till a more formal document, if thought necessary, shall be produced.

"Though the Lord Ordinary decides against the claim of Dr Crawford's creditors, he thinks that there is such reasonable doubt in the case as to justify the trial of it, and therefore he finds no expenses due."



No. 105. trustees were warranted and justified by the evident intention of the testator, in requiring that the money should be invested in the annuities expressed in their letters produced, so as to secure it for the benefit of the two claimants, Mrs Crawford and her son, according to their respective interests: Finds, that the principal of the said fund being so held under trust, subject to the exercise of the power of investment, and under the burden of the widow's annuity, which subsisted till long after Dr Crawford's death, never was vested in Dr Crawford, or payable to him, as personal estate falling under his *jus mariti*; and that it was not carried by his deeds of settlement; but Finds, that in so far as any interest became due to Mrs Crawford, after satisfying the widow's annuity and the other primary purposes of the trust, during the subsistence of her marriage with Dr Crawford, if any such there were, such interests must be considered as in bonis of the said Dr Crawford, and as carried by his settlements: Finds, that the rights of the claimants, Mrs Crawford and William Crawford, could not be prejudiced by any act of the current hands in holding out the funds in any particular terms; and that the assertions used by the other claimants, as creditors of Dr Crawford, were not sufficient to attach the said funds as part of his estate: Finds, that the letters of Mr William Angus, and Mr Edward Boyd produced, contain a sufficient expression of their will as trustees, at least to the effect of rendering it competent and necessary for the Court, either to direct the fund to be immediately invested, in terms of the instructions so given to the judicial factor, or to remain in publica custodia, till any more formal appointment, that may be thought necessary, shall be made; Therefore, repels the claim of William Cowan, except to the limited extent above expressed; and, subject to that exception, prefers the other claimants, Mrs Crawford and William Crawford, according to their respective claims; but, before granting any decerniture or warrant, appoints the cause to be enrolled, in order that the above findings may be correctly carried into effect; reserves any question as to the liability of Mrs Crawford to the claimant, Mr Cowan, as representing her husband, Dr Crawford: Finds no expenses due so far as hitherto incurred."

Cowan reclaimed on the merits, and W. R. Crawford on the point of expenses. Mrs Crawford also reclaimed as to expenses, and prayed the Court to alter the interlocutor in so far as to find that the interests which became due to her, during the subsistence of the marriage with Dr Crawford, if any such there were, belonged to her exclusively, and were not in bonis of her husband, nor carried by his settlements.

When the cause first came before the Court their Lordships expressed doubts, and ordered cases. It was finally put off for advising this day.

LORD GLENLEE.—I could not differ from the fundamental point of the interlocutor as to the trust not being evacuated; but as to the exercise of the powers of the trustees, it is a different matter. I see no statement of the trustees having



interfered in any other way than in giving the directions contained in the two letters; and that was not a joint determination. I doubt if the act of curatory appointing Morland was regular. There may be ground for the Court causing the fund to be invested in the mean time; but as to the extent of the powers of the trustees I am more doubtful, and also whether they could interfere at this particular time in regard to the mode of investing the fund.

**LORD MEDWYN.**—I am inclined to concur in the interlocutor. The fifth is the material clause; but I cannot hold the marriage of Miss Angus at the date of the trustee's death to be of so much consequence. The trustees have ample powers conferred on them, and if it was material that the fee should be secured to her children, I cannot think that the limiting of her right to a life interest is any excess of power in the trustees. They seem to be entitled to alter the form of settling, with Mrs Crawford's consent. The authorities from the English law don't bear upon this case, Mrs Crawford's right being limited by the conditions of the settlements. Perhaps the trustees should act more formally in the trust; yet I cannot hold it to have been evacuated by the appointment of a curator bonis, or to have yet expired.

**LORD JUSTICE-CLERK.**—I am of opinion that the interlocutor is right, and think the whole deed must be looked to in this question, which is one of intention. It appears to have been the purpose of the testator, to confer the largest powers on the trustees he named; he invested them with the power of securing the provisions of all his grandchildren, under such conditions as they should think expedient, "to render the same most useful and beneficial to each of the said children and their respective representatives." (His Lordship here referred to the clauses.) I think the provision as to Mrs Hornell is important as explaining the testator's intention. It is clear that he intended the trust to continue and be effectual, and that the powers in question should be exercised. As to the subsistence of the trust, nothing has happened to evacuate the powers of the trustees. They are still entitled to come forward and express their wish in regard to the disposal of the money, but I agree with the Lord Ordinary that it should be by a more formal document than the letters referred to. On the whole I do not think that there has been any great deviation from what was within the trustees' powers as to this lady. What is wanted is only to make the fee of the fund effectual to her and her representatives, and to have it invested in the most beneficial way.

**LORD MEADOWBANK** was absent.

**THE COURT** refused all the reclaiming notes, and adhered to the interlocutor of the Lord Ordinary, but remitted to his Lordship to supersede till the trustees should execute such formal appointment in exercise of their powers under the trust as they should deem expedient; and found no expenses due.

**GEO. McLELLAN, W.S.**—**DAVID WHIGHAM, W.S.**—**JOHN McCRAKEN, S.S.C.**—Agents.

1837

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No. 106.

— HAMILTON, Petitioner.—*Wilson.*

Jan. 21, 1837.

1ST DIVISION.

Hamilton.

*Cessio.*—In a petition for interim personal protection, which was not opposed, the Court, after the lapse of the intimation of thirty days, granted the petition; their Lordships intimated that it devolved on them, and not upon the clerks of Court to fix the amount of “reasonable penalty,” for which the petitioner’s cautioners should be liable to his creditors in the event of his failure to attend all diets of Court; and in order to have data for determining this amount, the petitioner was ordered to lodge a state of his affairs in process.

Agents.

No. 107.

ROBERT CARGILL, W.S., and JAMES CARGILL, Pursuers.—*Kealy**G. G. Bell.*WILLIAM MUIR (Smith’s Trustee), Defender.—*Monro.*

*Superior and Vassal—Title to Pursue.*—In an action against a vassal’s representative, at the instance of two parties holding by one title a right of superiority jointly, pro indiviso, concluding inter alia to have the defender ordained to enter with them;—Held that such conclusion was competent, and inferred no multiplication of superiors.

Jan. 21, 1837.

2D DIVISION.

J. Moncreiff.  
T.

THIS was an action at the instance of two superiors holding by one title the right of the superiority of certain subjects jointly, pro indiviso, directed against the vassal’s trustee, and concluding to have it found and declared that the defender was bound to fulfil the prestations of the feu-contract, and that he should be ordained to make payment of the feu-duty and to enter with the pursuers as superiors.

It was pleaded, inter alia, in defence, that the conclusion to have the defender ordained to enter with the pursuers as superiors was incompetent, and that a vassal was not bound to submit to a multiplication of superiors.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note \* :—“The Lord Ordinary having considered the closed

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\* “It is perhaps singular, but it does not appear that the precise point here agitated has occurred in any reported case, or is distinctly adverted to by any institutional writer. There is no doubt as to the general rule, that a vassal is not bound to submit to a *splitting* of the superiority into *parts*, and a *multiplication* of superiors, by giving one part to one person, and another part to another. But the Lord Ordinary sees no authority for holding, that an estate of superiority may not be held by two persons, by a *joint* title pro indiviso, or that the vassal is entitled to refuse to take an entry to the whole subject from the joint superiors tendering one charter; and he thinks that there is some authority for the reverse, in a case which, though not precisely parallel, affords an inference a fortiori.

record, and heard parties' procurators on the objection to the title of the No. 10  
pursuers, and the sixth defence or fifth plea in law, as reserved by the  
interlocutor of 3d June, 1835, and having made avizandum, Finds, that

Jan. 21, 1  
Cargill v.  
Muir.

" The reported cases on this point of feudal law, of the vassal's right to object to the multiplication of superiors, have almost all occurred in connexion with contested elections of Members of Parliament. But it is evident, that in every such case, there necessarily *must* have been a proper splitting or division of the superiority into *separate* parts or estates. The operation would have answered no purpose otherwise. So it was accordingly in the cases of the Duke of Montrose, &c. v. Colquhoun, January 31, 1781; Graham v. Westerra, May 23, 1826; and also in Maxwell v. Macmillan, June 9, 1741. The facts of this last case are not distinctly brought out in the reports of Kilkerran and Clerk Home, M. 8817, though the argument implies what was the character of the conveyances. But there is a report by Elchies, No. 4, Superior and Vassal, which renders the state of the case perfectly clear, as being that of a *positive splitting* for creating *separate freehold estates* of superiority as qualifications for election. Whatever loose expressions, therefore, may occur in the appeal case (as alleged at the bar) it is simply impossible that the question could relate to a joint pro indiviso title of superiority.

" The case of *heirs-portioners* comes nearer the point, though it is not the same. Heirs-portioners are not *joint* proprietors, but as their name imports, *part-owners* or portioners. They hold pro indiviso, while the subject is undivided. But each has a title in herself to her own *part* or *share*, which she may alienate or burden by her own separate act. The condition of two *joint-proprietors* in the fee is very different; they have no separate estates, but only one estate vested in both, not merely pro indiviso in respect of possession, but altogether pro indiviso in respect of the *right*. The distinction is the same which the Lord Ordinary believes is expressed by English lawyers, by the terms *joint-tenants* and *tenants in common*.

" But that case of *heirs-portioners* does, notwithstanding, furnish some authority for the present question. The law holds, that an estate in superiority is indivisible; and therefore, when there is but one such right, the eldest heir-portioner is entitled to take it, compensation being made to the rest otherwise. And hence it is held, that the vassal under such a right is not bound to take an entry of a *part* from any of the heirs. Yet the same authority which so decided, held expressly, that if all the heirs-portioners concur in offering one charter of the whole, the vassal is bound to accept of it. This was in the case of Lady Luss v. Inglis, July 30, 1678, M. 15028. The judgment in which, as reported by Stair, is in these words:—'The Lords repelled the defence, and found that the vassal was not obliged to take infeftment *severally* from the heirs-portioners of the superior, *but either from the whole jointly*, or from the eldest by the prerogative of her birth.' Stair himself, 3, 5, 11, expressly adverts to this finding in mentioning the decision; and it is more pointedly taken notice of in a note to one of the editions of his work, at 2, 4, 17; see More's edition, p. 256. Bankton, also, so states the law, that the vassal is not bound to take infeftment of *all* the heirs-portioners, 'unless they concur in one precept.'

" The case of two joint-proprietors in the fee, is evidently a case a fortiori. They not only *may* concur, but *must* concur in every title to be granted. There are not *two* estates, but *one* estate only. The superiority is *not split* at all.

" The Lord Ordinary does not rest any thing on any view of expediency or convenience. But it would evidently be attended with great inconvenience, if it were to be held that a profitable estate of superiority could not be at all held with its issues and profits, by two parties jointly in the fee. On the other side, the vassal has always his remedy. If the joint-superiors will not, or cannot concur in one charter, he is not bound to enter with them at all; and if he desires an entry, he is in that case entitled to pass them over, and enter with the over superior. That was the precise remedy given in the case of Lady Luss."

No. 107. as the pursuers, Robert Cargill and James Cargill, now standing by the death of Mrs Cargill, the liferentrix, in the full fee of the superiority in question, hold the said right of superiority jointly, by one title pro indiviso, and must concur in any entry to be granted to the defender as vassal, if he shall be found liable to take such entry, there is no splitting of the superiority or multiplication of superiors, to entitle the defender to object to the title of the pursuers to maintain the conclusions of the summons in this action: Therefore, Repels the said objection and defence, appoints the cause to be enrolled, in order that the parties may be heard, so far as it may be necessary, on the other pleas stated in the defence, and on the mode of disposing of such of them as involve disputed matters of fact; and in the meantime, reserves all questions of expenses.

The defender reclaimed, and argued, that he was not bound to take entry in the manner proposed, which involved an increase of difficulty and expense in the making up of his titles, and greater insecurity than in an entry with a single superior; that the case of heirs-portioners bore upon the present question, the eldest of whom was alone entitled to receive an entry, and that expressly on the ground that the vassal's condition was not to be made worse by being compelled to hold of more superiors than one.<sup>1</sup>

LORD MEDWYN.—I agree with the Lord Ordinary. I can conceive difficulties occurring in such cases, but not here, for these pursuers hold under one title. They are pro indiviso proprietors, and have but one seisin. There is an analogy between heirs-portioners and pro indiviso proprietors, but the two rights are quite distinct.

LORD JUSTICE-CLERK.—I also concur with the Lord Ordinary. There is no attempt to multiply superiors. A single entry is offered, and I can see no objection to it, looking to the manner in which this right of superiority is held by the pursuers.

LORD GLENLEE concurred.

LORD MEADOWBANK was absent.

THE COURT accordingly adhered, finding expenses due since the date of the Lord Ordinary's interlocutor.

ROBERT CARGILL, W.S.—W. ALEXANDER, W.S.—Agents.

<sup>1</sup> Stair, II. 4, 17, and III. 5, 11; Erskine, III. 8, 13; Fenton, 1523, Mor. 5337; Lady Innes, July 30, 1678, as reported by Fountainhall.

HACKSTON, Pursuer.—*Crawford*.

HIS CREDITORS, Defenders.

No. 108.

Jan. 24, 1837.

Hackston v.  
His Creditors.

**Cessio Process.**—An unopposed cessio, which was raised under 6 and 7 Wil. IV. c. 56, was inrolled and pleaded in the Inner House, after the expiration of the statutory intimation; the pursuer was personally present in Court; held competent, and in the circumstances, expedient, to administer the oath to him in Court, without making any remit to the sheriff under the twelfth section of the statute.

THIS was a process of cessio raised under 6 and 7 Wil. IV. c. 56. After the intimation of thirty days had expired, and the cause was inrolled in the Inner House, the Court called on the pursuer's counsel to make an oral statement of the case, in the same manner as under the old form. This was done, and no opposition being made.

*Crawford*, for the pursuer, who was present in Court, moved the Court to allow him to take the oath, and to pronounce decree finding him entitled to the benefit of the process of cessio.

The clerk of Court called the attention of their Lordships to the provisions of the twelfth section of the act, which declares that it shall be competent to remit to the sheriff of the county where the pursuer is domiciled, to have him examined on oath in presence of his creditors, and a report made to the Court before pronouncing decree.

*Crawford*, for Pursuer. That provision only applies to the case of an opposed cessio, and where there is occasion for a sifting examination of the pursuer's affairs. Where no opposition is offered, and a satisfactory statement has been submitted to the Court, the old form should be adhered to, of immediately administering the oath in their own presence, at least where the pursuer, as in this instance, was in attendance. And as it was not imperative on the Court to make a remit to the sheriff, but merely declared competent to do so, there was no sufficient ground to warrant such remit in this cause.

The Court, after some discussion, acted on the suggestion of Lord Mackenzie, which was to the effect, that this was a common proceeding in absence, in regard to which the statute did not contemplate a remit to the sheriff to take the oath, at least where the pursuer was in Court and ready to take it; and their Lordships allowed the oath to be taken before them in common form.

This was done, and, a trust-dispensee for the creditors being named by the pursuer,

THE COURT found him entitled to the benefit of the process, and pronounced decree accordingly.

No. 109.

CHRISTIAN ANDERSON, Advocate.—*Maitland—E. Maitland.*GEORGE MOON, Respondent.—*D. F. Hope—Jainieson.*

an. 24, 1837.

Anderson v.

Moon.

*Master and Servant—Contract.*—1. The proprietor of two spinning mills, hired his workers from year to year; in the middle of a term he directed a female worker, who had for some years been employed at one of the mills, to go and work at the other, which was a half mile more distant from her home; the kind of work and rate of wages at both mills were the same; and the proprietor offered to cause her victuals to be every day carried to the other mill for her use; there was no established practice of transferring workers from one mill to the other, at the proprietor's discretion:—Held, that the worker's objections to the proposed change were neither imaginary nor capricious, and that she was entitled to refuse to submit to it; and worker assailed accordingly from an action by the proprietor, to have her compelled to serve out the year, as directed by him. 2. Question whether the master's application was, in the circumstances, conceived in competent terms.

an. 24, 1837.

1st Division.

Ed. Corehouse.

D.

GEORGE MOON was proprietor of Russell Spinning Mill, in the county of Fife, at which mill Christian Anderson was hired as a spinner or carder in 1824. Moon subsequently became tenant of Hospital Mill, which was situated about half a mile nearer than Russell Mill, to the village of Springfield, where Christian Anderson lived. Many of the other workers at Russell Mill also resided at this village. At Russell Mill a notice was posted up, intimating that all the workers who intended leaving the work at Martinmas in any year, must give notice in August preceding; that the same notice would be given by the master if he did not intend continuing the service of a worker; and that, failing notice, both parties were bound for another year. This intimation continued posted up at the mill, as regulating the employment of the workers. The same notice was also posted up at Hospital Mill.

In January 1830, some years after Hospital Mill was occupied by Moon, Christian Anderson was removed to Hospital Mill, to which she made no objections: several other workers had also been removed from Russell Mill to Hospital Mill, when the latter was taken by Moon, and continued to be employed there afterwards. It did not appear whether any of them had stated objections against this removal. The species of work at both mills was the same, and the wages also were the same. There were some tradesmen or mechanics in Moon's service, who were occasionally employed at the one mill, and occasionally at the other, just as their services happened to be required at either: and a few of the spinners at Hospital Mill had, at least once, been temporarily transferred to Russell Mill, during a period when the work at Hospital Mill was impeded, owing to a deficient supply of water. But there was no general practice, in reference to the workers at either of these mills, of transferring them at



Moon's discretion, from one mill to the other, and there was no condition of this nature inserted in the printed regulations. No. 10

On Saturday the 29th of November, 1834, the manager of Hospital Mill intimated to Christian Anderson that she was to go to work at Russell Mill on the following Monday. She objected to this change, alleging that her engagement, which ran from year to year, and did not end till Martinmas 1835, was for service at Hospital Mill only, where alone she had been employed for several preceding years; and that this was above a half mile nearer to her residence than the other mill. On Monday following she offered to continue in her employment as usual at Hospital Mill, but this was objected to, and she was told she must go to Russell Mill, which she refused to do and left the work.

Jan. 24, 1835.  
Anderson  
Moon.

Some attempts were soon afterwards made by the manager of Russell Mill to persuade her to go there, and in particular it was promised that her victuals should be brought to her at the mill from her home, so as to obviate the objection that she would not have time to go home for her meals, at the brief interval allowed for meals. This interval was half an hour in winter, and three quarters of an hour in summer.

On December 24, 1834, Moon presented a petition to the Sheriff of Fife, stating that Anderson had refused to work at Russell Mill after being required to do so; that she was bound to work there till her term of service should expire at Martinmas 1835; and that he suffered loss and inconvenience by her desertion. He prayed the sheriff "to cite her to appear personally for examination, with certification, &c.; and upon the premises being admitted or proved, to grant warrant for imprisoning her person in Cupar Tolbooth, therein to remain on her own expenses, until she shall find sufficient security, acted in the Sheriff Court books, to return to the petitioner's service, and to remain there until Martinmas next, and faithfully perform her usual work; as also to find her liable in £10, or such other sum, &c. as damages;" and expenses. The judicial declaration of Anderson was taken, and a proof was led, which established the facts already stated. Moon attempted to prove that when Anderson was removed to Hospital Mill, it was intimated to her that she must return to Russell Mill when required; but he failed to establish this. The sheriff considered it proved that there was a known practice of removing workers from one mill to the other at Moon's discretion, and found, that, in the circumstances, Anderson was bound to work at Russell Mill in place of Hospital Mill whenever required by Moon to do so; particularly as the work and wages were the same at both mills, and the difference between them in point of distance from her home was not great. The order was qualified by the condition that Moon should provide a person to carry her victuals to her while employed at Russell Mill, as his manager had made that offer to Anderson "in order to remove any obstacle as to distance."



No. 169. *Anderson* brought an advocacy, to the competency of which, *Moon* took an objection, which was repelled.<sup>1</sup>

Jan. 24, 1837.

*Anderson v. Moon.*

The cause then returned to the Lord Ordinary, who pronounced this interlocutor.\*—“Finds, that the interlocutor of the sheriff under review is

<sup>1</sup> June 1, 1836, ante, (XIV. 863.)

\* NOTE.—“The Lord Ordinary considers this question of importance as a precedent. It is settled law that the judge ordinary or justices of peace, in the exercise of their powers as police magistrates, may grant warrant to apprehend an apprentice or servant who has deserted his work, and to ordain him to return, or if necessary, to imprison him until he find caution to return. This, though sometimes a harsh proceeding, is sanctioned by usage, and occasionally it may be requisite: for a workman, by deserting, may do great injury to his master, and such as he has not the means of repairing. But the remedy ought not to go farther than the necessity of the case requires, which is only to maintain the possession as it was at the period of desertion, leaving it open to the parties, if they are at issue as to the terms and conditions of their contract, to try the question by the ordinary form of process. If it were not so, they would meet as in a civil question on a very unequal footing; for on this criminal, or at least police proceeding, the workman is either apprehended or ordered to appear personally in court, and the very first step is to take his judicial declaration, while the master is neither required to appear personally, nor to submit to an examination, nor even to state his pleas in detail before his opponent is interrogated. It is plain, that if this were competent, when it is matter of dispute what the nature of the engagement is, the master would have a very great and unfair advantage. Accordingly, the cases of *Wright*<sup>1</sup> and of *Stewart*,<sup>2</sup> in which it was found incompetent for the Judge Ordinary to ordain an apprentice who had deserted his service to find caution that he should return and fulfil his indenture, proceed upon this principle. But these are precedents *a fortiori* in this case; for the sheriff not only ordains the advocator to return to her work, and to fulfil a contract, the terms of which are not ascertained by any written contract as an indenture, but which he thinks he can gather from the judicial declaration of the advocator, and the proof adduced. It will be observed that by this interlocutor, he does not maintain the possession, as it stood at the date of the desertion, for the girl was working, and had worked for three years previously at Hospital Mill. He decides as to the terms and conditions of the contract, as to which parties were at issue, and he inserts a new condition, which, confessedly, made no part of the agreement, but which the respondent suggested with the view to obviate the advocator's objection to remove from the one mill to the other. And this interlocutor is pronounced upon a petition, the only prayer of which is that the advocator shall find security to return to the respondent's service, to remain there till Martinmas next, and faithfully perform her usual work.

“On the merits, it is admitted that, by a yearly engagement, which had been thrice renewed, the advocator had worked at Hospital Mill. She objected to be transferred to Russell Mill on grounds which do not appear to be imaginary or capricious. Russell Mill is proved to be about half a mile farther from Springfield, where most of the spinners reside, and where the advocator lives with her parents, than Hospital Mill. So that, during the half-hour in winter which is allowed for meals, or even the three quarters of an hour allowed in summer, she could not, without great inconvenience, go home and return. And this seems to have been virtually admitted: for the respondent offered to employ a person to bring her victuals to the mill. But this might by no means remove the objection which she and her parents may reasonably have entertained. She is only nineteen years of age, and her two elder sisters were engaged at Hospital Mill, under whose inspection she worked there, and with whom she went and returned home, and which, in

<sup>1</sup> Feb. 9, 1826, (ante, IV. 434; or new ed. 410).

<sup>2</sup> June 21, 1832, (ante, X. 674).

incompetent, regard being had to the prayer of the respondent's petition, **No. 109.**  
 and the nature of the process:—On the merits, finds it is admitted that **Jan. 24, 1837.**  
 the engagement between the respondent and advocator was from year to **Anderson v. /**  
 year, and that at the time the last year's engagement commenced, she **Moon.**  
 was employed as a spinner at Hospital Mill, as she had been during the  
 two preceding years; finds it is not proved that when the advocator was  
 removed to Hospital Mill in January 1830, it was intimated to her that  
 she was to return to Russell Mill when required; finds it is not proved  
 that it was the practice at the work to remove spinners from Hospital  
 Mill to Russell Mill, as it suited the convenience of the respondent;  
 finds that the contract subsisting at the date of the petition must be held  
 as applicable to Hospital Mill alone, and that it was ultra vires of the  
 sheriff to modify that contract, by adopting a suggestion made by the  
 respondent, and to which the advocator had never acceded: Therefore  
 advocates the cause, alters the interlocutor of the sheriff, assoilzies the  
 advocator from the conclusions of the action, and decerns; and finds the  
 respondent liable in the expenses incurred in this and in the inferior court,  
 in so far as they have not already been found due."

winter, may have been under cloud of the night. At Russell Mill, she was deprived  
 of their protection; and to detain her there in the way suggested by the respondi-  
 ent, during the interval of rest, when all the other workers were unemployed, as  
 well as herself, may have been considered rather as increasing than removing the  
 grounds of her objection. But, at any rate, this proposal of bringing her victuals  
 made no part of the contract, and, as already said, had never been acceded to either  
 by her parents or herself.

"The respondent pleads that it was intimated to the advocator, when she and her  
 sisters were removed to Hospital Mill in January 1830, that she might be required  
 to return to Russell Mill. There is no evidence of this. Smith, the managur,  
 depones that he made such an intimation to the advocator's eldest sister Margaret,  
 but, in the first place, he is a single witness; and there is no circumstance to cor-  
 roborate his evidence. Margaret was tendered as a witness, but the respondent  
 objected to her being received; and Smith himself does not say that he made any  
 intimation to the advocator. So that even according to his evidence, it is a mere  
 conjecture that Margaret mentioned the circumstance to the advocator, or that she  
 ever heard of it.

"The respondent also pleads that it was the practice at the works to send the  
 spinners from one mill to another, as it suited the respondent's convenience. When  
 the proof is carefully examined, it will be found that this averment is not establish-  
 ed. It is true, that when the respondent first took the lease of Hospital Mill, a  
 number of spinners were brought there from Russell Mill. But to this they could  
 have no objection; because it was much nearer their home, and therefore much  
 more convenient. It is also proved that some of the mechanics and gasmen were  
 employed indifferently at the one mill or the other; but their case is quite dissimi-  
 lar to that of the girls employed as spinners. Their time is in their own hands;  
 and it must be of very little consequence to them where they work. But there is  
 no evidence of spinners being transferred from Hospital Mill to Russell Mill, except  
 in one case in summer 1833, when, in consequence of a scarcity of water at Hos-  
 pital Mill, either two or three carders were sent to Russell Mill, a fact admitted in  
 the judicial declaration of the advocator. A single instance of this kind is no  
 proof of a general practice at these mills. It may be added, that no notice of this  
 condition is to be found in the regulations at Hospital Mill, which were stuck up  
 for the information of the persons employed at the work."

## No. 109. Moon reclaimed.

Jan. 26, 1837.  
Sandeman v.  
Shepherd.

THE COURT refrained from giving a decision on the competency of the application to the sheriff, considering it unnecessary to do so; but, on the merits, their Lordships unanimously adhered to the judgment of the Lord Ordinary, and awarded additional expenses.

MACKENZIE and MACFARLANE, W.S.—D. M. ADAMSON.—Agents.

## No. 110.

EDWARD SANDEMAN, Pursuer.—*D. F. Hope—Russell.*  
ALEXANDER SHEPHERD, Defender.—*Rutherford—Anderson.*

*Guarantee—Right in Security.*—Where a debtor assigned a life-policy in security of certain advances, and his friend granted a relative guarantee for payment of the premiums, and annual interest on the advances—Held that the sum uplifted by the creditor out of the policy, after the debtor's death, must be imputed, after satisfying the principal of the advances, in extinction of an arrear of interest due on them, and not in payment of any other debt due by the deceased to the creditor.

Jan. 26, 1837.

1st Division.  
Ld. Fullerton.  
D.

THIS was a special case. In October, 1822, Sandeman entered into an agreement with the late Edward Fraser, merchant, Inverness, to cash Fraser's bills, to an amount not exceeding £2000, on certain terms. As part of the same agreement, Fraser assigned to Sandeman a life-policy for £3000, in security of the advances he might make under the agreement; and Shepherd, writer in Inverness, also granted a letter of guarantee for payment of the premiums on the policy, and the interest on Sandeman's advances. This letter was part of the same agreement. Fraser became bankrupt in December, 1822, at which time Sandeman was in advance, under the agreement, to the amount of £1856. Shepherd continued to pay the premium on the policy till 1827, when Fraser died. He also paid the interest on Sandeman's advances, until September, 1826.

The Insurance office brought a multiplepounding, as to the contents of the life-policy, in which process Sandeman was allowed to uplift £2000 out of the fund in medio, to relieve him of his advances. He afterwards raised an action against Shepherd for £127, as the amount of interest due on his advances from September, 1826, till January, 1828, when the interest on the sum in the policy began to run.

Shepherd pleaded in defence, that the difference between the amount of Sandeman's advances (£1856), and the sum uplifted by him (£2000), exceeded the sum of interest claimed, and must be imputed against that interest, preferably to any other debt which might be due by Fraser to Sandeman.

Sandeman stated, that Fraser obtained a discharge from his creditors,

and afterwards granted bills, with the knowledge of Shepherd, for the above balance of £1856, which were renewed from time to time, so as to keep the sum in a floating state, and relieve him from being in dead advances; that various transactions in business occurred between them, and in particular, there was a bill for £300, in addition to the £1856, which was granted in circumstances such as to make it also be covered by the security of the policy; that this more than exhausted the £2000 uplifted in the multiplepoinding, and that the whole interest claimed on £1856 remained to be paid by Shepherd under his guarantee.

The Lord Ordinary and the Court were satisfied, in the circumstances, that only the sum of £1856 was secured by the policy; that the difference between that sum and £2000 should be imputed, in the first place, to the interest sued for; that the interest was thereby extinguished; and that Shepherd must be assoilzied.

Their Lordships accordingly assoilzied.

J. BENNETT, W.S.—E. MACLEAN, W.S.—Agents.

SIR NORMAN MACDONALD LOCKHART, Petitioner.—*McNeill*.

No. 11

*Process—Appeal.*—Three declarators were conjoined, and a unanimous judgment was pronounced, which disposed of the whole merits of one of them—Observed by the LORD PRESIDENT, in granting a petition for leave to appeal, that it appeared competent to appeal, without leave, where the whole merits of that declarator were exhausted, although a remit was made to the Lord Ordinary to proceed with the other two declarators in the conjoined process.

AFTER judgment was pronounced in the declarator at the instance of Sir Norman Macdonald Lockhart of Lee and Carnwath, in the terms already reported,<sup>1</sup> he presented a petition for leave to appeal. The judgment had been unanimous, and the petitioner stated, that though the judgment exhausted the whole merits of his declarator, yet, in respect of that process having been conjoined with other two declarators, as to which a remit had been made to the Lord Ordinary to proceed, he was doubtful of the competency of appealing without leave of the Court.

THE COURT granted the petition, the LORD PRESIDENT observing, that, as the merits of the declarator at the instance of the petitioner were exhausted, it appeared to be competent for him to enter his appeal, without leave of the Court, notwithstanding the dependence of the other actions in the conjoined process.

CUNINGHAMS and BELL, W.S.—Agents.

<sup>1</sup> Jan. 19, 1837.

James of the price of this subject, as it could not be distributed under the ranking and a question arose as to the amount of expenses charged by William Renny, Raiser.—*D. F. Hope—C. A. Wilson.*  
 being sold to him, a sum of £850 was paid to him, and he was to sell the subjects at a charge for commission of 10 per cent on the price of the subjects sold.  
 and—*More—M. Neill.*  
 at Glasgow, to which taxation Renny objected, in respect he had re-  
 quired a multiplepoinding and sale of the subjects at Glasgow, and a process of ranking and sale at the prayer of the creditors and common agent, and was afterwards sold by the common agent, as trustee for the postponed creditors, in the ranking.—*Held*, in the circumstances, that the common agent was not entitled to charge a commission of 10 per cent on the price of the subjects, partly in respect that he had charged a full account of agency, as a professional man of business, for all steps connected with the sale of it, which account bore a large proportion to the amount of the whole price realized.  
 The Lord Ordinary approved of the auditor's report, and Renny re-

Jan. 26, 1837.

1st Division.

Ed. Fullerton.

D.

THIS was a case of a special nature. William Renny, who was common agent in the ranking and sale of the subjects, belonging to the estate of the bankrupt estate, which lay in the old town of Glasgow, was covered by an heritable bond, in which Renny acquired right by paying the contents of the bond out of certain proceeds of the subjects, and obtaining conveyance of the bond and subject to himself as common agent and trustee for behoof of the postponed creditors in the ranking. The bond contained a power of sale which limited the place of sale to Glasgow, and an application was made by Renny to the Court, stating that there was a heavy feu-duty payable out of the subject, but that it had great value for building ground, and that it could not be sold any where but at Glasgow, where alone the locality was known, without great loss to the estate; and therefore praying warrant to sell at Glasgow.

The Court were of opinion that they could not authorize a sale, in a ranking and sale, to take place any where but in Edinburgh, and refused the petition as incompetent.<sup>1</sup>

Another application was afterwards made by Renny and the creditors to have the bond and subject struck out of the ranking, in order that he might dispose of the subject under the power of sale in the bond, for behoof of the parties concerned in the subject. This petition was granted,<sup>2</sup> and Renny brought the subjects to sale at Glasgow, and obtained for it, in November, 1834, a price of £1402.

During the period when Renny had the management of this subject, while it formed part of the ranking, he had been required by the superior to pay up £185 of arrears of feu-duty accruing on the subject, besides granting an obligation to pay £25 per annum of feu-duty while the subject remained unsold. After it was struck out of the ranking he made a farther payment of £25 of feu-duty prior to the sale.

Renny afterwards raised a multiplepoinding in reference to the subjects, and a warrant was granted for the sale of the subjects at Glasgow, and a process of ranking and sale at the prayer of the creditors and common agent, and was afterwards sold by the common agent, as trustee for the postponed creditors, in the ranking.—*Held*, in the circumstances, that the common agent was not entitled to charge a commission of 10 per cent on the price of the subjects, partly in respect that he had charged a full account of agency, as a professional man of business, for all steps connected with the sale of it, which account bore a large proportion to the amount of the whole price realized.  
 Feb. 22, 1834 (ante, XII. 479).  
 May 17, 1834 (ante, XII. 602).



lance of the price of this subject, as it could not be distributed under the ranking, and a question arose as to the amount of expenses charged by him for selling it. The auditor taxed off a sum of £35, 4s. 3d., being a charge for commission at 2½ per cent on the price of the subjects sold at Glasgow, to which taxation Renny objected, in respect he had restricted his charge to 2½ per cent, which was reasonable, considering that he sold the subject, not as common agent in the ranking, but as a trustee, and he had been obliged to make considerable advances for arrears of feu-duties, and to come under an obligation relative to the prospective feu-duties, which would have proved very serious, if the subject had not been speedily sold.

The Lord Ordinary approved of the auditor's report, and Renny reclaimed.

The Court directed the account, which, independently of the payment of feu-duties, amounted to £292, after taxation, to be printed, and their Lordships intimated a unanimous opinion, that, as every item of business and agency connected with the heritable subject, both while it formed part of the ranking, and afterwards when struck out of it, was separately and fully charged, so as to make up a very large account, in proportion to the price of the subject, there should not be an additional charge of commission on the price of the subject, on account of Renny's having sold it in the character of trustee.

THE COURT therefore adhered, and awarded expenses against Renny since the date of the Lord Ordinary's judgment.

W. RENNY, W.S.—W. MUIR, S.S.C.—Agents.

JAMES EWING, Suspender.—D. F. Hope—Henderson. No. 1

STIRLINGSHIRE ROAD-TRUSTEES (Statute-Labour) and their CLERK; Chargers.—Rutherford—Spalding.

*Jurisdiction—Road-Trustees—Suspension.*—Circumstances in which the Court held a bill of suspension of diligence for levying an assessment of statute-labour conversion-money, an incompetent proceeding; and accordingly refused the bill.

By the Statute-Labour Act for Stirlingshire, passed in 1810, power was given to subdivide the county into districts, and the district trustees were authorized "to name surveyors or other proper officers," whose duty it should be, on or before 5th January in each year, "to make up and report upon oath an exact list of all ploughgates of land, &c., and of all persons keeping horses, &c. liable for statute-labour or for a conversion of the same, and of all cottagers, &c. liable for a conversion for special services." Directions were given as to the notice to be served by this officer on each party liable in assessment, and as to the remedy

No. 1  
Jan. 26,  
Ewing v.  
Road-Tr  
of Stirling

Jan. 26, 1  
1st Divis  
Ld. Cockb  
Bill-Cham

of appeal by any party aggrieved by the assessment, and the general  
affidavit of trustees, whose judgment was above stated. The court  
gave the order as to the mode of laying out, by the district  
trustees, from any two justices of the Peace for the shire, the road  
the path of the collector or overseer of any district, as to the manner of  
improvement. The statute declared that "no suspension, appeal, or  
complaint, or action, shall stop the performance of the statute, or  
prevent the payment of the converted price thereof, for that season, which  
they have been appropriated, saving always, nevertheless, to the party  
aggrieved, a complaint, his, her, or their redress, within four calendar  
months, by whom he, she, or they shall have been aggrieved, or one  
of his, her, or their several duties, services, and conversions for the year  
next after the determination of the complaint made, and that the  
James Living, tenant in Slackstock, Stirlingshire, presented a bill of  
suspension of diligence which was proceeding against him, for arrears of  
his conversion-money, at the instance of Henry Gordon, writer in Glas-  
gow, clerk to the district trustees of the district in which his farm  
was situated. He alleged that such irregularities had been committed in  
imposing and levying the assessment, that the charger and the district  
trustees were not within the protection of the statute, and therefore that  
it was open to the jurisdiction of the Court of Session to review the  
charger's procedure on the merits. In particular, he alleged that no  
survey had been taken, and that the assessment had been made  
when the warrant for levying the assessment had been applied for. The bill was  
ordered without caution. Respondent Robert Bogle and Co. and Others.

The charger and trustees answered, that the party empowered to make up a list of persons liable in assessment might be either a surveyor, or other proper officer; that the collector (charger) was such proper officer, and had duly made up the list, and that he had made oath before the Justices, on applying for the warrant. They also pleaded that, by the statute, the remedy of suspension was expressly cut off; that another course of procedure, such as appeal to the next general meeting of trustees, was pointed out; and that, even when a party was aggrieved by the Willingale done against him, a remedy was directed to be sought out of the convention for next year, but in the mean time, the money required for supplying a service as the maintenance of the roads, must be paid forthwith. The plea of the parties involved a good deal of detail and special circumstances. The Lord Ordinary on the Bills (Meadowbank) in vacation refused the bill, with expenses, both on the competency and the merits. A second bill was refused by the Lord Ordinary (Cockburn), with expenses. Having obtained a new petition to be amended, and ordering a new

The Court considered it, in the circumstances, to be a narrow and difficult question whether the irregularities alleged against the charges for that betwixt the constitution of the Court and the Court's decision to make



were of such a nature as to render a suspension a competent proceeding, in the face of the words of the statute already quoted. Their Lordships accordingly delayed giving judgment for a short interval after hearing parties, after which they intimated that they considered the suspension incompetent, and that they did not enter on the merits. Their Lordships were understood to be moved chiefly by the following considerations:—1st, The pressing nature of the public service for which the assessment was imposed; 2d, The combined effect of the absolute prohibition of a suspension, and the pointing out of a different mode of obtaining relief, if aggrieved, including, inter alia, a remedy against the conversion money of future years; 3d, The provision for allowing the warrant to be obtained upon oath being made by the collector, which oath was apparently made in this case; and, 4th, The suspender's failure, generally, to instruct irregularities of so high a degree as to throw the charge out of the protection of the statute.

The Court adhered, and awarded additional expenses.

D. Fraser, S. S. C. — Horkins and Laidlaw, W. S. — Agents.

JAMES GILLESPIE DAVIDSON and ROBERT SYM WILSON, Petitioners —

No. 114.

Do R. Hope — Solicitor General Cuninghame

ROBERT BOGLE and Co. and OTHERS, Respondents. — Keay — Prange,

**Judicial Factor — Process.** — A petition prayed the Court to appoint a party, as judicial factor on a trust-estate, or (in common form) “to do otherwise in the premises as to your Lordships shall seem proper;” appearance was made to oppose the appointment, and to suggest another nominee; — held competent for the Court, with consent of both parties, to appoint a third person to the office, without requiring any new or amended petition to be presented, or any farther intimation being made.

JAMES GILLESPIE DAVIDSON, W. S. and ROBERT SYM WILSON, W. S.

Jan. 26, 1837

presented a petition praying the Court “to appoint John Patten, W. S., to be judicial factor” on the funds falling under a particular trust-deed,

1st Division.

“or to do otherwise in the premises as to your Lordships shall seem proper.” Robert Bogle and Co. and others, opposed this appointment,

and suggested another nominee. After a discussion before the Court,

both parties agreed to the nomination of a third person (Aitcheson), and

a difficulty was then stated by the Lord President whether, in point of form,

such third party could be appointed under a petition which expressly

prayed for the nomination of Patten only, without allowing the prayer

of the petition to be amended, and ordering a new course of intimation

to be made.

The Court considered it in the circumstances to be a matter of course

to appoint a third person, and accordingly appointed Fullarton

judicial factor.

The Court, in similar circumstances, appointed Fullarton

No. 114. to be judicial factor in the estates of the Dumbarton Glass Works Company, in 1832.  
 n. 26, 1837, ay v. Begg.

LORD MACKENZIE.—The petition contains the usual clause, “or to do otherwise as to your Lordships shall seem proper,” and I think it competent, where appearance has been made on both sides, to name some other person than the nominee in the first petition, without any new or amended petition, or any renewed intimation.

THE COURT intimated their acquiescence in this opinion, and accordingly appointed Aitcheson, as suggested by both parties.

R. MACFARLANE, W.S.—J. COURT, S.S.C.—Agents.

No. 115. JOHN KAY, Pursuer.—*Rutherford—Shaw.*

REV. JAMES BEGG and THOMAS BALFOUR, Defendants.—*D. F. Hope—Anderson.*

*Small Debt Act, 6 Geo. IV. c. 48.*—1. The creditor in an account indorsed it over to a party, who thereafter sued for and recovered the contents in a Justice of Peace Small Debt Court; in a reduction of the Justices' decree, on an averment that the Justices had “maliciously committed the most apparent iniquity,” defence sustained, that the facts alleged were not such as to infer malice or oppression on the part of the Justices, without which being established the decree could not be opened up. 2. Opinion intimated, that, under the 6 Geo. IV. c. 48, a legal practitioner holding a bona fide assignation to a debt was entitled to appear for himself in the Justice of Peace Court and follow up the claim.

n. 26, 1837. By the act 6 Geo. IV. c. 48, § 5, it is enacted, that “when the parties shall appear, the Justices shall hear them viva voce, and examine witnesses upon oath, and also the parties by declaration, or upon oath, provided always that no procurator, solicitor, or any person practising the law, shall be allowed to appear or plead for them, either viva voce, or by writing, nor shall any pleadings, arguments, minutes, or evidence be taken down in writing, or entered on any record.” And by the 7th section, it is provided, “that it shall be competent for the Justices, if they shall see reason, in the circumstances of the case, for so doing, to allow the pursuer or defender to be heard in the matter of his complaint or defence by one of his family; or, if the pursuer should not be resident nearer than 20 miles from the place where the Court is held, it shall be competent for the Justices, if they shall see fit, to hear him by a person holding a written mandate or authority from him for that purpose, the said mandatory not being a procurator, solicitor, or person practising the law.” It is farther provided, by the 14th section, that no decree of the Justices “shall be set aside or altered in an action of reduction before the Court of Session, on any other ground except that of malice and oppression on the part of the Justices.”

In August, 1835, the defender, the Rev. James Begg of Libberton, procured from the Edinburgh Police Establishment, on payment of a sum

of ~~the dog~~ <sup>the dog</sup> ~~admitted to be~~ <sup>admitted to be</sup> a Newfoundland dog, which had been No. 1 found straying on the streets without a muzzle. After the dog had been <sup>Jan. 26,</sup> in his possession about three months, the pursuer, Kay, who was the <sup>Kay v.</sup> true owner, made a demand to have it restored; with which demand Mr Begg complied, on condition of being indemnified for the expenses incurred. Thereafter he made out an account against Kay, consisting of the following items, and which he indorsed to the other defender, Balfour.

" 1835.

Aug. 15. To paid Police Establishment for young Newfoundland dog, being one stated by them to be unclaimed by any person,

£0 15 0

Oct. 15. You having claimed the above dog as yours, to two months' keep of dog, at the same rate charged by Police, viz. 6d. per day,

1 10 0

£2 5 0.

" Pay the above sum to Mr Thomas Balfour, Agent, 8, Heriot Place, Edinburgh.

(Signed) JAMES BEGG."

Balfour, who, although he acted as a doer or agent, was not a legal practitioner, then brought a complaint, in his own name, as indorsee of this account, before the Justices, sitting under the act 6 Geo. IV. c. 48, against Kay, the owner of the dog.

Kay admitted that Mr Begg had paid the sum of 15s., and had kept the dog about three months, but offered certain evidence to show that the debt was not due, which being held to be irrelevant, was rejected. The Justices decreed for repayment of the 15s., but modified the charge for the keep of the dog to 3d. a-day. The decree, which was taken in name of Balfour, was extracted, and payment was made accordingly.

Kay then raised action against Mr Begg and Balfour to reduce the decree, on the grounds, inter alia, that it was "iniquitously, oppressively, and incompetently" pronounced by the Justices, and in contravention of the statute; that Mr Begg, although the real party at whose instance the claim was insisted in, had employed Balfour professionally to appear for him, having indorsed the account to Balfour for the purpose of evading the intent and tenor of the provisions of the act above quoted; and also that Kay was not truly due the sum in question; and that the Justices in pronouncing the decree, had "maliciously committed the same to an incompetent tribunal." In support of these grounds of reduction, it

No. 115.

1. 46, 1837.

9 iv. Begg.

was averred in the summons, that Balfour had laid before the Justices a written statement of his case, which they had received and taken into consideration; that they had refused to hear Kay, and rejected evidence tendered by him of facts showing the debt sued for not to have been truly due.

In defence against the action, it was pleaded—

1. No facts implying malice or oppression on the part of the Justices have been set forth in the summons, and none can be instructed by evidence; and the decree cannot be opened up and set aside unless it shall be established that it proceeded from malice and oppression on the part of the Justices towards the pursuer.

2. The decree was well founded on the merits, seeing the sum decerned for was merely the amount of the expenses incurred for advertisements and for the maintenance of the dog.

3. Balfour was in right of the debt sued for by indorsation, which is a legal and valid mode of transference; and, moreover, he is not alleged to have been, and in fact is not, a law-agent or procurator, such as is contemplated by the statute.

The Lord Ordinary “sustained the first defence,” and dismissed the action, finding the pursuer liable in expenses.

Kay reclaimed.

LORD MEADOWBANK.—I am for adhering to the interlocutor. The defender, Balfour, received an indorsation to this account, which is a legal mode of transferring the right to an open account. There is no allegation that he was not in the full right of the account. He then raised his suit before the Justices, and they pronounce decree finding him entitled to recover the sum in question. They could have done nothing else. We are told of the danger of the statute being evaded by such indorsations. I see no authority in the statute to prevent the ordinary operation of law, or interfere with the right which a man has to indorse his account away to another. It is said we may open a door to admit law-agents in the Small Debt Court, in contravention of the act. This party does not seem to have been such an agent; but if a law-agent is in the full right of a debt, I see nothing to prevent him appearing before the Justices to make it effectual.

LORD MIDWYN.—I am not satisfied that any thing has been done in contravention of the provisions of the statute. It is not alleged that this party was a procurator, or person practising the law; but there seems to be no doubt that, if such a person have a small debt to recover, it must be competent for him to bring it before this Court. Malice is certainly libelled in the summons, but there are no grounds stated for inferring either malice or oppression.

LORD JUSTICE-CLERK.—We have always treated questions coming before us under the 6 Geo. IV. c. 48, as of great importance. In the present case, I see no grounds for altering the Lord Ordinary's judgment. It is impossible to say that facts are set forth inferring malice or oppression. In regard to the alleged deviation from the provisions of the statute, it is quite clear that there is nothing in it which prohibits what is a matter of every-day practice, and is just an assignation of the account. We have such indorsations coming frequently under our no-

**James Balfour** is not said to have been a legal practitioner. There being therefore nothing illegal in the indorsement, and this party being in right of it, we must take him as the true indorsee of the account, and entitled to recover payment. Supposing a legal practitioner to get a bona fide indorsement to an account, I see nothing in the statute to prevent such party appearing and following up his claim.

No. 11

Jan. 27, 18

Sir J. Bos

Kerr v.

Jamieson.

**LORD GLENLEE** was absent.

**THE COURT** accordingly adhered, finding additional expenses.

**JAMES MALCOLM, S.S.C.—TAYLOR and BONAR, W.S.—Agents.**

**SIR JAMES BOSWELL, Petitioner.—M'Neill.**

No. 11

**Process—Entail.**—In an application for carrying through an excambion of entailed lands, under 6 and 7 W. IV. c. 42—Observed by the Court, at ordering intimation, that it was unnecessary to order service upon any of the heirs, in respect that they were sufficiently certiorated of the application, under the preliminary notices required by the statute.

By 6 and 7 W. IV. c. 42, powers are conferred upon heirs of entail, to excamb entailed lands, not exceeding one-fourth of the whole, after giving notice to the five heirs of entail, next in the order of succession, and also making publication in the London and Edinburgh Gazettes, besides other notices, at least three months prior to the date of an application being made in Court, for carrying through the excambion. The Act directs that where such application is made to the Court of Session, the Court “shall cause such farther intimation thereof to be made in the minute-book of the said Court, or on the walls of the Parliament House, or otherwise, as the said Court shall think proper.” Sir James Boswell of Auchinleck presented a petition, for excambion, under this Act, and the Court in ordering intimation thereof, observed, that it was unnecessary to order service upon any of the heirs, as they were duly certiorated of the petition, by means of the preliminary notices required by the statute.

Jan. 27, 18

1st Division  
D.

**J. Bowrie, W.S.—Agent.**

**ROBERT KERR and JAMES KERR, Suspenders.—Rutherford—Penney.**

No. 11

**ROBERT JAMIESON, W.S. and OTHERS, Chargers.—D. F. Hope—Buchanan.**

**Trust—Right in Security—Sale.**—Circumstances in which, where a trustee had come under large advances and obligations for the truster, and had advanced part of the lands for sale, in virtue of powers in the trust-deed—the Court, on petition, passed a bill of suspension and interdict at the instance of parties who alleged, that the land in question had been sold to them by the truster, and that they had already consigned a large portion of the price, that the trustee was not entitled to the sale, and that his security and relief was fully provided for: at the same time that their Lordships refused to grant any interim interdict.

No. 112. — Robert JAMIESON, W.S., came under interdict and suspension, amounting to about £10,000, on behalf of Alexander Colvill of New-  
 1st Division, bill, on the faith of a trust-deed of Colvill's heritage, executed in  
 2d Division, Jamieson's favour in February, 1868, under which he was interdicted. The  
 Bill-Chamber, trust-deed contained powers of sale, and Jamieson having advertised part  
 of the lands as for sale, in October, 1868, a bill of suspension and inter-  
 dict was presented to the Lord Ordinary on the Bills, at the instance of  
 Robert and James Kerr, founding on missives of sale of that part of the  
 property at a price of £10,000, which had been concluded between  
 Colvill and them, in December, 1868, and under which contract they  
 alleged they had already consigned £4000 of the price for Colvill's be-  
 nefit. They alleged that the trust-deed in favour of Jamieson was not  
 properly for the general creditors of Colvill, but solely for Jamieson's  
 own security; that they were willing to provide for this; and that he  
 had no interest farther.

Kerr v.  
 Jamieson.

11 of

1st Division  
 2d Division  
 Bill-Chamber

Answers were ordered, and an interim interdict was granted.  
 In his answers, Jamieson, besides alleging that no adequate provision  
 was made for his own security, farther pleaded, that the trust was for be-  
 nefit of Colvill's general creditors, and that he could not denude under  
 their claims were satisfied also.

The Lord Ordinary (Mackenzie) recalled the interdict, refused  
 the bill, and found the complainers liable to the respondents in ex-  
 penses.

In a second bill of suspension, which was offered on caution for all  
 damages and expenses, the complainers farther alleged, that Jamieson  
 was perfectly cognizant of the missives of sale, and was substantially a  
 party in the transaction. The prayer of the bill was directed against  
 Colvill and also against T. B. Ferrie, W.S., the partner of Jamieson,  
 who was alleged to be concerned in the proceedings.

Answers were ordered, and interim interdict was granted.

Jamieson alleged that the missives of sale had been impetrated from  
 Colvill at a price far below the value of the subject; and he denied  
 that he had been in any way a party to or cognizant of the sale. Colvill  
 concurred with Jamieson in opposing the suspension.

The Lord Ordinary passed the bill and continued the interdict.

~~Notes.—The Lord Ordinary can see no ground on which the trustees can  
 be interdicted from using the powers of sale, on the application of the complainers.  
 If they had stated facts showing that they had made the trustees a party to the  
 bargain of sale alleged to have taken place between them and the  
 trustees, the case would have been very different. But nothing of that kind is  
 stated; and the case seems just to come to the general case of an alleged sale of  
 property by the trustees, without consent of the trustees, and without  
 authority of the court. The Lord Ordinary cannot see on what ground an  
 alleged purchaser in such a sale can interdict the trustees, or how the trustees could  
 be extricated if such an interdict were granted.~~

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 authority of the court. The Lord Ordinary cannot see on what ground an  
 alleged purchaser in such a sale can interdict the trustees, or how the trustees could  
 be extricated if such an interdict were granted.

The charges resumed, and

No. 1

The Court, while they considered that sufficient grounds were stated to warrant the passing of the bill on caution, recalled the interdict.

Jan. 27.  
Dundas v

G. Lyon, W.S.—FRAZER and JAMIESON, W.S.—Agents.

GEORGE DUNDAS, Pursuer.—*Rutherford—Coventry.*

No. 1

JOHN DUNDAS, Defender.—*D. F. Hope—Napier.*

*Settlement—Clause—Executor.*—1. A holograph will, after leaving certain special legacies, contained the following clauses:—"Any money left after paying all expenses, I wish may be laid out on charities. I leave and bequeath to A. B. £200, with power to see this will executed."—Held that the provision in favour of charities was not void through uncertainty, the term "charities" being sufficiently expressive of the objects of her bounty, and it being held that a power of selecting and distributing among them was conferred upon A. B. according to the tenor and meaning of the will. 2. A direction being given, that certain plate and furniture, &c., "be divided equally," without specifying among whom—Held, in the circumstances, by the Lord Ordinary, and acquiesced in, that the division should be equally among the next of kin of the deceased.

MISS AGNES DUNDAS, daughter of Ralph Dundas, merchant in Edinburgh, executed a holograph Will, in which, after enumerating a list of legacies, chiefly of sums of money, the following bequest occurred:—

1st Div.  
Ld. Full  
D.

"Any money left after paying all expenses, I wish may be laid out on charities."

"I leave and bequeath to my nephew, John Dundas, the sum of £200 sterling, with power to see this will executed."

(Signed) "AGNES DUNDAS."

"The furniture, bed and table linen, I wish to be divided equally, and the silver plate, and any valuable books; the rest may be disposed of."

The latter bequest was declared to be a codicil to the Will. It appeared that a sum exceeding £600 remained after paying all expenses, and every legacy excepting that which related to "charities." An action was raised by George Dundas, one of the next of kin of the deceased, against the legatee who had been empowered to see the Will executed, concluding to have it found and declared, 1st, That as the plate, furniture, &c., were directed to be divided equally, without saying among whom, the division must be made among all the next of kin, because it must be presumed that such was the intention of the testatrix, if her intention was truly discoverable; and if it was not discoverable, the division must still be among the next of kin, as in the case of intestate movable succession; 2d, That as the residue was only directed in general to be laid out "on charities," without specifying what these charities, or charitable purposes, were, and as no power of selection was expressly



**Nov 1837** *James v. James*, the testator, who had no children, left his estate to his wife, to be paid to her at her death, and there being no means provided by the Will, of rendering it certain or definite. The defender had no more power than if he had been simply an executor nominate or dative: and such an executor could not have supplied the defect in the Will, by selecting "charities" at his own discretion, as the objects of the bequest.

The defender answered, 1st, That the Will was tantamount to a direction to distribute the plate, furniture, &c., equally among the next of kin, which he was ready to do; and 2d, That although no charities were specified, yet a power was conferred on him to select among them at his discretion; and thus the Will was not void through uncertainty. In every case of construction of a settlement, the cardinal rule was to proceed according to the true intention of the testator, whether expressed or distinctly implied. In this instance, by selecting some of the charitable institutions of Edinburgh, where the testatrix resided, he (the defender) might feel certain that he was giving effect to the true meaning of her Will, by distributing the residue among them. And if this was plain, her Will, he must have power to make the distribution in terms of it, as he was appointed specially "with power to see this Will executed," which was a larger appointment than a mere nomination, of him as executor would have been.

The Lord Ordinary found, that the division of the furniture, bed and table linen, silver plate, and valuable books, amongst the next of kin, and determined that the bequest to "charities" was not void on the ground of uncertainty or indistinctness; but does, when combined with the terms of the appointment of the defender as executor, import a discretionary power on his part to select the charities on which the bequest is to be conferred. Therefore, and to this extent, sustained the second defence, and absolved the defender from the conclusions of the action; but found no expenses due, and decreed.

**NOTE.**—There seems no room here for the objection of uncertainty. The objection applies when it appears that the testator had some particular object in view, but has failed either in defining that object, or in specifying more of the more definite operation, to its precise accomplishment. This last, for instance, might have been the ground of the decision in the case of *Ewen v. the Magistrates of Montrose*, (Wilson and Shaw's Appeal Cases, vol. IV, 340,) referred to by the court.

"Here there is no uncertainty as to the meaning of the testator. She clearly had no special charity in view. Her object was the general one—that the residue should be laid out on charities, and there can be no doubt that the application of the money to any objects falling under that general description (of 'charitable' meaning is sufficiently clear), would be a due fulfilment of her intention on that point. The Lord Ordinary is not prepared to say that such a bequest would not have been good, even without the appointment of an executor, against her husband, his confirming as executor at law. But any difficulty on that point is here removed; for immediately following the direction that the residue shall be 'laid out on charities,' there is the bequest to the defender of £200, 'with power to see the will executed.' It appears to the Lord Ordinary that, in such construction, this must

The partner reclaimed in so far as regarded the bequest in favour of No. 118. charities, 1177

Jan. 27, 1837.

Dundas v. Dundas.

**LORD BALGRAY.**—I am satisfied that the interlocutor is right. The defender was appointed executor; he was named to see the Will executed; and he must do that, *secundum arbitrium boni viri*. And I should think that any of the next of kin would have a title to enforce the performance of this duty according to the true intent of the testator. I think, therefore, that the defender's interpretation of the settlement is well-founded, and that he must just proceed as he proposes to do.

**JUROR PRESIDENT.**—The interlocutor is quite right. Nothing is more common than to see one person place a sum of money at another's discretion, merely directing him to apply it to charitable purposes. A man, for instance, sends a donation to the minister of a parish to be distributed by him. And if this be frequently done, *inter vivos*, I cannot see why it may not equally be done, by the intervention of a Will. In regard to the precise words of this settlement, I conceive that they are a little stronger than the simple nomination of an executor. Power is expressly given "to see this Will executed." Suppose that a special legacy of £500 had been left to "charities," and that the residue had been given to some other party, is it to be held that the whole of the Will was to be executed, excepting the payment of the legacy to charities? Could the Will be said to be executed, unless that sum was laid out on charities? If a special sum had been so bequeathed, I should have felt no difficulty whatever: and, in point of principle, I do not perceive any difference between that and the present case.

**LORD MACGEEZIE.**—I think the case not altogether free of difficulty, but in all the circumstances, the interlocutor appears to be well-founded. If no executor had been nominated, but a bequest in these terms had been left to "charities" in the abstract; and one of the next of kin had confirmed as executor dative, I should have felt the case to be attended with very considerable difficulty. Or even if there had been a simple nomination of the defender as executor, I should still have thought there was a good deal of difficulty. But the circumstances of this case are materially different from either of these. After stating that "any money left, after paying all expenses, I wish may be laid out on charities," a sum of £200 is left to the defender "with power to see this Will executed." Now can I have any doubt, on a fair interpretation of the Will, that it was the intention of the testatrix, that the defender should have the power of seeing the provision in favour of charities executed, as well as the other provisions of the Will? If the words used were such as to lay any limitation on the executor's power, I should have felt satisfied that it was contrary to this lady's intention. She clearly meant the defender to have every requisite power for executing, out and out, all the provisions of the Will, in all its parts. And I am satisfied she meant to confer on him a power

which clearly imports a discretionary power in the executor to make that selection of charities without which her will, in regard to the immediately preceding legacy, could not be carried into effect; and this construction, of course, brings the case within the rule established in the case of *Grierson v. Chrichton*, and the other cases referred to by the defender.

These references were not given in the *London papers*.

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**Major Emergency Issues and Long-Range Climate Goals**

11) *Testament—Provisions to Children—Vesting.*—A testator appointed his trustees at the expiry of fourteen years from his decease, to dispose of certain lands, and divide the proceeds among his surviving children, the shares of those predeceasing without issue accreting to the survivors equally; the deed provided, "that the shares falling to each should not be liable to be affected by their debts or debts while in the hands of the trustees, and should only be liable to such contingencies after the same is actually paid over and discharged;" shortly after expiry of the term, three sons and three daughters of the testator then surviving, the trustees with consent of the sons, entered into a minute of sale, whereby they bound themselves, on payment of the price, to dispose the lands to the daughters, the sons being ex-Maritimus following; some days thereafter one of the sons died, and, previous to the date of the minute, disposed his right of succession to his estate—held that the share of the price or value of the lands accruing to the deceased had not vested in him at the date of his death, so as to be carried by the operation to his sisters, but that it accreted equally to them and their two brothers.

**THE** late George Wilkie of Auchleshie, by trust-disposition and settlement, dated in May, 1818, conveyed his whole heritable and moveable property to certain trustees. The purposes of the trust were as follows:—  
 1. As soon as possible after the testator's decease, the trustees were to sell and dispose of his whole property, excepting the lands of Auchleshie, Hillends, and Redhall. 2. They were then to divide the free residue of the proceeds equally among all his children then in life. 3. The trustees were to retain the lands of Auchleshie, &c. in their management for fourteen years after the testator's decease, arranging so as that the leases should expire with the termination of that period. 4. After payment of an annuity to his widow, the residue of the rents of these lands was to suffer an annual division at the term of Martinmas yearly, among all his children then in life. 5. At the expiry of the above fourteen years, the trustees were directed to sell the lands of Auchleshie, &c., by public roup, due notice being given by advertisements; and, finally, The trustees were appointed "as soon after the sale of said lands as possible, to divide the free surplus and residue thereof among all my children then in life, or their issue, per stirpes, equally, share and share alike, the shares of the predeceasers without issue always accrescing to the survivors equally, but the shares falling to each of my said children, as aforesaid, shall not be liable to be affected or attached by their debts or deeds while in the hands of my said trustees, and shall only be liable to such contingencies after the same is actually paid over to them and discharged."

No. 119.  
 Jan. 27, 1837.  
 Wilkie v.  
 Wilkie.  
 2d Division.  
 Lord Jeffrey.  
 T.

George Wilkie died in January, 1820, leaving three daughters, the claimants, Elizabeth, Isabella, and Jane Wilkie, and five sons, three of whom, the claimants, John and Duncan Wilkie, and the late James Wilkie, survived the expiry of the term of fourteen years from the testator's death. The trustees accepted and administered the trust. When the fourteen years had elapsed, which happened in January, 1834, the trustees, in terms of the deed, formally exposed the lands of Auchleshie, &c., to public sale, but without success.

Thereafter, by an arrangement, to which the six surviving children of George Wilkie were all parties, a minute of sale was entered into on 7th August, 1834, between the trustees on the one part, and the claimant, Elizabeth Wilkie, and her two sisters, on the other part, whereby the trustees, with consent of the three brothers, bound and obliged themselves, on receiving payment of the price, to dispoise to Elizabeth Wilkie, and her sisters, the lands of Auchleshie and others,—the purchasers' entry to be at the term of Martinmas, 1834; and the dispoonees became bound to make payment to the trustees of £6967, "as the stipulated price of the shares of the said lands and others above described, relating to the interests of the said James, John, and Duncan Wilkie, being the remaining members of the said family, having

indented over their seals and signatures, in presence of the said trustees, and of the said James, John, and Duncan Wilkie, on the 7th day of August, 1834.

No. 119. the right in their own persons to the one half of said land), and that at  
 an. 27, 1837. the said term of Martinmas next, in the present year, 1834.”  
 Wilkie v.  
 Wilkie.

On the 19th August thereafter, James Wilkie died, having, previous to this transaction, disposed and assigned to his sisters his whole interest and right of succession in his father's means and estate. In these circumstances, it became matter of question whether James Wilkie's interest in the price had so vested in him as to be carried by this disposition. In the mean time, the Misses Wilkie made payment to the trustees of £4645, being the two shares of John and Duncan Wilkie, and granted their promissory note for £942, or two-fifths of the share of the price effeiring to the interest of the deceased James, they being in any view themselves entitled to the other three-fifths.

Thereafter the trustees raised an action of multiplepounding, to determine the rights of the parties interested in the succession.

The Misses Wilkie on the one hand, and John and Duncan Wilkie on the other, respectively claimed to be preferred for the amount of two-fifths of the share of the price effeiring to the interest of their deceased brother.

The Lord Ordinary having ordered Cases, it was

*Pleaded for the Misses Wilkie—*

1. The claimants, as the disponees of their brother James, are entitled to the whole of his share of the price of the lands of Auchleshie, &c., the said share having vested in him before his death in virtue of the intention of the testator, and the conception of the trust-deed. The rule is, that under such provisions as that in question, the rights of the residuary legatees vest from the moment that the period of limitation has expired; but the present case is still stronger, because James outlived not only the expiry of the fourteen years, but likewise the sale of the estate, whereby the price was fixed and the fund ascertained, and nothing more remained to be done than to pay the money to those who had right to receive it.

2. By the nature as well as the terms of the transaction by which the estate was disposed of, the shares became immediately thereafter vested rights, and the transaction was in itself de facto a division and distribution of the estate. The whole members of the family, including James, were parties to the arrangement regarding the minute of sale; and where all parties interested agreed to such an arrangement, no objection can be stated against it, though the immediate vesting of the rights should cause, de facto, an earlier division of the fund than might otherwise have taken place.<sup>1</sup>

*Pleaded for John and Duncan Wilkie—*

This is entirely a question of intention, arising inter hæredes; and the

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<sup>1</sup> Bruce v. Moir, June 28, 1833, ante, XI., 799; Morrison v. Miller, Feb. 9, 1827, ante, V., 322 (new ed. 299).

intention is very clearly to be gathered from the terms of the 6th provision of the settlement, which lead unavoidably to the conclusion, that a child predeceasing, without issue, the division to follow on the realization of the price of the lands, could have no interest in the succession, and was incapable of affecting it by his deeds. Admitting the general principle as to the immediate vesting of beneficiary interests, there is no room for its application in the case of an express declaration, that these interests shall not accrue to the heirs or legatees, until the estate have been realized and distributed.<sup>1</sup> And the minute of sale affords no special ground for altering the rights of parties as under the trust-deed, pointing distinctly, as it does, to the ensuing Martinmas as the period when any interest in the property or price of the lands was to vest in the purchasers.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : \*—“ Finds, that upon a just construction of the trust-deed of George Wilkie, deceased, and also of the transaction entered into among his trustees and surviving children, on the 7th of August, 1834, no share of the price or value of the lands of Auchleshie can be held to have vested in James Wilkie at the time of his death on the 19th of the said month of August, and that the share of the said price which might have vested in him, if he had survived the ensuing term of Martinmas in that year, accresced, in terms of the original trust-deed, to the five children of the said George Wilkie who survived the said term of Martinmas, equally among them,—and to this extent, sustains the claim of the claimants, John and Duncan Wilkie, and rejects (or restricts) that of the other claimants, Elizabeth, Isabella, and Jane Wilkie: Finds the said claimants, John and Duncan Wilkie, entitled to interest at the rate of five per cent.

No. 119.

Jan. 27, 1837

Wilkie v.

Wilkie.

<sup>1</sup> Roper on Legacies, p. 485; Elwin v. Elwin, 8 Vesey, 547; Thorburn's Trustees v. Thorburn, Feb. 16, 1836, ante, XIV. 485.

\* “NOTE.—Looking only to the father's trust-deed, there scarcely seems to be room for a question,—the clause providing, that none of the shares shall be affected by the debts or deeds of the children, till actually paid over by the trustees, (by which the Lord Ordinary understands, till they might and ought to have been paid over,) appearing to have been introduced expressly to exclude the present claim of the sisters. Their only maintainable argument is, on the effect of the transaction of 7th August, which may be contended to have recognised a *de presenti* right in them as purchasers, and to afford a plausible ground for holding, that if any of them had died after that date, and before Martinmas, that right would not have accresced to the survivors, but might have transmitted to assignees or adjudgers. On consideration, however, the Lord Ordinary is satisfied, that there is no solidity in this view, and that it was not the intention of any of the parties to vary or renounce any of the provisions of the trust-deed, as to the vesting or succession of the shares of the children. As the price, indeed, is, by that very transaction, made payable, not to the brothers individually, but to the original trustees, it seems altogether impossible to hold that they were not still to dispose of it according to the express directions of the truster. To obviate this conclusive view, it was suggested, that it might be held that a new trust was substantially created by the implication of that transaction of August; but this seems quite inadmissible and extravagant.”



No. 119. on the sum of £4,645 of the said price, from the said term of Martinmas, 1834, till the same be paid (or accounted for) in April, 1835; and of consent, Finds them entitled to interest at the rate of 5 per cent. only on their proportion of the balance of the said price, from the said term of Martinmas, 1834, till paid; and before further answer, appoints the cause to be enrolled, that it may be explained what special decree of ranking and preference will be required finally to dispose of the cause, in conformity with these findings."

n. 27, 1837.  
Wilkie v.  
Wilkie.

The Misses Wilkie reclaimed.

LORD MEDWYN.—I find nothing to object to in this interlocutor. If the trustees had not acted properly, I might have held the subjects to have vested prior to the death of James Wilkie; but there is no such allegation. The trustees could not by any act of theirs have paid over the share of this party prior to his death. Taking this minute as a proper minute of sale, we are to consider the Misses Wilkie, in regard to the question of vesting, just as ordinary purchasers.

LORD JUSTICE CLERK.—This is a question of intention, and I think the interlocutor right. It is clear that in regard to the two parts of his succession, this testator had two purposes in view, and he expresses himself accordingly in a different manner as to each of them. The case of Thorburn is a decisive authority on the point in question. In the transaction as to the sale, it is clear that the trustees had it in view to facilitate the purchase of the lands of Auchleshie by the testator's daughters. But the matter depended on the literal fulfilment of every part of the transaction: the whole might have flown off before the term of Martinmas, when only the transaction was complete in terms of the minute.

LORD MEDWYN.—There is no contradiction between the case of Stevenson and that of Thorburn, and I agree that the latter applies a fortiori to the present case.

LORD MEADOWBANK.—I do not wish to interfere with the case of Thorburn, but I have this difficulty. It is admitted that the provision as to the Auchleshie property was different from that as to the testator's other property; but there must be clear expressions showing that it was to be differently disposed of as to the period of vesting. The moveable succession vested a morte testatoris; and looking to the words of the clause providing for the division of the Auchleshie property after the period of 14 years, I am bound to interpret them so as to make the whole deed uniform. In regard to the other part of the case, I am inclined to think that James Wilkie's share would have vested from the commencement of the transaction of sale, supposing the whole six children to have entered on the agreement. If the shares of the sisters would have vested, it would be inequitable to hold that the shares of the sons should not vest also.

LORD GLENLEE was absent.

THE COURT adhered.

MACLACHLAN and IVORY, W.S.—MACINTOSH and DUCAT, W.S.—Agents.



JAMES ANDERSON, Pursuer.—*Rutherford—Russell.*

JEAN ANDERSON GARROWAY and OTHERS.—Defenders.—*Keay—Marshall.*

No. 12

Jan. 27, 18  
Anderson  
Garroway.

*Husband and Wife—Revocation.*—Terms and provisions of a postnuptial contract and subsequent deed of settlement by the husband with consent of the wife, which held not to admit of a power of revocation by the husband on the death of the wife, or to imply that certain legacies contained in the deeds had become ineffectual in consequence of her predecease.

ABOUT the year 1785, the pursuer, Anderson, married Ann Coats, a widow, having two children by her first marriage, for whose maintenance funds were provided by their deceased father. There was no antenuptial contract. Of this marriage there was issue one daughter, the defender Jean Anderson, afterwards married to one Garroway. Anderson, who was a weaver, and Mrs Anderson having subsequently acquired certain funds partly by their industry, and partly by inheritance from Mrs Anderson's relations, they executed in 1804 a postnuptial contract of marriage, whereby provisions were made in various events. In the event of the wife's survivance, a total liferent was provided to her. In the event of Anderson surviving, and entering into a second marriage, and his daughter Jean being then in life, he thereby "dispones, assigns, conveys, and makes over from him, his heirs, and successors, to and in favour of the said Jean Anderson, one just and equal third part pro indiviso, of all and haill the whole heritable subjects which shall be pertaining and belonging to him at the decease of the said Ann Coats his present wife, and particularly without prejudice to the said generality, the heritable subjects in Bridgeton wherein he presently stands infest and seized, conformable to his instruments of sasine duly recorded, burdened with the liferent right of the said James Anderson during all the days and years of his lifetime; and the said James Anderson, in the event of his so entering into a second or future marriage, binds and obliges himself to make payment to the said Jean Anderson his daughter, during his life, of the sum of £10 sterling yearly, &c." On the other hand Mrs Anderson made over to her husband "the whole heritable and moveable subjects presently pertaining and belonging to her, or which may happen to pertain and belong to her at the time of her decease, or which may be competent to be claimed by her nearest in kin through the dissolution of the marriage, as also her whole paraphernalia and wearing apparel." Both parties bound themselves "not to alter these presents without mutual advice and consent."

Jan. 27, 18

2d Division  
Lord Jeffrey  
F.

In 1825, James Anderson executed a disposition and settlement, "with the advice and consent of his wife," on the narrative that "whereas, by postnuptial contract entered into between me on the one part, and my ~~and~~ wife on the other part, of date the 10th day of March 1804, we, for

No. 120,

A. 87, 1837.

Anderson v.

Garraway

the reasons and causes therein mentioned, settled the succession of our whole heritable and moveable properties, in favour of the persons therein mentioned; and under the burdens and provisions therein expressed; and, whereas, we, the said James Anderson and Ann Coats, have now thought it advisable and expedient in some respects, to alter and amend the said postnuptial contract, we, by these presents, accordingly do so, under this express provision and declaration, however, that in so far as the said postnuptial contract is not altered or corrected by these presents, it shall remain valid, sufficient, and effectual in other respects, and to all intents and purposes, as if these presents had never been entered into;” and farther, “wit ye us the said James Anderson and Ann Coats, in the event of the death of the longest liver of us both, to have bargained as we do by these presents, burden our heirs, executors, and successors, with the payment of the following legacies and sums of money.” By this deed, Mrs Anderson’s liferent was left untouched, and certain legacies were bequeathed to her children by the first marriage, which were laid partly on the share provided to her daughter, Mrs Garraway. In regard to their grandson, James Anderson Garraway, the deed bore that in place of him “receiving his liferent right pro indiviso, with his brothers and sisters mentioned in said postnuptial contract, I the said James Anderson, with consent of the said Ann Coats, my wife, hereby in lieu and instead thereof, dispose, convey, and make over from me, my heirs, and successors, to and in favour of the said James Anderson Garraway, my grandson, in liferent, and to his children lawfully begotten, equally in fee after the death of the longest liver of us both; first, the whole dung belonging to my heritable properties situated in Bridgeton; and secondly, all and whole my lands and property of Nerston,” &c. In the event of his wife predeceasing, and Anderson marrying again and having children, it was farther declared that his second wife, after his death, should enjoy the liferent of two-thirds of his heritable property, excepting the lands of Nerston, the other third being provided to Mrs Garraway as in the postnuptial contract.

Mrs Anderson died in November 1834, and, in January 1835, Anderson married a young woman who had been previously a servant in the family. Thereafter he raised action against his daughter Jean Anderson and her husband and the other parties interested in the postnuptial contract and subsequent settlement, libelling on these deeds, and concluding to have it found and declared, that the said deeds, in so far as granted in favour of the defenders, were revocable at his pleasure, and that he was entitled to convey away either onerously or gratuitously the estates and effects therein disposed of, or otherwise, that all the conveyances and provisions contained in these deeds in favour of the defenders have already lapsed and can never be effectual in consequence of his wife having predeceased him.

In support of his action Anderson pleaded—

1. The deeds libelled on are revocable, (the deed of 1825 having been granted without any consideration on the part of the wife and merely with her consent), in respect that the provisions in question in favour of the defenders are gratuitous and mortis causa, and a power of revocation is implied in them. No. 12  
Jan. 27, 1835  
Anderson  
Garraway

2. According to the true construction of the deeds, the provisions, especially that to James Anderson Garraway in 1835, were not to take effect in the event which has happened, of the pursuer surviving his first wife.

In defence it was maintained—

1. The deeds libelled on are not revocable by the pursuer, in respect that the parties thereto expressly bind themselves not to revoke or alter the same, except by their mutual consent, which provision in the first deed was confirmed and renewed by the partial alterations contained in the second.

2. The deeds are not revocable, in respect that they do not constitute gratuitous donations, but are mutual and onerous contracts by which the pursuer's wife, the mother of the principal defenders, gave up the rights of her next of kin, in the event of her predecease, in return for the provisions thereby made in favour of her children and grandchildren.

3. The deeds in question are not revocable, in respect that the provisions which they contain are not mortis causa, but are constituted by dispositive words *de presenti*, and direct conveyances *inter vivos*, with procuratory and precept, some of them becoming exigible, even during the lifetime of the pursuer.

4. According to the true construction of the deeds, none of the legacies thereby conveyed can be held to have lapsed or become ineffectual by the predecease of the pursuer's first wife.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note: \*—" Finds, I mo, That neither of the joint deeds of

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\* " The point of *construction* (though more broadly libelled) was argued only as to the provision to James Anderson Garraway and his children, under the deed of 1825; and solely on the ground, that this provision is there declared to be given 'instead and in lieu' of a joint and contingent *liferent* provided to him by the former deed of 1804, and that, as the former *liferent* was given only in the event of the *husband's predecease*, and could never have been claimed, in the event which has actually happened, of his *survivance*, so this *surrogatum* should equally be held to have lapsed by the same occurrence. The Lord Ordinary is satisfied, however, that there is no solidity in this view of the matter. Where one provision is declared to be 'instead or in lieu' of another, this merely means that the first is withdrawn when the second is bestowed, but by no means implies that the second is to be taken under all the same conditions as might have been attached to the first. It is, in short, an independent and separate grant, consequent, indeed, on the revocation of another, but affected only by the conditions specially attached to it. There is, accordingly, no inconsistency or impropriety in finding that a certain fee is given 'instead and in lieu' of a *contingent liferent*, and

1804 settlement executed in 1804 and 1825 respectively by the pursuer, James Anderson, and his first wife, Ann Coats, now deceased, are capable of being taken effect to the benefit of the children of the marriage.

in so far as the children of James Anderson Garroway are concerned, this is precisely the case which has occurred. The contingency of the wife's survivance is so far repeated or implied, the grant being to take effect (like all the legacies and annuities given along with it) from and after the death of the longest liver, of the spouses, husband and wife indifferently. The point as to the surviving husband's power of revocation generally was more confidently argued, and upon premises and assumptions which were, for the most part, unexceptionable. But there was a fatal flaw, as it appeared to the Lord Ordinary, in connecting them with the conclusion.

"By the original deed of 1804, the wife had merely a total liferent, in the event of her survivance. In the event of her predecease, the only child had one-third of the property, and the other two-thirds remained with the father, and the Lord Ordinary held it clear that none of those provisions could be altered, except by the joint act of the spouses. By the second joint deed of 1825 the wife's liferent was left untouched. But the lands of Nerston were taken out of the property before the daughter's third was again given to her, and both that third, and the remainder were burdened with the legacies and annuities there specified, most of which were in favour of the wife's relations. If these legacies had been made burdens only on the father's two-thirds, the Lord Ordinary is of opinion that he might have made this second deed without the wife's concurrence, because it would not then have been an alteration of the deed of 1804, but only an addition to it, and affecting no other interest than his own. But if he could have made such a deed of his own authority, it seems to be clear that he might also have revoked it in the same way, and not the less, although he might needlessly have taken the name and concurrence of the wife in making it. But unluckily, the legacies, &c. in the deed of 1825, are laid partly on the share of the child of the marriage, and as that was a material alteration of the original deed, it necessarily required the wife's concurrence, and made the second deed, in so far, as onerous as the first, and therefore as little liable to revocation, except by the joint granters.

"The pursuer argued indeed, and very plausibly, that as by revoking the legacies and devise of Nerston, he would actually better the condition of the child of the marriage, both by enlarging her third to its original amount, and relieving it of its proportion of those legacies, there was no interest in any one representing the mother, or for whom she could be supposed to have interfered, to object to such a revocation. A little reflection, however, will show that this is a narrow and inaccurate view of the question. The legatees under the deed 1825 are mostly relatives of the wife; at all events, they must be presumed to be persons whom she, as well as the husband, intended to favour, and to a certain extent, to favour more than her own daughter. When, therefore, she chooses to take a part of the daughter's provision, and to give it to those other persons, having full power with her husband so to do, she truly purchases those legacies for her favourites, by the part thus sacrificed of her daughter's provision, and again makes a joint and remuneratory deed with her husband, as truly onerous, and, therefore, as irrevocable as the original deed of 1804. To put this in a clear light, it is only necessary to magnify the features. Suppose that by the deed of 1804 (irrevocable except by mutual consent) the whole property is destined to the daughter. Then, in 1825, the daughter disoblige the parents, or obtains an independent fortune, and other relatives of the wife especially, come into favour, and are needful. Then a joint deed of alteration is made, by which two-thirds of the property are taken from the daughter and distributed among those other relatives, and shortly after the wife dies. Could the husband alone revoke these provisions even for the purpose of reconveying the whole property to his only

being revoked by the single deed or will of the said James Anderson: **No. 12**  
**Finds; 2do,** That according to the just and true construction of the said **Jan. 28, 18**  
 deeds, the legacies and annuities provided by the said joint deed of 1825, **Nisbet v.**  
 to the persons therein mentioned, and the heritage thereby devised to **M'Lelland.**  
 James Anderson Garroway and his children, will be due and acclamable  
 to and by the said persons respectively, at the death of the said James  
 Anderson, pursuer, and cannot be held to have lapsed or become ineffec-  
 tual by the predecease of the said Ann Coats, the first wife of the said  
 James Anderson, and, therefore, sustains the defences generally for the  
 whole defenders who have compeared in this action, assoilzies them from  
 the whole conclusions of the libel, and decerns; finds expenses due, sub-  
 ject to modification."

The pursuer reclaimed on the merits, and the defenders in so far as  
 they had been found entitled only to modified expenses.

THE COURT pronounced the following interlocutor:—"Adhere to  
 the interlocutor of the Lord Ordinary under this declaration that  
 the deeds, in so far as concern other parties than those who have  
 appeared as defenders, are not affected by this judgment; find  
 additional expenses due, subject to modification by the Lordordi-  
 nary, and remit to his Lordship to proceed accordingly."

WILLIAM MUIR, S.S.C.—MACLEAN & HAMILTON, W.S.—Agents.

JAMES NISBET, Petitioner.—*D. F. Hope—Penney.*

JAMES M'LELLAND, Respondent.—*Rutherford—Cowan.*

**No. 12**

*Bankruptcy—Proof.*—Circumstances in which the Court held that the transac-  
 tions and dealings of a party, with a bankrupt, were not such as to render him  
 subject to examination by the trustee, under § 32, of the bankrupt act, as a person  
 "connected with the bankrupt's business."

THE bankrupt act, § 32, after authorizing the examination of the **Jan. 28, 18**  
 bankrupt, provides, that "the trustee may also, if he thinks it necessary **1st Divis**  
**D.**

child? The Lord Ordinary thinks he could not, and he has decided the case  
 upon that principle: For he thinks it impossible, after the case of Nicolson, 16th  
 December, 1806 (Morison voce Legacy, Appendix, No. 2), that a single judge  
 (however inclined) should take it upon him to distinguish between the parts of a  
 legacy left by joint testators, and to hold that it might be revoked by the survivor,  
 in so far as it falls upon his own property, and yet be irrevocable in relation to  
 the part which affects properties at the disposal (or joint disposal) of the pre-  
 decessor.

The point, however, in this last view is one of considerable nicety; and as the  
 case must be considered as a hard one for the pursuer (now the father of a second  
 child), in so far as the legacies, &c. fall upon his own two-thirds of the original  
 estate, expenses have only been given, subject to modification."



for the purpose of obtaining a full discovery of the bankrupt's estate and effects, inist for examination of his wife and others of his family, for being connected with his business, upon all proper interrogatories of a question arising as to the construction of that branch of the clause which relates to persons connected with the bankrupt's business, in the following circumstances:

The estate of James Dickson, brewer and distiller in Calton, of Glasgow, was sequestrated under the bankrupt act in June 1836, and James McCalland, accountant in Glasgow, was appointed trustee. At the statutory examination of the bankrupt, he declared that, when he entered to his distillery at Calton, in February, 1834, there was a proposal between James Nisbet, spirit dealer in Glasgow, and him, to become copartners in the distillery; but the proposal never was acted on, nothing more than one puncheon of yeast was ever bought in name of the company; and perhaps a few grain-bags were at one time brought to the distillery marked with the firm of Dickson and Nisbet, but this was without the declarant's consent; and that after the declarant had carried on the distillery for ten or fourteen days, he became desirous to form no copartnership with Nisbet, and offered him £50 to drop all farther thought of the connexion, to which Nisbet agreed. That there was a son of Nisbet's in the distillery named Robert, who entered into the declarant's service about November, 1835, and continued for three or four months, receiving twenty shillings per week of wages. That in spring, 1836, the declarant took a lease of a distillery at Helensburgh, and put it under Robert Nisbet's management, and after working it for a few months, he assigned the lease and sold the stock on hand, worth from £140 to £150, and utensils to Robert Nisbet: That the assignation was prepared by Thomson, writer in Glasgow, who was James Nisbet's brother-in-law: That in the end of April or beginning of May, 1836, the money was paid over by Robert Nisbet to the declarant, directly by Robert Nisbet, when no one else was present but Thomson: That the greater part of the money, and also the sums drawn for several days before at the brewery, were then paid over by the declarant to James Nisbet, in extinction, pro tanto, of a debt due to him, which amounted, by an account rendered by Nisbet, on 15th April, to £1534: That on 22d April he bought a quantity of barley from Ewing, May, and Co., which, on the 23d, he resold to James Nisbet, without ever having taken delivery of it, and on 25th he applied £330, being the greater part of the price, to pay malt excise duties: That on 16th April, he bought barley to the amount of £539 from John M'Call and Co., and took delivery of it: that he sold 200 bolls of this, about the beginning of May, to Robert Nisbet, for the Helensburgh distillery: That the price, being about £250, was received, he thought, in cash, in Thomson's office, and the cash was applied in paying excise duties, and extinguishing James Nisbet's debt, pro tanto: That, in a day or two afterwards, he sold thirty bolls more to Robert Nisbet, and, as he thought, paid the price

**mes Nisbet :** That the balance of £1534, due to James Nisbet on **No. 121.**  
**April,** was reduced prior to sequestration to about £100, by various **Jan. 28, 1837.**  
**ments in cash** arising from the proceeds of spirits, &c. : That James **Nisbet v.**  
**et** was always threatening legal measures against him, and it was to **M'Lelland.**  
**these** that the payments in question were made, and also, and chiefly,  
**me** Nisbet had always been friendly, and the declarant trusted to his  
**afterwards** assisted by Nisbet with money : That he had the pay-  
**s** to Nisbet in view in making the sales of spirits, barley, &c. : That  
**ok no** receipts from Nisbet for the payments, and had no book or  
**document** where they were entered, and he had no means of check-  
**Nisbet's** account, but he believed it to be correct from his conviction  
**isbet's** accuracy : That he may have made a payment of £61, odds,  
**isbet,** within a day or two of granting the mandate to apply for  
**sestration :** That since December, 1835, he had ceased to do business  
**deposit-account** with the only bank which he had ever so dealt with ;  
**did so** because, if he had bills lying over at that bank, the funds in  
**deposit-account** would have been retained by the bank to meet them :  
**a** considerable number of puncheons of whisky were sold by the  
**rant** at intervals during the month of May, and the earlier part of  
**, and** the prices applied to pay excise duties, and James Nisbet, who  
**the only** creditor, of any amount, whom he was paying. One of the  
**ments,** amounting to £61, was made on the forenoon of 24th June,  
**he** attending a meeting of a committee of his creditors : That on 12th  
**, the** declarant had a meeting with some of his creditors, to whom he  
**d** his inability to meet his engagements, and they signed a minute  
**ing** to give him time ; which minute was afterwards shown by decla-  
**to** James Nisbet, who refused to sign it : That he, at the same time,  
**£123** to Nisbet, to account of the balance due to him, and after-  
**s** made a number of considerable payments to him : and That it  
**the** declarant's understanding, that, if he had been able to carry  
**gh** the arrangement, James Nisbet would have accommodated him  
**ying** him back sums to enable him to carry on his business.  
**Robert** Nisbet was also examined, and he deponed, that after being for  
**time** in charge of the Helensburgh distillery, for the bankrupt's  
**if,** he bought the barley, &c. on the premises from the bankrupt, and  
**the** lease off his hand : That the price paid was £165, which the  
**ient** borrowed from his uncle, Thomson : That his entry was on  
**April,** and the price was paid on 3d May : That the price of the  
**olls,** bought on 3d May, being £275, and of the thirty bolls, bought  
**after,** being £37, 10s., was, on each occasion, paid to Dickson either  
**Thomson's** office, or James Nisbet's spirit cellar, but James Nisbet was  
**absent,** although, on the latter occasion, he was about the premises :  
**That** James Nisbet was averse to his acquiring right to the lease of  
**distillery,** and would not advance money to assist in it.  
**appeared,** from a note holograph of Nisbet, that, in October, 1833,



Not 187. 200 balls of wool, thought apparently sold by him but actually the  
 bankrupt's property, held by the bankrupt's joint account with the  
 bankrupt's wife. The bankrupt's wife then cited James Nisbet to appear for exam-  
 ination in respect of his being connected with the bankrupt's business.  
 James Nisbet objected that he was not connected in the nature of the  
 statute, but was not liable to examination. The Sheriff, after further  
 advice, appointed the said James Nisbet to appear for examination, and  
 to answer all pertinent interrogatories in writing, tending to show his  
 connection with the bankrupt's affairs, and his liability to undergo ex-  
 amination under the statute. He did not come. The Sheriff, in pursuance  
 of the order, Nisbet deposed that he had long been acquainted  
 with the bankrupt, and knew of his having acquired right to a distillery  
 in Galop, in the beginning of 1894. He was then asked whether any  
 communings then took place between the bankrupt and him respecting  
 his becoming a partner? To this question it was objected that its object  
 was to prove him a partner, which was held to be an incompetent inter-  
 rogatory in Belm, July 10, 1905. The Sheriff found that the objection  
 was premature, and allowed the question. Nisbet then stated that there  
 never had been a copartnership, and he had received the £50, as mentioned  
 by Dickson, on renouncing all claim to such partnership; that he gave no  
 receipt for this sum; that twenty-two documents shown to him, consisting  
 of receipts, retred bills, and discharged accounts, were in his handwriting;  
 and that he was not a cash-keeper of Dickson, nor did he keep any books  
 of his, nor act as his clerk or agent.

The Sheriff, "in respect it is admitted by the witness that some time  
 ago proposals were submitted to him by the bankrupt to enter into a cer-  
 tain partnership or joint trade, and that although he gave no express  
 consent, yet after certain communings he received £50 from the bank-  
 rupt for which he gave no receipt, which seems to imply that some sort  
 of partnership, of greater or less extent, had been formed between them  
 on that occasion; in respect the bankrupt appears to have kept no regular  
 books himself, while the documents produced, and in particular the  
 account-current between the parties, show not merely a great variety of  
 transactions between them, but such an intimate union, particularly in  
 relation to bills, as almost rendered the proposed witness the banker or  
 cash-keeper of the bankrupt,—found that the objector falls under the  
 description of persons connected with the bankrupt's affairs or business,  
 and therefore is subject to examination under the statute; but that under  
 the two qualifications of being examined only on such matters as do not  
 tend to criminate himself, and bear reference to the written documents  
 produced in process, and founded on in this interlocutor."

Nisbet was examined under this interlocutor, and deposed that for  
 twelve or fifteen years he had had occasional transactions in business with  
 Dickson; that he had little buying and selling with him for two years  
 before bankruptcy; that he never remembered to have borrowed money

from him, but often lent money to him; and that he repeatedly rendered accounts before the account-current of 13th April. In the course of the interrogation, Nisbet was asked, Whether, in February last, when the bankrupt took a lease of the Helensburgh distillery, he was aware of it? and Whether he was consulted by the bankrupt before this was done, and gave advice to the bankrupt on the subject? He then objected to the competency, 1st, of examining him at all, in respect he did not fall within the statutory limits of persons examinable; and, 2d, that the questions were in themselves incompetent, being just an attempt by an opposite party, to take a precognition from him on oath, for the purpose of eliciting information, and founding an action of reduction and repetition against him.

The Sheriff found \* “that the witness is bound to answer the proposed

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\* The entire interlocutor of the Sheriff was in these terms:—“Finds that it is a general principle applicable to legal proceedings, that a pursuer must make out his own case, and that too by evidence or documents adduced by himself, and not by information extracted either by judicial examination, or oath of his adversary—the former, that is the judicial examination, being an extraordinary remedy, competent only in the course of a suit where pregnant circumstances of fraud are admitted, or ex facie apparent; and the latter, the oath on reference, the last step, by the import of which the case, whatever it is, must be determined: Finds, on the other hand, that on the sequestration of bankrupts, the principles of the common law have to a great extent been broken in upon, it having been declared competent by statute for the trustee not merely to subject the bankrupt himself to examination upon oath, but also a variety of persons standing in certain degrees of relationship or connexion with him, without any regard to the pecuniary interests with which such examination may be attended to themselves: Finds that in determining what questions may be competently put to a witness, and what questions he is bound to answer, who has rendered himself subject to examination from his connexion in business or otherways with the bankrupt, and where a question is put to the witness tending to establish or elucidate a civil debt due by the witness to the bankrupt estate, the Sheriff is driven to a decision between the conflicting authority of the common law on the one hand, which never permits a party to lead a precognition of his future case upon oath, by the examination of the very party against whom that case is to be directed, and the authority of the statute on the other, which arms the trustee with extraordinary powers, with a view to the recovery of the bankrupt's property from the hands of any persons in whom it may be vested, or who may be alleged to have irregularly or improperly come to be possessed of it: Finds that on this subject it has been determined by the Court in the case of Belch, 10th July, 1805, and 10th June, 1806, that a party against whom an action was in dependence, to have him declared a member of the bankrupt firm, cannot be compelled to answer questions tending to shew that he is a member of that copartnery, a decision which proceeded on the principle that a witness cannot be compelled to answer to the circumstances of a cause depending between the estate and the person examined, for the inquiry is already proceeding in another course,—a decision to which effect has already been given by the sheriff in these examinations, by refusing to admit as competent questions relative to the subject-matter of the suit relating to a quantity of barley between the bankrupt and the witness: Finds that the question now objected to brings out a different point, viz. whether the witness, who has become subject to examination from his close connection with the bankrupt in business, and from having been in a manner his book-keeper, in regard to various transactions, is

No. 126. Questions, and all other questions not tending to involve him in any criminal prosecution or penalty, though they may relate to claims which the trustee may have against him for civil debts, and although he may be

Re. 185. 1847.  
Nichol v. Nichol  
M.L. 174

compelled to answer questions having reference to such matters incident to his business affairs, but not to any depending suit, either between the estate, or any person connected with the estate and the witness, but to an ulterior claim of claimant, which may be brought against the witness by the trustee, for repayment of money or recovery of property alleged to have been received by the bankrupt from the bankrupt on the eve of insolvency, under suspicious circumstances, the details of which are given in the accounts referred to in the witness examination, as kept by him for the trustee, and in the prosecution of which action or actions the information now sought to be extracted on oath from the witness may be of the most essential service. Finds that there is no express authority upon this point, and therefore it is one on which it is extremely difficult to form an opinion from the conflicting authority of the rule of the common law, and of the object of the bankrupt statute, which are thus brought into collision; but that upon the whole the weight of authority seems to preponderate in favour of the opinion, that the witness is, contrary to the principle of the common law in such cases, legally bound to answer, in respect, first, that the object of the statute is to compel the bankrupt, and all persons connected with him, or alleged to hold his property, if from their connexion with his affairs legally subject to examination, to undergo an extraordinary and searching species of examination upon oath, with a view to the recovery of the estate for behoof of the creditors, and to obviate the difficulties which the trustee otherwise might have to encounter in the discovery of the bankrupt's property when in the hands of others than the bankrupt himself; in respect, second, that the circumstances of the witness, and the close connexion which he is admitted to have had with the bankrupt in business for nearly fifteen years, has rendered him legally subject to examination, and the statute contains no exception in such case recognising a right in the alleged debtor to the bankrupt estate to decline answering any questions that may be competent to be put to other witnesses; in respect, third, that it is expressly declared by the statute 46 Geo. III. c. 37, that a witness "cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or of any other person or persons;" in respect, fourth, it is stated by Mr Bell, that "it is not a sufficient excuse for declining to answer a relevant question, that it may establish, or tend to establish, that the person under examination owes a debt or is otherwise subject to a civil suit;" and that "where they admit that they have received the debtor's property, although they will not be compellable to answer to what may criminate themselves, and a commitment for refusal would be illegal, yet it would seem that they may on such admission be held liable for the property of which they are thus unable to clear themselves;" in respect, fifthly, it has been decided by Lord Ellenborough, in the case of *Smith v. Brignell*, 1 Campbell 30, Bell II. 400, note, that, even where a witness connected with the bankrupt estate, and who is charged with having concealed the bankrupt's property, had inadvertently answered a question to which he might have demurred from its tending to subject him in the double statutory penalties for concealing the bankrupt's property, yet "having given the answer, it might be used in evidence against himself for all purposes for which it was legally applicable,"—a decision which seems to proceed on the principle that the main objection against a witness being compelled to answer questions of this description, viz. that his answer may thereafter be used in evidence in a civil suit brought by the trustee

aware that the present is the first of a series of questions intended to extract from him information in regard to various transactions between him and the bankrupt on which legal proceedings may ultimately be founded against himself: Therefore repels the objections, and appoints the witness to answer the question under the usual legal compulsitor." No. 121.  
Jan. 28, 1837.  
Nisbet v.  
M'Lelland.

Nisbet presented a petition and complaint to the Court, founding on § 71 of Bankrupt Act, and also on his right at common law to bring under the review of the Court the judgment of the Sheriff, while acting in a situation the same as, or similar to, that of a commissioner leading a proof in a process pending in Court.

Nisbet pleaded that he was not one of the persons "connected with the bankrupt's business" in the sense of the statute. No partnership had ever existed in reference to the Calton distillery, though it had once been talked of, in 1834. His sole connexion with the bankrupt was that he had occasionally had dealings with him, as with any other customer; that he had lent sums of money to him, had rendered his accounts, and had received repeated payments, which, however, still left him a creditor. But this did not bring him within the statutory description; and indeed the chief object of the clause in the statute was to discover any funds secreted by the bankrupt for his own behoof. And if it was alleged that his transactions had been such as to entitle the trustee to reduce any of them as being illegal preferences, that only afforded the stronger ground for exempting him from being precognosced on oath by the trustee.<sup>1</sup> He objected separately to the peculiar questions put, which, however, it was unnecessary to enter upon, if the other objection was sustained.

M'Lelland answered, that the object of the Bankrupt Act was to produce an equal distribution among the creditors, and to cut down illegal preferences, as well as to discover all secreted funds. For this purpose a statutory power of examination was given, which embraced even the bankrupt's wife, as well as the rest of his family, "and others connected with his business." This was the most marked departure from the ordinary common law rules of evidence, and the sole question left was, whether the connexion of Nisbet with the business was such as fell within the purview of the statute. Then considering how intimately he was mixed up with all the chief money transactions, for some months prior to the bankruptcy; that the bankrupt had not even books of his own, or any bank where he deposited his cash, but that the chief records of his proceedings were to be found in the books and accounts of Nisbet, he

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tee against himself, is ill founded, as such answers are admissible evidence even in such a suit: Therefore, upon the whole, finds, though with considerable difficulty, that the witness is bound to answer," &c., as quoted above in the report.

<sup>1</sup> M'Lell., Dec. 4, 1792; Bell's Cases, 75; Belch, July 10, 1805, 2 Bell, 399.

# CASES DECIDED IN THE

No. 121.

Jan. 23, 1827.

Mack v. Bell.

M. L. Bell.

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v. Mack

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stood within the position contemplated by the statute, especially as his son, while in the bankrupt's employment, had been mixed up with many of these transactions. All these considerations were strengthened by the transaction in 1824, as to a partnership in the Cotton distillery.

It is not necessary to say that the petitioner is not one of the persons whom the statute has rendered subject to examination. In regard to the alleged connection, so far back as February, 1824, it merely appears to have resulted in this, that what over the parties had at one time intended, the bankrupt had given a sum of £10 to Nisbet, and put an end to all connexion with him as to that matter. But that is just the reverse, so far as it goes, of proving that he was connected with the bankrupt's business. Then with regard to his other transactions, if such a construction they implied was to subject a man to examination under the statute, I think any man who walked into a haberdasher's shop and bought goods from him, might be equally said to be connected with his business, and to be liable to examination in the event of his supervening bankruptcy.

LORD GILLIES.—I am of the same opinion. The interlocutor of the Sheriff is an able one; but I am satisfied that the connexion of the petitioner with the bankrupt was not such as the statute contemplates by the words "connected with his business." Any customer of a party, or any one having dealt with him, might be subjected to examination, if the petitioner could be so. I am clearly of opinion that these words cannot be meant to include every body who has had dealings with the bankrupt, or else every one of his creditors might be examined.

LORD MACKENZIE.—The question which is made out against the petitioner is one of mere suspicion only; and that suspicion is not of his being connected with the bankrupt's business, but of having obtained undue preferences from him. But these are not grounds for holding him subject to the statutory examination.

LORD BALGRAY was absent.

THE COURT found that the petitioner could not be examined; but refused to find him entitled to expenses.

CAMPBELL and MACDOWALL, W.S.—A. WELSH, S.S.C.—Agents.

<sup>1</sup> 2 Bell, 394, 395, and 398; Mackersy, March 1, 1823 (ante, II. 256; new edit. 225); Macintosh, Dec. 14, 1825 (ante, IV. 312, or new edit. 315); Robertson's Trustee, June 16, 1827 (ante, V. 309; new ed. 748); Henley's Law of Bankruptcy, 80.

JANET CLUNIE, Advocate.—*Wood*.  
 WILLIAM DRYSDALE, Respondent.—*Patton*.

No. 122.

Jan. 28, 1837.

Clunie v.  
Drysdale.

*Filiation—Semiplena Probatio—Witness.*—1. Evidence in an action of filiation which held insufficient to warrant the pursuer's oath in supplement. 2. In such action, the pursuer's sister held not admissible as a witness, except for the purpose of corroborating the testimony of other witnesses, in defect of other evidence. 3. Circumstances in which additional proof refused to be allowed.

THE advocate, Janet Clunie, was delivered of a natural child on the 26th July, 1828, and she thereafter brought an action of filiation before the Sheriff of Perth, against the respondent, Drysdale, who denied the paternity of the child. In May, 1830, Drysdale emitted a declaration to the effect, inter alia, that he and Clunie were neighbours, and had been long acquainted; that on one occasion, about the beginning of 1822, when the parties were together in the house of one Bennet, a person present proposed to marry them; that he heard that another person was sent to the door to proclaim them, but that "he does not recollect being in bed with Clunie on that occasion;" that about the end of 1824, or beginning of 1825, they had been alone for about an hour, between nine and ten of the evening, in a public-house in Perth, kept by one Robertson, where they had some spirits together, and that this was the only occasion on which they had been together in a public-house.

Jan. 28, 1837.

2D DIVISION.  
Lord Jeffrey.

The Sheriff having allowed a proof, it appeared in evidence that, about two years after the proceedings in Bennet's house alluded to in the above declaration, Clunie attempted unsuccessfully, before the Commissary Court, to make out a marriage with Drysdale; that the parties had been subsequently seen occasionally together, but not in suspicious circumstances; and that, in the year 1827, they had been upwards of an hour together in a public-house in Perth, kept by Donald Robertson.

The pursuer having tendered her sister as a witness, and proposed to examine her as to circumstances alleged to have taken place between the pursuer and defender, not previously spoken to by other witnesses, and within her sole knowledge, the Sheriff refused to allow her to be examined, except in corroboration of the testimony of other witnesses.

The Sheriff, on advising the proof, considering it not to amount to a *semiplena probatio*, refused Janet Clunie her oath in supplement; whereupon she brought an advocacy, and pleaded, that the evidence adduced was sufficient to entitle her to her oath; and that her sister was, under the circumstances, a competent witness, and ought to have been received; and she farther offered to adduce additional proof.

Drysdale, on the other hand, pleaded, that the pursuer had failed in her proof, and that the Sheriff's judgment was right; that the evidence of the sister was inadmissible as a witness to independent facts—a step—



No. 122. mother having in a similar action been rejected as a witness, which was a case a fortiori in favour of the exclusion in the present, and that additional evidence could not now be allowed.

14th Feb. 1827.

James v. Dymally.

14th Feb. 1827.

James v. Dymally.

The Lord Ordinary remitted simpliciter to the Sheriff, but found no expenses due; adding to his interlocutor the note subjoined. **Chambers** reclaimed, craving at all events to be allowed an additional proof.

**Lord Justice Clerk.**—I cannot think there are sufficient grounds for granting the oath in supplement. As to admitting the evidence of the sister, it would be a dangerous precedent. *Humphry v. Aitken* is a strong case upon that point. It would be dangerous to encourage the notion that a sister's evidence was admissible, except for the purpose of corroborating the testimony of another witness. There may be grounds for suspicion, but we must have evidence to warrant the oath in supplement.

**Lord Meadowbank.**—I have some doubts. If I could hold that there was

*Humphry v. Aitken*, Feb. 18, 1822 (1 Shaw's Appeals, 111).

The Lord Ordinary gives this judgment with some hesitation, especially as to the admission of further evidence offered by the advocate. The weight of the case against the respondent is in the evidence afforded by his own declaration as to the former connexion between the parties in 1824; and though there can be but little doubt as to the import of a man's statement that 'he cannot recollect' whether he had been in bed with a woman who pursued a declarator of marriage against him, within a few months after that transaction, it might still be desirable to have the truth of the matter ascertained by the testimony of impartial witnesses. The Lord Ordinary is of opinion, therefore, that the evidence as to this point was not incompetent, and the chief reason why he does not remit, in order to have it taken, is, that even assuming the intimacy between the parties at that time to have gone the full length of carnal intercourse, this, with the other circumstances as the proof now stands, would scarcely amount to *semplicita probatio* of a paternity induced by acts in 1827.

"If the sister's evidence were admissible, the case might be clear enough; and the Lord Ordinary would be well pleased if he could think himself at liberty to receive it. But he can find no authority to warrant so great a relaxation of the rigorous rule which has hitherto prevailed as to the unsupported evidence of near relations.

"The defect in the advocate's case is the total want of any proof of intercourse, or meetings of any kind, about the time of the child's conception, and the estrangement which plainly followed her unsuccessful attempt to make out a marriage with the respondent in 1824. On the other hand, the Lord Ordinary thinks it sufficiently made out that the respondent's declaration is false in several particulars, and inclines especially to hold the meeting at Robertson's to have been in 1827. If it be assumed that the parties had illicit intercourse in 1824, very slight indications of familiarity will justify a belief that this had been resumed, even after an interval of alienation; and, when no other paramour is indicated, and there is nothing in the circumstances of the party accused to tempt the woman to a false accusation, the cause of truth may be more endangered by refusing than by admitting her oath in supplement; especially as in giving that oath she is not so much swearing in her own cause, as in that of an infant, in whom some other person must have as great an interest as she has.

"Those are the grounds of the Lord Ordinary's hesitation: But still, being of opinion that the judgment of the Sheriff is in accordance with the course of decisions, he has felt it his duty to confirm it."



sufficient evidence of the meeting in Robertson's having taken place in 1827; I should be rather inclined to allow the oath. No. 122.

LORD MEDWYN.—I am quite satisfied that we should adhere to the interlocutor. As to the nister's evidence, I agree with the judgment of the Sheriff, that the only case in which any deviation should be allowed from the rule of the inadmissibility of such a witness, is for the purpose of corroborating a particular important fact sworn to by another witness, where it was not possible to have other evidence. The proof was led in 1831, and it is too late now to propose to tender new evidence. As to the evidence before us, the principle to be applied in considering it is, that there must be something more than suspicion, though less than proof; but I do not think the evidence amounts to this. There is no appearance of their having been any improper familiarity.

LORD GLENLEE was absent.

THE COURT accordingly adhered, but found no expenses due.

RITCHIE and HILL, W.S.—W. SPALDING, S.S.C.—Agents.

THOMAS, EARL of STRATHMORE, Pursuer.—*Forsyth—Whigham.*  
JOHN, late EARL of STRATHMORE'S TRUSTEES, Defenders.—*Rutherford*  
—*Anderson.*

No. 123.

*Writ—Erasure—Settlement.*—A settlement of a heritable estate was made by three relative deeds—(1) a deed of entail, containing a disposition to certain heirs, "whom failing, to any persons to be named by the entailer, in any nomination to be executed by him at any time of his life;" (2) a relative deed of nomination of heirs, in the form of a probative writ, which excluded the nearest heir, and declared the order of heirs who were called, but contained no dispositive words; and (3) a trust-disposition for certain temporary purposes, under burden of which, the other two deeds were granted: These deeds were all executed on the same day, and a duplicate of each deed was executed at the same time; the testing clause of each deed specially referred to the simultaneous execution of the duplicate, and vice versa; there were numerous erasures and superinductions in the deeds and duplicates, but, with two immaterial exceptions, no erasure occurred in the same place of both the deed and its duplicate, the deed being entire wherever the duplicate was erased, and vice versa; no notice of the erasures was taken in the testing clause of any of the deeds or duplicates; Held, in a reduction (1) That the deeds were, in the circumstances, unchallengeable; and (2) That the combined effect of the disposition in the entail, and of the relative deed of nomination of heirs, was, to form an effectual conveyance in favour of these heirs, just as if they had been originally inserted in the entail.

At the death of the late John, Earl of Strathmore, his trustees, under a private settlement, entered on the possession of his Scottish estates. The settlement on which they founded, consisted of the following deeds: 1st, A deed of entail (under burden of the trust-disposition in their favour), bearing date December 15th, 1815, which disposed the barony and lordship of Glamis and his Lordship's other Scottish estates, in favour of himself and his issue in a certain order, "whom failing, to any person or persons to be named by him in any nomination, or other writ-

Feb. 1, 1837  
1st DIVISION.  
Ld. Cockburn  
B.

No. 123. ing to be executed by him at any time of his life :” whom failing, to certain other heirs. This deed, besides enumerating the lands disposed, contained a general clause, disposing “all other lands and heritages within Scotland, presently belonging, or which shall happen to belong, to me at my death.”  
 b. 1, 1837.  
 Earl of Strathmore v. Earl of Strathmore's trustees.

(2) A deed of nomination of heirs, dated the same day, and referring to the entail and the reserved power of nominating, whereby his Lordship excluded his brother, the Hon. Thomas Bowes, and John Lyon of Hetton House, and his brother Charles Lyon, from the succession, and appointed another series of heirs. This deed was in the form of a Scottish probative writ. (3) A trust-disposition of his Lordship's estates, referring to the deeds of entail, and nomination of heirs, and conveying the lands to James Farrer and others, as trustees, who were directed to hold the lands for thirty years after his Lordship's death, and on certain contingencies, for some time longer, during which period they were to apply the accumulated rents in purchasing and entailing other lands.

On the same day when these three deeds were signed, Lord Strathmore also executed three duplicate deeds, purporting to be of the same tenor. The testing clause of each of the deeds in both sets referred to the contemporaneous execution of a duplicate, in the same manner as in the following example, taken from the testing clause of one of the duplicate deeds of entail. “In witness whereof I have subscribed this and the forty preceding pages of stamped paper, written by John Muir, apprentice to James Dundas, clerk to the signet, together with a duplicate hereof, written by James Sutherland, also apprentice to the said James Dundas, at Edinburgh, the 15th day of December, 1815, before these witnesses, James MacAlpine, clerk to the said James Dundas, the said John Muir, writer hereof, and William Wilson, clerk to the signet.”

Shortly before his Lordship's death, he executed a deed, adding another person to the number of his trustees. His Lordship died without lawful issue, in 1820, and immediately after his death, the trustees put one set of the deeds upon record, retaining the other set in their own custody. An action to reduce the whole deeds was raised by Thomas, now Earl of Strathmore, who pleaded chiefly that as they rendered him destitute, though a Peer of the realm, and as they provided for an excessive accumulation of rents, they were contra bonos mores and against sound policy. The Court sustained the defences, and assoilzied.<sup>1</sup> This judgment was affirmed on appeal.<sup>2</sup>

Afterwards his Lordship raised a new action of reduction libelling that the deeds were “fabricated, simulated and devised; of false dates, not properly tested, and want, or are defective in, the solemnities required

<sup>1</sup> February 16, 1830 (ante, VIII. 530.) In that report a fuller account of the tenor of the deeds is given, to which reference is now made.

<sup>2</sup> March 23, 1830.

by law; and in particular, that the said deeds, which are alleged to constitute the settlement of the said John Bowes Lyon, late Earl of Strathmore, have been vitiated and altered, in substantialibus, after the alleged execution thereof; that numerous important passages, as they originally stood, have been erased and obliterated, and new and different passages have been fabricated, and simulately inserted in their place; that no fewer than 160 such erasures and new insertions have been executed on the alleged settlement; and that, in particular, various of the lands conveyed, as they now appear ex facie of the deeds, have been so simulately inserted on erasures, as well as passages affecting the destination of heirs, and the duration of the trust thereby created.”

No. 123.  
Feb. 1, 1837.  
Earl of Strath-  
more v. Earl of  
Strathmore's  
Trustees.

A plea of *res judicata* being stated by the defenders in bar of this action, it was repelled by the Court.<sup>1</sup> The defenders then satisfied the production by lodging the recorded deeds, and also the duplicate deeds under seal. The Lord Ordinary appointed defences on the merits, and “remitted to Thomas Thomson, Esq., deputy clerk register, to open the sealed packet now put into process by the defenders, and that in presence of the parties, or their respective counsel or agents, and to report to the Lord Ordinary as to the particular state and appearance of the deeds therein contained, in so far as regards erasures and interlineations, and, thereafter, again to seal up the said packet, to be disposed of in terms of any future order of the Lord Ordinary, or the Court.” A report was returned under this order. In their defences the defenders stated that the deeds were in all respects genuine and authentic; and that no erasure occurred in substantialibus, so as to have affected their validity, even if only one set of deeds had been executed, but still less were any of the erasures material where there were duplicate deeds. And they alleged that although there were erasures in the duplicate deeds also, yet, with two immaterial exceptions, the whole words written on erasures in the recorded deeds, were free of erasure in the duplicate deeds, and, vice versa, the words written on erasure in the duplicate deeds, were free of erasure in the recorded deeds. So that both deeds must have been in their present state when signed in duplicate.

In preparing a record, and before preparing the condescendence, the pursuer moved for leave to make a farther inspection of the deeds, with the aid of persons of skill, whose names were stated in a notice served on the defenders. The defenders insisted that this motion could only be allowed under such precautions as should protect the deeds against all hazard from further erasure by any party. The Lord Ordinary (Moncrieff) “allowed the pursuer, by his agent and any of his counsel, with the assistance of any one of the other persons mentioned in the notice, such person to be specified in the intimation herein after mentioned, to

<sup>1</sup> May 24, 1833 (ante, XI. 644.)

No. 123.

Feb. 4, 1832.  
Lord of Streat-  
sacres. Earl of  
Traillhouse's  
Trustees.

inspect and examine the deeds under reduction, and also the duplicates thereof at present sealed up, and for that purpose remitted to Mr Thomson, deputy clerk register, to open the parcel as sealed up by him, and at such time and place as he may appoint; and in presence of the clerk of this process to allow inspection and examination of the said deeds; but expressly, that no experiment of any kind shall be allowed to be made on the paper, or the ink of the said deeds; and that after said inspection and examination, the deeds shall be reenclosed and sealed, to await farther orders of the Lord Ordinary and the Court, and appointing the pursuer to give intimation to the defender's agents, of the time and place appointed for examination of the deeds, at least forty-eight hours before it is to take place. But the Lord Ordinary, in the present state of this process, refused the motion of the pursuer to any greater or wider extent."

\* \* \* NOTE.—In case the pursuer should be dissatisfied with this order, it is necessary to explain the very peculiar circumstances of this cause.

The pursuer insists for reduction of the deeds called for, merely on the ground that they 'have been vitiated and altered in substantialibus after the alleged execution thereof.' The principal deeds were in the public register, and they have been transmitted to the clerk of the process, under a warrant from the Court. At this time was done, the defenders put into process a sealed packet, which they stated contained duplicates of the same deeds, executed but not recorded, and they moved the Lord Ordinary to make some order by which the precise state of both sets of deeds, in respect of vitiations or alterations might be ascertained, for the future guidance of the Court. The Lord Ordinary made a remit to Mr Thomson, the deputy clerk register, first, with regard to the deeds in the sealed packet, and afterwards with regard to the recorded deeds; and the first remit was specially to 'open the sealed packet now put into process by the defenders, and that in presence of the parties, or their respective counsel and agents,' and 'to report to the Lord Ordinary as to the particular state and appearance of the deeds therein contained, in so far as regards erasures and interlineations,' &c., and thereafter to re-seal the packets, to be disposed of by the Lord Ordinary or the Court. These interlocutors were acquiesced in, and the deeds having been very minutely examined, Mr Thomson made a full and very special report as to the state of each deed.

"The parties then proceeded to prepare a record in the cause, and a condescendence and answers have been lodged.

"In this state of the cause the pursuer makes a motion for a further inspection of the deeds, before revising his condescendence. To this there may be no objection, if it be regularly conducted and guarded. But at first the pursuer refused to give any specification of the person to whose inspection he wished the deeds to be laid open, and insisted that the order should be made without limitation. The Lord Ordinary having required him to specify the persons, beyond his counsel and agent, whom he proposed to employ; the notice now produced was given, and it was manifest from the four last names in the list, that the intention is to set, not one, but various engravers and other persons, assumed to be scientific, to an inspection and sifting of these writs at this stage of the process.

"It will be particularly observed, 1st, That these deeds have never yet been seen by the Lord Ordinary or the Court.

"2d, That the remit was made with the consent of both parties for ascertaining the present state of the deeds.

"3d, That the report was made by the person, undoubtedly the very best qua-

An inspection of the deeds was then made by the pursuer's agent, aided by Mr. Lizars, engraver. No. 12

The pursuer raised a supplementary reduction of the duplicate deeds, on the ground of their being erased in substantialibus, which action was conjoined with the first. As parties were still at issue respecting the number and extent of the erasures, a new remit was made of consent by the Lord Ordinary (Cockburn) to Cosmo Innes, advocate, to inspect the deeds, and "report on the whole erasures." He drew up a report from which it appeared that, in the recorded deed of entail there were forty-two entire words, in various places, written on erasures; and sixty-two letters, or syllables, also in various places, written on erasures. Among all these the only erasure and superinduction which also occurred in the duplicate deed of entail, was in a part of the name of a parcel of lands called Younies, composing a portion of the barony of Glammiss. The description of the whole lands was contained in a procuratory of resignation, and in both deeds the words "all and whole the lands, ancient barony, lordship and thanedom of Glammiss," were free of erasure. These words were immediately succeeded by the following clause: "comprehending the mains and town of Glammiss; the town and lands of Balnagoon, Myreton, Easter and Wester Younies, Arnafool, &c." In the recorded entail the letters *Yo*, in Younies, were written on an erasure; in the unrecorded duplicate, the letters *You* were written on an erasure; and the same partial erasure also occurred in the trust-disposition and its duplicate.

Feb. 1, 18  
Earl of St.  
more v. E.  
Strathmore  
Trustees

The pursuer pleaded that this erasure was fatal, at least to the portion of lands affected by it. The defenders answered (1) that there was a valid conveyance of the whole barony of Glammiss, of which these lands were only a parcel, and within which they were included, even though not specified; (2) that the erasure was too minute to be material, enough

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lified, at least in the present instance, and that it was most minute and particular.

"4th, That although the inspection was ordered to be made in presence of the pursuer and his agent, it is not averred in the condescendence lodged, that there are any erasures or vitiations other than those reported.

"Nevertheless, it is possible that things may be omitted, and the pursuer might be entitled to a further inspection before revising, though the Lord Ordinary must confess that he should not approve of a multitude of counsel and agents being brought to such a business; and by the above interlocutor, the Lord Ordinary, though with hesitation, has allowed him to take the assistance of one other person whom he may suppose to have particular skill. But what he particularly objects to is, the attempt to bring such a number of such persons to such an inspection, at the present moment, whereby a conflict of opinions, founded, as the Court well know, very often, on mere imagination, may be raised as to the actual state of the deeds. He owns that he was not without fear that experiments were contemplated. At any rate, he has thought it necessary to guard against it; and, on the whole, he thinks the interlocutor gives the pursuer the utmost latitude which he can possibly expect in the present state of the cause; what may be thought necessary at this point."

23. of the words "Easter and Wester Younies" being free of erasure, to identify this parcel of the barony, as being contained in the settlement; and (3) there was a separate general clause conveying the whole Scottish heritage of which the entailer should be possessed at his death, which was free from challenge, and must have embraced this parcel of lands, even had it not otherwise been conveyed.

In regard to the other erasures which occurred in the recorded deed and not in the duplicate, a great number of them were obviously trivial, and one of the most important seemed to be the following. Resignation was directed to be made for new infeftment to the granter, and the heirs male of his body "successively, in order, according to their *respective* seniorities, and the heirs male respectively to be procreated of their bodies successively, whom failing, to the heirs whatsoever lawfully to be procreated of the bodies of my said heirs male successively in order according to their *seniority*, and the heirs whatsoever *respectively* to be procreated of their bodies *respectively*, whom failing" to the heirs whatsoever of his lordship's body, &c. The words in italics were written on erasures, and the pursuer contended that as they affected the destination of the estates, they were necessarily in substantialibus. The defenders answered (1) that the same passage in the duplicate deed was free of erasure; (2) that the whole of this destination was repeated in the deed of nomination of heirs, and was free from erasure there; and (3) that, in themselves the erasures did not substantially affect the destination.

In the duplicate deed of entail the number of erasures, including all those which were obviously insignificant, was not much less than in the recorded entail. The following seemed to be among the more important of the erasures in this writ. The deed disposed inter alia, "the burgh of barony after mentioned, erected by King Charles II. conform to a charter under the Great Seal, in favour of the deceased Patrick Earl of Strathmore, therein designed Earl of Kinghorn, dated at Whitehall the *thirtieth* day of May, 1672;" and a large portion of the contents of the charter containing the burgh of barony of Glamis, &c., was there recited. The reporter (Cosmo Innes) in pointing out the erasure in the latter half of the word "thirtieth," also added that it had been first written "thirteen."

The pursuer objected that this erasure, being in the date of the charter, which was inter essentialia, showed that a different charter must have been originally referred to, and not the charter as now described; and accordingly that the burgh of barony, &c., contained in the charter was not duly comprehended in the disposition. The defenders answered (1) that the date of the charter was free of erasure in the recorded deed; (2) that the charter was identified by the name of the granter, and grantee, the place where it was granted, and the month and year in which it was granted, besides the recital of a large portion of its contents; that there was no other charter in May, 1672; that it was thus sufficiently identified, and that this was all that was required.—Another erasure occurred in the



clause by which, after specially enumerating the whole lands conveyed, a general disposition was added of the whole lands within Scotland, which pertained to the granter then or at his death. The deed disposed these together with all right or interest which his lordship had or could pretend to the “earldom, &c., lands, baronies, &c., teinds, fishings and other heri-  
*tages herein particularly and generally before disposed, or to any portion of the same*” to be resigned in the hands of the granter’s immediate superiors, &c. The pursuer objected that the words in italics, which were superinduced on erasures, were inter essentialia. The defenders answered, (1) the words were free of erasure in the duplicate entail; and (2) they were surplusage, as the rest of the deed was in all respects as effectual without them.—Again, in the destination of the estate, after all the heirs, called in the deed of nomination and certain posterior substitutions, were exhausted, the estates were to devolve in the last place, on the granter’s “heirs whatsoever, and their assignees, *the eldest heir female and the descendants of her body always excluding heirs portioners, &c.*” The pursuer contended that the two words and the letter in italics, being written on erasures were a fatal nullity. The defenders answered (1) that the recorded duplicate was free of erasure in this passage; (2) that the erasure could only affect one member of the destination, which was the most remote of any, and that the pursuer was cut off from all interest in it; and (3) that it was not in itself a material erasure, being supported and explained by the context.

In the recorded deed of nomination of heirs, the narrative clause referred to the deed of entail as having disposed the lands “for new infeftment *of the same* to be granted to myself,” &c. It then stated the destination as set forth in the entail, and referred to the trust-disposition; after which it declared the granter’s resolution to exclude the Hon. Thomas Bowes, and John and Charles Lyon, “from ever succeeding to my said estates.” It then proceeded, “I do therefore hereby declare and appoint, that, in case of the failure of heirs whatsoever of my body, and the heirs of their bodies, my said lands and estates shall devolve and belong to the heirs male lawfully procreated or to be procreated of the body of the said Thomas Bowes successively in their order, and the heirs male respectively to be procreated of their bodies successively, whom failing, to the persons having right for the time to the titles of Earl of Strathmore, &c., other than and except the said Thomas Bowes, John Lyon, and Charles Lyon, all and each of whom are specially excluded and *debarred from ever* succeeding to or enjoying my said lands,” &c. A declaration followed, in favour of a certain class of heirs, in the course of which a clause occurred “excluding and excepting always the said Thomas Bowes, John Lyon, and Charles Lyon,” as to whom it was declared *that* after, “none of whom shall ever succeed to or enjoy my said lands *or any part thereof*, and who are all and each specially excluded *in* the subsequent clause of the destination, calling the heirs

No. 12

Feb. 1, 18

Earl of Strathmore v. Earl of Strathmore

Trustees.



made on whatever of the grantor the words occurred, *as distinctly always the said Thomas Botwell, John Lyon, and Charles Lyon.* The words or syllables, in the above quotations, so far as printed in italics, were written on erasures. The pursuer contended that these were in essential, and that he was not effectually cut off from the succession. The defender answered that even if there had been no duplicate deed of nomination, the erasures were of no importance, considering the context of the deeds, and that, as no corresponding erasure existed in the duplicate, this was an additional, though an unnecessary, corroboration of the recorded deed. vi

In the unrecorded duplicate deed of nomination of heirs, the erasures were apparently less worthy of notice than those which have just been specified in the recorded deed. In reference to the terms of this deed of nomination the pursuer pleaded, as a separate reason of reduction, that, as he was not cut off from the succession by the deed of entail, if taken by itself, so he could not effectually be cut off by the deed of nomination as it contained no dispositive words. The defenders answered that the entail contained an apt disposition, *hæredibus nominatis*, and that it was unnecessary, in a deed of nomination which related to the entail and the reserved power of nomination, to insert any dispositive words whatever. In the recorded trust-disposition and its duplicate the number and character of the erasures were generally of a similar sort to those already specified. In the narrative of the deed, after referring to the entail and the deed of nomination, the grantor also referred to his having “*already executed a will of my estates and property situated in England;*” after which he proceeded to dispoise the Scottish estates in trust as already mentioned. The words in italics, which were superinduced on a comparatively large erasure, were the only words which were erased both in the recorded trust-deed, and in the duplicate. The defenders pleaded that they were altogether immaterial. As to the other superinductions on erasures, the grounds upon which each was attacked and defended were similar to those already noticed, with this difference that the defenders farther pleaded, as to the trust-deed, that as the pursuer was completely debarred from the succession by the combined effect of the entail and the deed of nomination of heirs, he had no interest or title to challenge the validity of the trust-deed.

The pursuer did not apparently rely so much on any one erasure, as on the number of erasures, great and small, occurring in the deeds. In reference to the erasures, he pleaded in general, 1st, that they, or at least some of them, occurred in substantialibus; and 2d, that if any deed was

<sup>1</sup> Porterfield, Nov. 13, 1829, (ante, VIII. 16.)

<sup>2</sup> Pittullo, Nov. 22, 1761 (11536); Brown, June 20, 1701 (11541); Reid, June 24, 1834, (ante, XII. 781); 3 Ersk. 2, 2, and 20; Bell on Testing Deeds, 104, 116; Innes, Dec. 10, 1828, (ante, V. 559, or new ed. 525), *affd.*; 4

invalid, in respect of erasures in substantialibus; that deed could not be rendered valid by the production of any duplicate deed, which was free of erasures. Such duplicate might be valid in itself, if free of erasures, but it could not cure another deed which was in itself invalid on account of erasures in substantialibus. It therefore followed, that, in judging of the validity of each deed, it must be tried without reference to the duplicate, and must stand or fall on its own merits alone; and in afterwards trying the validity of its duplicate, that duplicate must be also examined by itself; because, if it was invalid, on account of erasures, it could not effectually support another invalid deed.

The defenders pleaded. 1st. That the partial erasure of a word is not necessarily fatal even to that word itself, especially where it was apparent that no other word, capable of giving a different meaning to the sentence had been originally written on the erased space.<sup>1</sup> 2d. That even where an erasure was more extensive, still, if it occurred in an unimportant part of the deed, or if the words superinduced gave a consistent meaning to the clause in which they occurred, and were supported by the context of the deed, the erasure produced no nullity.<sup>2</sup> 3d. That where a deed consisted of distinct parts, an erasure, even if creating a nullity in one part, did not necessarily affect the validity of the rest.<sup>3</sup> And 4th. That as each of the three deeds, referred, in gremio of its testing clause, to the duplicate which was simultaneously executed, that was tantamount to a statement in the testing clause that every word, written on an erasure in the deed, and written free of erasure in the duplicate, was written on erasure prior to signature of the deed and duplicate; and that this alone did as distinctly point out the whole erasures, with two immaterial exceptions,\* to have been executed prior to signature, as the most express enumeration of erasures in the testing clause would have done.<sup>4</sup> By applying these rules to the deeds, the defenders contended that their validity was unchallengeable; and as the case was free from every suspicion of fraud, and was a mere case of erasure not authenticated in the testing clause, they were entitled to the most favourable application of these rules.<sup>5</sup>

W. and S. 379; Grant, May 12, 1830, (ante, VIII. 734); Howden, July 10, 1835, (ante, XIII. 1097); Sharpe, April 18, 1835, 1 Sh. and M'L. 619; Davidson, Nov. 14, 1827, (ante, VI. 8).

<sup>1</sup> Gaywood, June 19, 1828, (ante, VI. 991); Earl of Cassilis' Trustees, June 2, 1831, (ante, IX. 663); Morrison, June 30, 1829, (ante, VII. 810).

<sup>2</sup> 4 St. 42, 19; Wright, Feb. 8, 1672 (11440); Lyon, Dec. 21, 1709 (11544); Gunning, April 18, 1721, Rob. App. Ca. 364; Maxwell, April 30, 1725, Rob. App. Ca. 539; Spottiswood, June 17, 1741 (16811).

<sup>3</sup> Kemps, March 2, 1802, F.C.; Earl of Traquair, June 26, 1822 (ante, I. 527, or new ed. 485); Abernethy, Jan. 16, 1835, (ante, XIII. 263).

\* "Younies," in the deed of entail; and "a will" in the narrative of the trust-deed.

<sup>4</sup> 4 St. 42, 19; Boswell, Feb. 20, 1708 (17025); Cubison, July 3, 1716 (17025).

<sup>5</sup> Adam, June 12, 1810, F. C.

No. 12

Feb. 1, 183

Earl of Str

more v. Ea

Strathmore

Trustees.

**No. 128.** In the deed of 1820, whereby a new trustee was appointed and added to the others, and which was executed in London, some erasures were also founded on by the pursuer which do not require particular notice.

Feb. 1, 1837.  
Earl of Strathmore v. Earl of Strathmore's Trustees.

The Lord Ordinary "approved of Mr Innes' report, against which no objections have been lodged; sustained the defences, assolizied the defenders, and decerned; but found the pursuer entitled to his expenses incurred to this date out of the trust funds."\*

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\* NOTE.—"The remit to Mr Innes was made before answer, and of consent, with an order to him 'to report on the whole erasures,' and on the parties 'to print the deeds in such a form as to show the whole erasures therein.' Mr Innes reported; and the deeds were so printed; and not only have no objections been lodged, but, until the debate had begun, no proposal or expression of any desire to object was hinted. In these circumstances, the Lord Ordinary holds the report, which is by a person of skill in his own department, to be conclusive; and he does so the more readily, 1st, Because a final reference to such a person was almost a matter of necessity in the circumstances of the case, where the erasures are said to be about 460, and where the judges of each of these were certainly to be five, and might be thirteen, each of whom, if there was to be no final report, would have been obliged to form his separate opinion of each erasure and alleged erasure. 2dly, Because his clear impression, at the time of making the remit, was, that it was understood that the report was to be held on all sides as fixing the facts.

"Upon the merits, the case is very peculiar in two particulars. 1st, In the unusual number of erasures. 2d, In the means which the granter has afforded of enabling the law to dispose of these by an unusual number of relative and inseparably connected deeds.

"The erasures being so numerous, and the pursuer professing to make a point of almost every one of them, it is impossible for the Lord Ordinary to state his opinion of them in detail. He can only say, in general, that the conclusions he has come to, depend on the following views:—

"1st. That a very great number, nearly the whole, of the passages objected to are plainly immaterial, consisting of words, syllables, or letters, which have obviously been written on erasures, merely in order to correct palpable clerical errors, a misspelling, or such other accidents, and the entire omission of which parts of the deeds would create no doubt of the granter's meaning, or of its due expression, especially considering that some of them occur in parts of the deed which are merely narrative, or which only describe the contents of the other deeds, or in which the necessity of absolute accuracy is superseded by the use of general terms or directions.

"2d. That though there be passages of more importance, which it is possible may, in given circumstances, hereafter supersede, or otherwise affect detached portions of some, or of all of these deeds, at the instance of the pursuer, or of any other party entitled to found on these defects, there is none of them which so vitiates any of the deeds in substantialibus, as that reduction is the necessary legal consequence; even though each particular deed challenged were to be looked at by itself.

"3d. But none of these deeds can so be looked at, because the trust, the entail, and the nomination of heirs form one general settlement; and, having been executed in duplicate, all in one day, and all bearing express reference to each other, it is competent, when each erasure is excepted to, to throw any explanatory light upon it that can be obtained from these other writings, signed by the granter, in relation to that very passage, as to every passage of the deed challenged; and that this reference from the one to the other is peculiarly competent and peculiarly conclusive as to the general averment made by the pursuer in the record, that important words have been obliterated, and different words inserted after subscription—of these there has been no proof beyond what the deeds themselves afford; and when the whole are taken into view, they negative the assertion.

Both parties reclaimed, the pursuer on the merits, and the defenders No. 12 as to the award of expenses.

The Court ordered Cases, on considering which the following Opinions were delivered :—

Feb. 1, 181  
Earl of Sarmore v. Ea  
Scrathmore  
Trustees.

**LORD PRESIDENT.**—I entertain some doubt whether there is sufficient evidence before us to certiorate us that these erasures were actually made before the execution of the deed, and not after it. Whether they are of greater or less importance, I conceive that no party was entitled to make them after the deed was once executed. They are above 200 in number in either set of deeds. They are not noticed in the testing-clause in any of the deeds. And in one of the deeds there is an erasure regarding the destination of the estates. Undoubtedly, it might be said that the effect of that erasure must, in any event, be limited to the single member of the destination, in which it occurs. But still I should have wished those doubts set at rest, respecting the date of these alterations, many of which appear plainly of small importance, but none of which could be made, after the execution of the deed, without the utmost danger to its validity.

**LORD GILLIES.**—Until I see at least one erasure in substantialibus pointed out, I cannot perceive any difficulty in disposing of this case. I own that I have no favourable leaning towards a settlement of this description, the purpose of which is to accumulate an immense fortune for the aggrandizement of a future generation, at the expense of privation to the present; just as little as I feel for those settlements which disinherit the natural heir for the purpose of founding largely endowed hospitals; but I cannot allow my own feelings to have the least influence upon the decision of this or any other question, and the sole subject for consideration here is, whether the deeds under reduction are good by the law of Scotland. I think they are so; and I must think so, until some one erasure in substantialibus be pointed out by the pursuer. A single one would be of far more importance than all which the learning and ingenuity of the pursuer have yet been able to instruct. It is true that the number of erasures is very great; but this is not a case where the rule "*plura juvant*" applies: and, therefore, if not one of all these erasures occurs in substantialibus, the whole taken together will not warrant the reduction of any of these deeds. I have perused the deeds without detecting such an erasure: the pursuer has hitherto failed to specify any such

"4th. That, even though effect were given to the whole erasures, to the extent of holding each erased passage as not written at all, this would not render the settlement either void or inoperative, and would at least leave enough to exclude the pursuer from demanding that total reduction which he now seeks, and upon which all his other conclusions depend.

"It is needless to refer to cases, because the abstract rules are clear; and almost the only general result of the decisions is, that, in their application, every case depends mainly on its peculiar circumstances. The Lord Ordinary may only observe, that there is no erasure here, than which one equally or more important cannot be shown to have been disregarded in a case at least as strong, and this even when there was no aid to be got from any collateral deed.

"But, although the pursuer be wrong, the Lord Ordinary gives him his costs hitherto incurred, because he was warranted, or rather tempted, to try the question, by what appeared on the very face of the instruments. He had better not speculate, however, on this indulgence being continued for ever."

1837. *Erasure*; and I must therefore decide upon the testing-clause, as such evidence exists. And there is a striking peculiarity in this case which confirms me strongly in the opinion that the defences ought to be sustained. The whole of the settlements, under challenge, were executed in duplicate. There were ten complete sets, each containing a series of these deeds, executed at the same time, the one being a duplicate of the other. And in the testing-clause of each deed, special reference is made to the duplicate signed of even date with it. The effect of this necessarily is to produce a much stronger assurance that the erasures were made prior to the execution of the deed, than any notice of them in the testing-clause of the deed, in common form, would have done. By the general practice, the testing-clause is not filled in till long after the date when the deed has been signed; and this does open the door to the hazard of erasures or marginal notes being specified in the testing-clause, if made before it was filled in, though perhaps made posterior to the signature of the deed. But in this case, the reference made in the testing-clause of each deed, to the execution of a duplicate, produces a stronger conviction, that the erasures were all of prior date to the signature of the deeds, because, with two immaterial exceptions, the whole erasures in the one deed occur in passages which are free of erasure in the other; and vice versa. But if it be alleged against the deed A that a certain word is written on an erasure, and the erasure is not noticed in the testing-clause, and must therefore be presumed to have been made subsequently to the signature, it appears to me that the answer is conclusive, that the testing-clause of deed A refers to the execution of a duplicate deed B, of the same date, in which deed B the suspected word is written free of erasure, and is therefore of unimpeachable authenticity. But the whole of the words written on erasures, with two unimportant exceptions, have their authenticity thus conclusively vouched; and I think the reference in the testing-clause of the deed A, to the contemporaneous execution of the deed B, is at least as good an authentication of every passage containing an erasure in the deed A, which is de facto written fair and free from erasure in the deed B, as if the testing-clause of A had specially enumerated all such erasures, in the ordinary way. It attests the existence of a duplicate in which none of its own erasures occur; and which could not be a duplicate, unless all these erasures were made prior to the signature of the duplicate deed. The erased passages of the one duplicate are thus supported by the corresponding passages free of erasure in the other, and the effect is to strengthen both, as much as if the testing-clause of each had enumerated its own erasures.

I regret that we have not the assistance to-day of our respected brother, Lord Balgray, but I understand that his Lordship was of the same opinion with that which I have now expressed.

LORD MACKENZIE.—I am of the same opinion. In regard to cases where erasures occur in probative deeds, they may be considered under two classes; first, where forgery or fraudulent vitiation is alleged and proved; and, second, where such an element is altogether wanting. In the first class of cases the Court have sometimes inferred the total nullity of a deed, in odium corruptoris, where they would not have gone so far had the deed belonged to the second class. In the present instance, the deeds under challenge do not belong to the first, but to the second class of these cases. There is no proof, or allegation, or even suspicion of wilful or fraudulent interpolation or erasure. It is just the ordinary case, where

erasures are found in a deed, and the question is raised how far they affect its authenticity. The existence of an erasure on the face of a deed, though not noticed in the testing clause, does not of itself afford any proof or certainty of a vitiation after the deed was signed. It just comes to this, that it was quite possible that the alteration was made after the deed was signed. There may indeed have been no such vitiation; the erasure may have been made before signing; but as the very end and purpose of a probative writ is to produce legal certainty, that end is pro tanto defeated by every such erasure, so far as that it at least may have been made after signing, and the Court must then look at the effect of such erasure, in case it had been so made. That effect may be to annul the instrument in whole, or in part, or it may be altogether immaterial. But in the case of simple erasure, apart from all suspicion of fraud, I know no case in which an erasure is allowed to produce total nullity, unless in its own nature it was such as, when taken along with the whole deed, amounted to a vitiation in substantialibus of the deed. The Court are obliged therefore to examine the nature of the erasures, and decide what is the effect of each and all of them. What then are the erasures which thus open the possibility of other words having stood there at the date of the signature of the deed? Are any of them such as thereby to infer the total or partial nullity of the deed? I have examined them with attention, and I have been unable to find any one which can annul any material part of the deed, and still less the whole of it. There is not one, I conceive, in substantialibus. And as to the mere numerical amount of erasures, each of which is immaterial, that may indeed affect the character of the deed so far as slovenliness is concerned, but it can have no effect on its validity. I am not sufficiently acquainted with the details of practice in conveyancers' offices, either at the present time or as at the date of these deeds, to be able to say how far the number of erasures in them is uncommon, or unusual. But whether they be so or not, if they are all immaterial, the mere number of them will not make up one error in substantialibus. There is no arithmetical proportion between erasures which are immaterial, and erasures which are material, by means of which a given number of the former shall be computed as tantamount to one of the latter. And it must be remembered that the case before the Court relates to the settlement of a party deceased, which must stand or fall according to its present form. If it were a deed of entail which came under our judicial cognizance in consequence of some Act of Parliament directing it to be framed at the sight of this Court, then the number of erasures, even immaterial in themselves, might fairly be pressed on our attention as a reason for our not giving our sanction to such a document, but requiring that it should be written out afresh and with greater care. But the case here is entirely different. The deeds must be taken as they stand; they are made and cannot be altered; and the sole question is, whether or not they are valid in law. And in reference to that question, I am unable to rest any legitimate effect upon the observation that the erasures are numerous. That is not enough. The question remains, whether there is so much as one erasure which, either per se, or from its connexion with others, is in substantialibus. If there had been such an erasure, I think the pursuer could not have failed to point it out. And my own examination of the deeds has not detected any such. Indeed the pursuer, in place of relying on any one erasure, has brought them forward in whole lines, like a regiment, in order to produce an impression. But in examining these we are bound to look at them, giving due effect to every legitimate aid which our law permits

No. 12

Feb. 1, 18

Earl of Str

more v. Ea

Strathmore

Trustees.

123. to be founded on, in supporting words which are found on an erasure not authenticated by the testing-clause. The Lord Ordinary has alluded to some of the aids, and Lord Gillies has adverted to another, which I hold to be of the greatest possible importance; I mean the execution of the duplicate deeds, and the reliance which is made in the testing-clause of each deed to the co-temporary execution of a duplicate. The effect of the execution of the duplicate deed to all erasures in the first deed, which do not also occur in the second, and, *versus*, as to all erasures in the second which do not occur in the first, is just that these erasures must have been made, and the existing words superinduced them, before the deeds were signed. The testing-clause proves that they were agreed at the date of signing, otherwise they could not be duplicates of either. So far as one of these deeds remains free of erasure, it must of necessity have contained the same words from the first; and, therefore, any corresponding words written on erasure in the duplicate, which words make that duplicate agree with the deed first mentioned, must have been so written prior to signing because it could not otherwise have been the duplicate, at that date, which the testing-clause proves it to have been. This is substantially the same as if the testing-clause of one deed, in stating the other to be a duplicate, had stated all the words on erasures, occurring in itself, corresponding with words in the other deed, free of erasure, were written on erasures before signing; and had specified what those words were. Now, is it possible to doubt that, if the testing-clause of either deed had expressly enumerated and specified the erasures superinductions, the deed must have been duly authenticated? And the reference to the duplicate appears to be nearly tantamount to this, with the exception of such erasures as equally occur in both duplicates, and these are quite immaterial. On the whole, I consider the present to be a special case. I do not hold that the execution of duplicates is alone enough to save the deeds. But taking all the circumstances together, of which that is one of the most important, I consider the deeds to be unchallengeable. And in regard to each individual erasure, after looking carefully into the deeds, I think it may, in this particular case, be defended. I would therefore sustain the defences.

**LORD PRESIDENT.**—I have already mentioned the nature of the doubts which had occurred to me; but, in all the circumstances of the case, I hold that the erasures were not material.

On the pursuer's motion, their Lordships found the pursuer entitled to his expenses out of the trust-estate, observing that, in the circumstances, Lord Strathmore was naturally led to try this action, and that it should be tried at the cost of the trust.

**THE COURT** pronounced this interlocutor:—"Adhere to the interdict reclaimed against, and refuse the desire of both reclaiming notes, and the pursuer entitled to additional expenses, to be paid out of the trust fund."

**J. HAMILTON, W.S.—DUNNAS and WILSON, W.S.—Agents.**



JOHN CALDER, Pursuer.—*Sol.-Gen. Cunningham—Shand.*

No. 124

GEORGE GORDON, Defender.—*M<sup>c</sup>Neill—Spalding.*

**Arbitration—Submission.**—1. Where the agent of one of the parties to a submission, impetrates a decree-arbitral obreptione, and by improper and unfair procedure—Held that the decree is liable to reduction.—2. Circumstances in which this rule was applied.

In 1830 John Calder took a lease for nineteen years, of the lands of Feb. 1, 1831 Buxburn, from George Gordon of Buxburn, and entered into possession. He fell into arrears, and Gordon took out a sequestration against him, which Calder resisted, alleging that Gordon had failed to make implementation of obligations incumbent on him by the lease, so as to give rise to a claim of damages. Gordon stated his whole claims for rent and otherwise as exceeding £1500; Calder denied these, and stated his claim for damages, &c., and for improvements on the farm, &c., to exceed £950. It was agreed between the parties that Calder should renounce his tack as at January, 1833, and that the whole claims arising out of the lease, hinc inde, should be submitted to arbitration. A deed of submission was executed in favour of two arbiters, with power to name an oversman, and it was stipulated that Calder should immediately renounce possession of the land; and, farther, should quit the houses of the farm, within ten days after a final decree-arbitral was pronounced. Parties were heard by the arbiters, and written statements were lodged on both sides; and a remit was made, of consent, to persons of skill, to report on the state of the farm, the fences, the manure, &c. On considering the report and pleadings, the arbiters agreed as to the decision of some of the points of dispute, but not as to the whole, and they executed a devolution upon William Watson, Sheriff-substitute of Aberdeenshire. Parties were repeatedly heard before him, and a new remit was made by him to a land-surveyor, who returned a report as to the state of the farm, and alleged improvements on it by Calder; after which, the oversman personally inspected the farm. He then pronounced this order:—"6th September, 1833. The arbiter having heard parties' procurators, finds the sum due by John Calder to be £20 sterling, and ordains the said sum to be paid within fourteen days, with certification."

No payment was made in terms of this order, and after the lapse of a twelvemonth, during which the submission had been duly prorogated, the agent of Gordon wrote to Stronach, the agent of Calder, to transmit to him the proceedings in the submission. Stronach wrote in answer, on 17th September, 1834:—

"I now send you the proceedings in the submission between John Calder and Mr Gordon, with a note which the former proposes to lay before the arbiter, in consequence of an obvious error in Mr Gordon's

1st Division  
Ld. Cockburn  
B.  
Calder v.  
Gordon.

124. claim, which seems to have escaped notice at the time the matter was last under his notice.

1837.

" John Calder's rent, crop 1832, for 73 acres, 3 roods,	
19 falls, at £1, 15s. per acre, was	£120 1 8
Off 20 acres, 10 falls, at 17s. 6d. per acre,	
per lease,	£17 12 1½
Off 14 acres, 2 roods, 31 falls, at £1, 15s.	
per do., taken off by Mr Gordon in	
March, 1832,	25 14 3½
	<hr/> 43 6 4½

Rent for crop 1832,	£85 14 11½
Sum charged by Mr Gordon for rent, crop 1832, see	
Answers, No. 8, p. 7,	116 17 6

Overcharged on said crop,	£31 2 6½
Allowance of yearly deduction in money or manure, during	
the lease, admitted by Mr Gordon on his oath,	30 0 0
	<hr/> £61 2 6½

" Calder is prepared to prove, that 14 acres, 2 roods, 31 falls, were taken off by Mr Gordon in March, 1832, and were actually let by Mr Gordon to another tenant, so that, in place of having any thing to pay, Calder will have something considerable to receive from Mr Gordon."

Parties were at issue whether the " note" above referred to was a separate note inclosed within the letter, or was the statement in figures which was engrossed in the letter itself. A postscript was added to the letter, respecting an alleged account for £3, 18s., which was stated to be a farther sum to be still credited to Calder.

On 20th September, Gordon's agent sent the proceedings to the clerk in the submission, stating "as Calder has not paid the £20 found due by him to Mr Gordon, you will require to extend the decret-arbitral."

A decree-arbitral for the sum of £20 was accordingly extended on 7th October. On 16th October, Stronach wrote to Gordon's agent,—" You have placed me in a most awkward situation by applying for, and obtaining a decret-arbitral against John Calder, without having first communicated his note to the arbitrer; or, at any rate, advised me of your intention to apply for the decree. My object in sending you the papers on the 17th ultimo, in place of at once sending them to the arbitrer, as instructed by Calder, was to afford you an opportunity of reconsidering the matter, with a view to a private arrangement." He added, that he

bring the matter "again under the arbiter's notice, being satisfied No. 124  
 e would not have granted the request contained in your note to Feb. 1, 183  
 rk, had he been made aware of the note lodged for Calder, with- Calder v.  
 least hearing the parties on that subject." Gordon's agent an- Gordon.

l, that his whole proceedings had been regular and proper.  
 der raised a reduction of the decree on various grounds, which ulti-  
 resolved into two, one of which was merely a question of error  
 , in reference to the deduction of £3, 18s., as to which no judg-  
 was given by the Court; the other was, that the oversman's order

September, 1833, was not final, but was subject to be recalled or  
 l; and as the pursuer's agent, Stronach, had distinctly intimated to  
 fender's agent, by his letter of 17th September, 1834, that the  
 r required to be farther heard on various important points; and  
 nt him a note of these along with the process, it was contrary to  
 aith and fair procedure, on the part of the defender's agent, to send  
 process to the clerk to the submission, and ask for a decree, with-  
 en giving notice to the pursuer's agent, that he meant to oppose  
 ther hearing, or that he was about to ask the decree to be extend-  
 nd as he had also kept both the oversman and clerk in ignorance  
 e pursuer required to be farther heard, they were thereby com-  
 misled, so that a decree-arbitral was pronounced in circumstances  
 h the oversman would not have pronounced it, had he not been  
 the dark respecting them, and the defender had truly got the  
 fraudulently, or obreptione, and was not entitled to avail himself  
 any effect whatever. This was the more evident, as the whole  
 ire had lain over for a year prior to the moment when the defend-  
 ent took the sudden and irregular step of asking for decree in the  
 stances just explained. It ought, therefore, to be set aside, and  
 should be reponed against it, as if the submission had never been  
 into.

defender answered:—The order of the oversman on 6th Septem-  
 33, was final and irrevocable; at least it contained the deliberate  
 f his judgment on the whole claims of parties, after they had been  
 ard. It ordained payment in fourteen days; and, although the  
 r had indulged the pursuer with a year's delay, that only strength-  
 s right to obtain a decree-arbitral in terms of the order, whenever  
 dd apply to have it extended; and the pursuer had no right what-  
 expect farther notice before this was done. In regard to the in-  
 of a desire to be farther heard, which was contained in the  
 f 17th September, that imposed no duty upon the defender's  
 take steps for this purpose, as it was the duty of the pursuer's  
 agent, to do whatever was requisite for this, if he seriously desired  
 the decree. And as the decree-arbitral was not extended till  
 being about three weeks after the process was borrowed up

No. 124. by the defender's agent, Stronach, the pursuer's agent, had full opportunity to apply to be farther heard if he chose; and he could not fail to know the purpose for which the process was borrowed up by the defender's agent, and the necessity of there being a decree-arbitral extended without farther delay, especially as the pursuer had possession of the houses on the farm until ten days had expired after such decree was pronounced.

Ch. 1, 1837.  
Calder v.  
Gordon.

The Lord Ordinary "sustained the defences, assolvizied the defender, and decerned; and found the pursuer liable in expenses."\*

The pursuer reclaimed.

LORD GILLIES.—I am very unwilling to touch a decree-arbitral, unless there be strong grounds for doing so, but I fear that I cannot take the same view of this case which the Lord Ordinary has done. I think the decree-arbitral has in this instance been obtained by dint of unseasonable and unseemly over-agency on the part of the defender, and that it cannot avail him, but must be set aside. Upon September 17, 1834, the pursuer's agent, Stronach, wrote a sensible and rational letter to the defender's agent, communicating a note of statements as to overcharges, of very considerable amount, which he distinctly intimated that Calder proposed to lay before the oversman. The defender's agent made no answer to that letter, and he gives no satisfactory explanation why he did not answer it. I think, however, it was entitled to an answer. But the case did not stop here. Within three days after receiving that letter, the defender's agent, without answering Stronach, or making the least intimation to him, wrote to the clerk of the submission—"As Calder has not paid the £20 found due by him to Mr Gordon, you will require to extend the decree-arbitral." In this communication he did not make the least reference to the intimation he had received from Stronach, and I think this was extremely improper. The defender's agent was bound, either to have answered Stronach's letter, and certiorated him of the course he was about to take in applying to have the decree-arbitral extended, or he ought to have transmitted Stronach's letter, containing the note of the alleged errors and overcharges, and the intimation of a desire for farther hearing, to the clerk of the submission, along with the process, so as to certiorate the oversman of its contents. But he

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\* "NOTE.—It was maintained, at the debate, against the decret-arbitral,—That it was obtained by fraud. The Lord Ordinary is of opinion, that there is nothing condescended on to warrant this charge. No fact is stated, except that of the agent of the pursuer having sent the agent of the defender a copy of a note, 'which the former (the pursuer) proposes to lay before the arbiter.' The latter, three or four days thereafter, asked the clerk to extend the decree, the nature of which the arbiter had previously indicated, and this was done. The fraud consists in the defender's agent not having lodged the paper which his adversary said that he (the adversary) was to lodge; and the application for the extension of the decree is described in the pursuer's Condescendence (Art. 16), as 'secret communications with the clerk.' It was not the duty or the right of the defender's agent to lodge the pursuer's papers, and being told that this one was to be lodged by the pursuer himself, the defender was perfectly entitled to ask for the decree. Besides, the pursuer had ample opportunity of being heard, and to all appearance was fully heard, either on his note or on any thing he chose, after all this."

refrained from doing either of these things. And it appears that, immediately after the decree was extended, Stronach wrote what seems to me to be also a sensible letter, complaining of the undue advantage which had been taken, and stating, "My object in sending you the papers on the 17th ultimo, in place of at once sending them to the arbiter, as instructed by Calder, was to afford you an opportunity of reconsidering the matter, with a view to a private arrangement." And then he intimates, he is satisfied that the oversman would not have given decree without a farther hearing of parties had he known the facts which were kept back by Gordon's agent. That letter appears to me to afford a satisfactory explanation of the whole proceeding, and I have no doubt it states what is an adequate, and a true reason for the course followed by Stronach, in his communication of 17th September, with the defender's agent. The answer of the defender's agent is not at all satisfactory to my mind. And in the whole circumstances I feel myself warranted to suspect, and constrained to believe, that the oversman was led to pronounce a decree while some circumstances were wilfully kept back from him by the defender's agent, which he was bound to have communicated (or at least to have certiorated the pursuer if he did not), and that in this way a decree was improperly impetrated by the defender. I think that decree must, in the special circumstances of the case, be set aside.

**LORD MACKENZIE.**—I think the Lord Ordinary's interlocutor should be altered. The defender's agent sent to the pursuer's agent for the process, and he received it along with a note, containing a statement, which, it was intimated, was intended to be laid before the oversman. Parties are at issue whether the letter contained a separate note included within it, or whether the statement engrossed in it was the "note" referred to. I rather think, if I must make a guess, that the latter is the more probable supposition; and I shall take it so, which is putting it on the weakest footing for the pursuer's present reduction. But even in that view, I think the subsequent decree was obtained by nimious and unfair procedure, and must be opened up. It is certainly a difficult thing to open up a decree-arbitral; but it would be a very serious thing for the country, if a decree-arbitral which had been obtained by unfair means, could not be set aside. Now assuming that there was no separate note included in the letter of the pursuer's agent, still I am satisfied that the statement in that letter which was transmitted along with the process was just meant to be handed over to the clerk to the submission along with the process. But in place of this, the defender's agent kept back that statement, at the same time that he transmitted the process, and asked for a decree-arbitral to be immediately extended. I cannot think that a procedure like that, was either safe or admissible, while he neither gave notice on the one hand to the pursuer's agent that his note was not forwarded to the clerk, though the process was, nor, on the other hand, to the clerk, that such a note was in existence, and was withheld by him. I think such conduct decidedly amounted to over-agency; to erroneous, and substantially incorrect and improper agency. What effect the note would have had on the oversman if it had been laid before him, whether great or small, I cannot tell. But the decree-arbitral must be opened up if this Court holds that the arbiter was led, by the undue proceedings of one party, to issue a decree without affording to the other a due hearing, or opportunity of being heard, in reference to the note in question. I think we can do nothing but reduce the decree.

**LORD PATERSON.**—I am of the same opinion. I think in all the circumstances the decree was obtained obreptione. Considering the terms of the letter

No. 124.

Feb. 1, 1837.

Calder v.

Gordon.

No. 124. of the pursuer's agent, of 17th September, I think the defender's agent, in returning the process to the clerk to the submission, as he had not answered the letter of the pursuer's agent, was bound not to have asked for a decree-arbitral, without certiorating the oversman, through the clerk to the submission, of the note referred to in the letter of 17th September. Whether there was any separate note in that letter or not, is quite immaterial. If there was no separate note, the letter itself should have been transmitted along with the process, to the clerk to the submission, as the defender's agent had made no answer to that letter, and given no intimation to the pursuer's agent that he was to apply for the issuing of a decree. I think there was gross precipitation, to say the least, in demanding a decree under these circumstances; and as it was obtained by a party who at the same time kept the oversman in the dark as to the fact of the note being in existence, while he gave no intimation to the opposite party that his note was withheld from the oversman, I think it was obtained by undue means, and must be reduced.

THE COURT altered the interlocutor of the Lord Ordinary, and reduced the decree, and awarded expenses in favour of the pursuer.

W. & J. B. DOUGLAS, W.S.—J. SHEPHERD, W.S.—Agents.

No. 125.

A B, Raiser.

— AULD, Claimant.—D. F. HOPE—Glasgow.

— HIGGINS, Claimant.—Inglis.

*Process.*—Held unnecessary, in respect of A. S. 11th July, 1828, § 77, to append a copy of the summons in a process of multiplepinding, to a reclaiming note presented by one of the claimants.

Feb. 2, 1837. In a process of multiplepinding a judgment was pronounced, against  
1st Division. which a party, named Higgins, presented a reclaiming note. When moved in Court,

The *Dean of Faculty*, for the competing claimant, objected that the note was incompetent, in respect that no copy of the summons was appended to it.

LORD MACKENZIE.—This matter is regulated by the 77th section of A. S. 11th July, 1828, by which a special exemption is made in regard to processes of multiplepinding, and certain others, as to which it is declared that the note may be received though no copy of the summons is appended to it.

THE COURT found the note competent; and, on the merits, made a remit of the cause to the Lord Ordinary, with power to recall the interlocutor complained of.

Agents,

THOMAS RIDLEY and COMPANY, and FREDERICK A. BELL, Advocators. No. 12

—Keay—More—Pattison.

WILLIAM SLOAN, Respondent.—D. F. Hope—Turnbull.

Feb. 2, 18  
Ridley v.  
Sloan.

**Lien—Delivery.**—Certain goods having been shipped in a carrying vessel, and deposited, on their arrival at the port of destination, in the warehouse of the shipowners' agent—Circumstances in which held, in a question with the shippers, that the agent had no right of lien over the goods for the general debt of a party to whom the shippers had intended to consign them, but who had become bankrupt, in consequence of which no delivery was ever required on his behalf.

PREVIOUS to the year 1835, the advocators, Ridley and Company, of Newcastle-upon-Tyne, had occasionally consigned to James Stanislaus Bell of Glasgow shipments of bottles of their manufacture, as upon sale and purchase, the respondent Sloan being the Glasgow agent for the shipowners employed by Ridley and Company. In the body of the freight-bills presented by Sloan to Bell was a standing notice to the following effect:—"All goods are subject to a lien, in favour of the shipowners generally, not only for the freight and charges thereon, but for all previously unsettled freights and charges."

Feb. 2, 18  
2d Division  
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By letter of 27th March, 1835, James Bell gave an order to Ridley and Company to ship for him 100 gross of wine-bottles. To this letter no answer was returned, but, on 24th April, these parties shipped 100 gross of bottles in bulk, addressed to "Mr Bell, Glasgow." No invoice or bill of lading was made out, but the following receipt was granted by the shipmaster:—

"Newcastle-upon-Tyne, April 24, 1835.—Received of Thomas Ridley and Company, on board the Ann, whereof I am master, the under-mentioned goods, in good condition—which, on my arrival at Glasgow, I promise to deliver and forward to the under-mentioned person, on being paid the customary freight for the same—the danger of the sea only excepted—as witness my hand,

"JOHN CRAWFORD.

"Mr Bell, Glasgow,  
1200 dozen wine-bottles in bulk."

The vessel arrived in Glasgow on the 9th of May. Previous to its arrival James Bell had become bankrupt, and intimation had been made to Sloan by James Bell's brother, Frederick Augustus Bell, a mercantile agent in Glasgow, that the bottles were to be delivered to him (Frederick A. Bell). They were landed and warehoused by Sloan. No demand for their delivery was made by James Bell or on his behalf, and no bill of lading or mandate authorizing delivery to James Bell was produced to Sloan. By letter of 13th May, Ridley and Company authorized Frederick A. Bell to take delivery of the bottles for their behoof, and at the



Nr 126. same time transmitted a formal order or mandate for delivery thereof, to be presented to Sloan, to whom it was accordingly communicated. Frederick Bell having thereafter offered payment of the freight, and demanded delivery in terms of this authority, it was refused by Sloan, who alleged a right to retain the bottles in security, and for payment of a general balance due to him by James Bell on account of unpaid charges for freight.

Feb. 4, 1837.  
Sloan v.  
Sloan

In these circumstances, Ridley and Company, and Frederick Bell, presented a petition to the sheriff of Lanarkshire against Sloan, praying to have him ordained forthwith to deliver up the bottles to Frederick Bell on payment of the freight thereof. The petition stated, and this statement was repeated in the replies, and not expressly departed from in the condescendence which followed, that the bottles were originally shipped to the care of Frederick Bell, he being alleged to be the "Mr Bell" referred to in the shipmaster's receipt.

It was pleaded in answer by Sloan, that he was not bound to deliver the goods upon any order except from James Bell, to whom they were de facto consigned and sent, and that, looking to the contract arising out of the terms of the freight-notes above-mentioned, he was entitled to exercise a lien over the goods until his claim against James Bell should be settled.

A proof was allowed, on advising which the sheriff-substitute decided in favour of the petitioners. This judgment having been altered by the sheriff, Ridley and Company and Frederick Bell brought an advocacy, in which, changing their ground as to Frederick Bell having been the party for whom the shipment was originally meant, they pleaded, on the footing of the bottles having been intended to be sent to James Bell,—

1. Ridley and Company having retained in their own hands the receipt or bill of lading which was granted by the shipmaster for the bottles in question, and having never transmitted the same, nor any invoice or other notice of the shipment to James Bell, they were entitled to authorize any person they pleased to take delivery of these bottles from the shipmaster, and were under no obligation whatever to deliver the same, or allow the same to be delivered, to James Bell.

2. In the circumstances of this case, there was no consignment to James Bell, and no question as to stoppage in transitu can be raised; there having been no delivery to him, either real or constructive, Ridley and Company are not bound, as the condition of demanding delivery of the goods from Sloan, to pay more than the freight chargeable on the goods, and are not liable for any general balance or other sum alleged to be due by James Bell to Sloan.

It was pleaded in answer—

1. In their proceedings before the sheriff, the advocates set out with the statement, that the goods in question were sent originally to Frederick Bell, as their consignee, and on that they perilled their case

they now maintain their argument on the footing that the goods were shipped to James Bell; but a party cannot be allowed thus to change his ground and plead *fact* alternatively, and is not entitled, after this irregular pleading, to the benefit of a judgment in law on the facts as proved.

No. 1  
Feb. 2, 1881  
Ridley v.  
Sloan.

2. Assuming the competency of this pleading, and supposing the goods to have been intended and actually shipped for James Bell—it is admitted that Ridley and Company had not written either to Sloan or to Frederick Bell, at the date of the goods being deposited in Sloan's warehouse; but if there was no timeous intimation, Ridley and Company had no right, after the goods had reached their destination, with the consent of all parties, and without any disclaimer from James Bell, to stop in transitu, and change the party who was to receive delivery. Sloan therefore received the bottles as the goods of James Bell, and has a lien over them, in terms of the freight-notes, for freight previously due on account of his other shipments.

The Lord Ordinary advocated the cause, and pronounced the following interlocutor, adding the subjoined note: \*—“ Finds it proved and

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\* “ Though this advocacy relates to a small matter, the Lord Ordinary is of opinion that it involves a very important question of mercantile law; and, though he certainly entertains the greatest respect for the judgment of the learned sheriff, he cannot but think that it is seriously erroneous. The defender is simply in the condition of the shipowners: he cannot make himself better; and the question is, Whether, under the circumstances, he has any right of lien over these goods shipped in the vessel as a carrying vessel, against the shippers, for the general debt of a party to whom they may have intended to consign them, but who never held any right to require delivery of them, and who never did require delivery of them?

“ The Lord Ordinary is, in the first place, very clearly of opinion, that it is no answer to this case, that the pursuers laid it on an averment, in general terms, that the goods were consigned to the order of Mr Frederick A. Bell. The facts are in the condescendence and answers, and the proof; and it is apparent, that the goods were not, in any proper sense, consigned to any one, until Mr F. Bell received the warrant to demand delivery. But, in the second place, the real merits of the case lie in two very different points of law, both of which are clearly raised by the facts in the record.

“ One is, that, in the case of a common carrier, or a carrying ship, which is in *pari causa*, it is with extreme difficulty that any lien can be established in the carrier or shipowner against the owner of the goods transmitting them by such a conveyance, beyond the freight and charges of the goods themselves; and no case, the Lord Ordinary is inclined to think, can be shown, where such a lien has been sustained as in the shipowners against the shippers for the previous unconnected debts of the consignee.—See Bell's Commentaries, 2, p. 110, 3d Edition—and the case of *Ruthworth v. Hadfield*, there quoted.

“ But there is another point which appears to the Lord Ordinary to be still more conclusive. It is not strictly on the doctrine of stoppage in transitu, though it has some affinity to it. It has been a question much agitated, whether bankruptcy, ~~in fact~~, operates a stoppage in transitu. The leaning of the law of Scotland has been affirmative, contrary to the rule very reluctantly adopted by the Judges in England. But, laying this controverted point aside, on which Mr Bell expresses his opinion, it never was a matter of doubt, that a man who finds himself in a

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admitted, that the pursuers, Ridley and Company, shipped 400 gross of wine bottles in bulk, addressed to Mr Bell, Glasgow: Finds that there was no regular bill of lading granted, but that the receipt given by the shipmaster, dated 24th April, 1833, bore, that the goods were received, 'which, on my arrival at Glasgow, I promise to deliver and forward to the under-mentioned person, on being paid the customary freight for the same—the danger of the sea only excepted—as witness my hand.—Mr Bell, Glasgow, 1200 dozen wine bottles in bulk.—JOHN CHAWFORD: Finds it proved that no invoice or bill of lading was, in the first instance, transmitted to any one: Finds it proved that, previous to the date of the said consignment, the pursuers had been in the practice of consigning to Mr James Stanislaus Bell, of Glasgow, goods of a similar description, as upon sale and purchase: Finds it proved that, after some correspondence, Mr James S. Bell had, by letter of the 27th March, 1833, given an order or permission to ship for him 100 gross of bottles: Finds that no answer was made to that letter, but that the shipment above-mentioned was made on the 24th of April thereafter, in the terms expressed in the receipt: Finds that it is sworn by the shipmaster, that the wherry-men who brought the goods to the ship said, that they were for Mr James Bell of Glasgow—but that this is not good evidence of the fact that the consignment was made to him: Finds, however, upon the whole facts, that it may be inferred that, in original intention, these goods were meant to be addressed to the said James S. Bell: Finds it clearly proved, that, before the vessel arrived at Glasgow, it had been

state of bankruptcy, may, and ought to refuse to take delivery of goods, for which he knows he cannot pay; Bell, L. 227-8-9, and the cases there quoted. Now, assuming the defender's best state of the case here, it is very clear that Mr James S. Bell, finding himself bankrupt, did plainly reject delivery of the goods, so far as he had any title on which to demand it, and his creditors were too sensible of the entire want of title ever to attempt to ask it. This, then, being the state of the case, beyond all doubt the defender, as agent of the shipowners, held the goods for the shippers simply, no delivery being competent except on their order. They granted authority to take delivery to Mr Frederick Bell; that authority was duly intimated, with an express tender of the freight and charges. The practice under the previous freight bills, between the defender and Mr James Bell, could be of no effect against them, there being no debt due by them to the defender, and their obligation to the shipowners being expressly for freight and charges only. In short, the defender seems to have taken up some notion that he could separate himself from the shipowners, and that by warehousing the goods, without any bills of lading, any order of delivery, or any demand of delivery, for James Bell, and in the face of the notice that the delivery was to be made to Mr Frederick Bell, as agent of the shippers, and the express demand on written authority exhibited to him, he could make out a lien against them for the general balance due by James Bell. This view of the matter appears to the Lord Ordinary to be very important in point of principle. It is always to be kept in remembrance, that Mr James Bell's dealings with the pursuers were entirely as a purchaser, and never, as an agent. There is no attempt to prove that he ever acted as an agent for them: any lien against him, therefore, on previous dealings, could never create a lien against them for his debts."

intimated to Andrew Davidson, clerk of the defender, that the bottles were to be delivered to Mr Frederick A. Bell, then carrying on business as a mercantile agent in Glasgow: Finds that the vessel arrived at Glasgow on or about the 9th of May, 1835, and that the bottles were landed and warehoused by the defender and respondent, as agent of the shipowner: Finds it proved that, before that date, Mr James S. Bell had fallen into a state of bankruptcy: Finds that no demand for delivery of the said bottles was ever made by the said James S. Bell, or on his behalf; and that no invoice, bill of lading, receipt, or other order or mandate, authorizing delivery to the said James S. Bell, was ever produced to the defender and respondent: Finds that, by letter of the 13th May, 1835, the pursuers expressly authorized Mr Frederick A. Bell to demand and receive delivery of the said goods for their behoof, and transmitted, annexed to the said letter, a formal order or mandate for the delivery thereof, to be presented to the defender—which order or mandate Mr Bell has sworn that he transmitted by his clerk to the defender, but which has not been produced: Finds it clearly proved, that, after receiving such authority, Mr F. A. Bell did expressly demand delivery of the goods, tendering payment of the freight and all charges connected with that consignment: Finds, that, according to the freight bills previously used between the defender and Mr James S. Bell previous to the consignment in question, it was matter of contract, or usage in the trade, that each parcel of goods consigned should be liable to a lien or retention, not only for the freight and charges on that consignment itself, but for all previous unsettled freights and charges between the same parties: But finds, that any such contract or understanding could be of no effect against the pursuers in respect of the goods in question, except in so far as it should appear that they were so consigned as to entitle and bind the defender to deliver them to Mr James S. Bell, or to the trustee for his creditors: Finds that, on the facts thus ascertained, there never was any right vested in the said James S. Bell, in virtue of which he could have required or compelled delivery of the said bottles to him; and that it was perfectly competent to, and in the power of the pursuers, whatever was the original intention in the consignment, to authorize and instruct Mr Frederick A. Bell to take delivery of them as their agent: Finds that, supposing the consignment to have been made in the expectation of Mr James S. Bell receiving the goods, it was not only perfectly competent for him, but clearly his duty, to refuse to receive them when he found himself to be in a state of bankruptcy, and that, as no bill of lading, or other mandate for delivery to him, had ever been presented to the defender, he could acquire no right of lien for the separate debt of Mr James Bell, by the act of warehousing the goods as agent of the shipowner: Finds that there is no incompetency in this shape of the pursuers' plea, under the form of the original petition: Therefore, on the whole, recalls the interlocutor of the sheriff, and decerns in terms of

No. 12

Feb. 2, 1835.  
Ridley v.  
Sloan.

126. the prayer of the original petition ; finds expenses due both in this Court and in the inferior court."

Feb. 2, 1837.

Ridley v.

Hume.

Sloan reclaimed.

LORD MEADOWBANK.—I have no doubts as to the propriety of adhering to the interlocutor. The first consignment of the goods was the letter of 13th May, containing the order for delivery to Frederick Bell.

LORD MEDWYN.—I agree with the Lord Ordinary on the merits, but I differ from him as to the question of expenses. The goods were unquestionably ordered and manufactured for James Bell, and Sloan understood them to be sent for him. It was natural, in the circumstances, for Sloan to suppose that this was a mere attempt to defeat his lien. Though I cannot support his view therefore, yet looking to the manner in which the advocates originally came into Court, making a false statement as to the goods being shipped for Frederick Bell, and Sloan being satisfied that this statement was incorrect, I think it hard that he should be saddled with the whole expenses.

LORD GLENLEE.—I am for adhering to the interlocutor. I am not so impressed with the impropriety of the conduct of Ridley and Company, as to propose to deprive them of their claim for expenses in a case where the opposite party have been maintaining a plea contrary to the interests of commerce and to views of common sense. It is plain the goods were not intended to be sent to James Bell, otherwise than on sale. The state of the fact came out in the course of the proceedings. This was a special contract. The parties had nothing to do but with this contract; and it is not said that there was any regular freight-note, bearing that, in the event of a claim arising for the freight of these goods, it should extend to the freight of all other goods freighted for James Bell. The shipowners and their agent, Sloan, must obey the order for delivery to Frederick Bell. In consequence of what occurred, the goods devolved on the original owners. I therefore think the interlocutor right; and, though very ready to be influenced by the views of Lord Medwyn, I cannot see any such impropriety in the conduct of the advocates as to prevent them obtaining their expenses.

LORD MEADOWBANK.—There being no bill of lading, my impression was that the shippers wished to keep the goods in their own hands. The goods were in such a situation that the shipmaster, without farther notice, was not in right to have delivered them to any body.

LORD JUSTICE CLERK was absent.

THE COURT accordingly adhered, finding additional expenses.

G. J. UAR, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

EARL of TRAQUAIR and OTHERS, Pursuers.—*Keay—Whigham.*  
 WILLIAMSON'S EXECUTORS, Defenders.—*D. F. Hope—Rutherford—*  
*G. G. Bell.*

No. 12

Feb. 2, 1825  
 Earl of  
 Traquair  
 Williamson  
 Executors

**Obligation.—Road Trustees.**—Certain proprietors having undertaken the formation of a turnpike-road through a district in which their lands lay, and having communicated the scheme to a non-resident proprietor of an entailed estate, who intimated a general approval, and signed the first of a series of bonds granted for money borrowed to complete the undertaking, but died before the date of the second—Circumstances which, in a question with the other proprietors, held not to establish against him an obligation for the whole undertaking, so as to bind his representatives beyond the extent of his share of the bond which he had subscribed.

In the year 1825, the pursuers, the Earl of Traquair and six others, proprietors in the lower district of Peebles-shire, resolved on the formation of a road from the confines of Selkirkshire, by Leithen Water, through the district of the county of Peebles in which their properties lay, to the borders of Mid-Lothian, for which powers had been obtained in an act of Parliament passed some time before. For this purpose they caused a general meeting of road trustees of the county of Peebles to be called to take the matter into consideration, and at that meeting, held on the 20th October, 1825, it was “resolved unanimously that the meeting shall authorize the heritors of the parishes of Traquair and Innerleithen, immediately on the works contemplated being in such condition that toll-duties may be legally exigible, to erect such number of toll-bars as may be sanctioned by law on the road proposed to be amended, altered, and formed from the point called the Piper’s Grave, to the boundary of the the county of Selkirk; and that the meeting resolve that an assignation be granted to the said heritors, or a committee to be named by them, of the proceeds of the said toll-bars to be erected for the indemnification of those who may advance money for amending, altering, and forming the said road, building the bridge proposed, and for every other purpose connected with the said road, under such reservation as is required by the statute 1818 to be made in granting such assignment.”

Feb. 2, 1825  
 2d Division  
 Ld. Monck  
 T.

Among the properties likely to be benefited on the proposed new road was that of Cardrona, which was held under terms of a strict entail by the late Dr Williamson, who had succeeded to it in the previous year, but was permanently domiciled in England, and never was in Scotland after his succession. On the 5th December, 1825, Mr Allan of Glen, one of the pursuers, wrote to Charles Balfour Scott, W.S., as the agent of Dr Williamson, the following letter:—“My dear Sir,—I expect to see the long-talked-of road up Leithen Water begun next spring, as the under-noted proprietors in the county of Peebles have got liberty to ~~make the~~ road, and put the legal number of tolls on it, for security of ~~the~~ expended on the said road and bridge over Tweed at Traquair

10. 27. House. We have agreed to be conjunctly and severally bound in a  
 1 of 837. bond for the money to be borrowed for executing these works, and I  
 2 of shall be happy if Mr Williamson will allow yet to add his name to the  
 3 of list under noted. I need not state the numerous advantages which this  
 4 of road will produce to Cardrona, as you are fully aware of them. I  
 5 of always am, &c.

(Signed) WILLIAM ALLAN.

Lord Traquair.

Mr Campbell, Kailzie.

Mr Stewart, Glenormiston.

Sir James Suttie.

Mr Horsburgh, Pim.

Mr Ballantyne, Helyoe.

Mr Allan, Glen.

This letter was communicated to Dr Williamson by Mr Scott, accompanied by one from himself in these terms:—"7th December, 1825.—The road proposed is a road from Innerleithen towards Edinburgh, and it certainly would be a great advantage to that part of the country. At the same time, situated as you are, and not having it in your power to take any share in the management, you may perhaps not feel disposed to give your name to the bond. I merely mention this for your consideration; and in case you feel disposed to countenance the undertaking, you might perhaps prefer doing it by a subscription, either for the road or bridge."

In answer Dr Williamson wrote to Mr Scott:—"10th December, 1825.—I am very glad to hear of the projected road up Leithen Water, and the bridge over the Tweed, which I really think will be a great improvement, and I consent with pleasure to your adding my name to the respectable list."

Mr Scott, on the 22d December, wrote Dr Williamson that he "would in due time communicate to Mr Allan your intentions as to Leithen Water road and bridge over the Tweed." There was no evidence, however, that Mr Scott had shown Dr Williamson's letter to Mr Allan or any of the pursuers, but it was admitted that he had intimated to Mr Allan that Dr Williamson was favourable to the scheme.

On the 24th of March, 1826, a meeting of the proprietors interested in the proposed road was held, in the sederunt of which Mr Allan was inserted as appearing for himself and for Dr Williamson, but there was no evidence that Mr Allan was authorized to appear or act for that gentleman. At this meeting, it was stated that a plan and survey of the proposed road had been prepared, and that the estimated expenses was about £6000, and the minute further bore as follows:—"The gentlemen present, taking into consideration the great benefit which the formation of this road will afford to the country,—Resolve unanimously, that the same



shall be made at the joint expense of the parties hereto, and for whom at the meeting appearance is made (it being understood always that Mr Suttie and his father, Sir James, are not to be accounted as two obligants, but that Mr Suttie binds Sir James); and as money must be borrowed for the works, they agree that the parties and their constituents shall raise the money by loan; therefore the parties hereto agree, and bind and oblige themselves to the effect following: That is to say, that a sum not exceeding six thousand pounds sterling shall be borrowed on the joint security of Lord Linton, Mr Campbell, Sir James Suttie, Mr Steuart, Mr Allan, Dr Williamson, and Mr Horsburgh, in one sum, or in such separate sums as the committee herein after named, or quorum thereof, shall direct; and the parties bind and oblige themselves, and their constituents (Mr Suttie as aforesaid only binding Sir James), to execute the bond or bonds that may be necessary; and if any one shall be absent when the bonds come to be signed, the parties agree for themselves, and their constituents as aforesaid, that the said bonds may be executed by the other parties, or any two of them, and that the party or parties not executing the same on being required, give their or his obligations, or obligation, to free and relieve the parties who may have signed the bonds of the proportion thereof, which, under the agreement hereby made, behoved to be borne by the party who may not have signed the same."

This minute was signed by the gentlemen present, and afterwards by Sir James Suttie, as approving of the obligation come under for him by his son, and by another gentleman (Mr Ballantyne) who was absent, and these parties to this minute, seven in number, form the pursuers in the present action. No copy of the minute was communicated by direction of the meeting to Dr Williamson or Mr Scott; but the latter, as agent and one of the curators, alongst with Mr Allan and Dr Williamson, of a minor nephew of the latter—having agreed to lend a sum of £1025, belonging to the minor, to the gentlemen engaged in this undertaking, a copy of the above minute was sent to Mr Scott in the month of June, as the authority for borrowing the money. For this sum a bond was granted by the pursuers and Dr Williamson, setting forth as follows: "Considering that we have formed the resolution of making a road down Leithen water, and of erecting bridges on the said line of road, and across the Tweed, and of borrowing money for the accomplishment thereof, grant us instantly to have borrowed and received the sum of £1025," &c. This bond was transmitted to Dr Williamson, and was executed by him in the month of September, 1826. The road was commenced, but in the month of January, 1827, and before any further money was borrowed, Dr Williamson died, being succeeded in the lands of Cardrona by the Earl of Traquair, who did not otherwise represent him, and leaving a will by which he appointed Mr Scott and Mrs Abigail Conyers or Williamson his executors.

on of the road was continued, and various sums of money,

No. 1  
Feb. 2, 1827  
Earl of  
Traquair  
Williamson  
Executors

No. 127.

Feb. 2, 1837.  
*Earl of  
 Raoul v.  
 William's  
 executors.*

amounting in all to £6025, were borrowed by the pursuers, from time to time, till the end of the year 1829, when the road was completed. During all this period, and down to 1832, no intimation was made to Dr Williamson's executors that they were considered to be liable for any share of the expense of the road, but subsequently a demand was made on them for an eighth share, on the ground that Dr Williamson had personally bound himself to the full extent of the undertaking. This demand being resisted, except in regard to a share of the bond subscribed by Dr Williamson, the pursuers raised this action against the executors, concluding for payment.

The defence was, that Dr Williamson (whose only interest was as proprietor of an entailed estate) had done nothing to bind himself and representatives beyond the amount of the bond he had actually subscribed.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note : \*—" Finds that the late Charles Williamson, Esq. was

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\* " This case is certainly doubtful. The first impression is perhaps against the defenders. But, on full consideration, the Lord Ordinary has come to the conviction that the law and justice of the case require a judgment in their favour.

" This is an attempt to subject the personal representatives of an heir of entail deceased, who have no connexion with the entailed estate, in a full share of the expense of making a road for the benefit of the landed interest in the district, all of which was incurred and laid out after his death. For what was incurred in his lifetime by the only bond which he signed, the liability is admitted. He may have so bound himself as to make his personal estate liable for the whole. But, in the question, whether he has done so or not, *to the effect of relieving the other proprietors*, a clear case ought to be made out. There is no question with creditors.

" No written obligation to that effect by the deceased was ever delivered to the pursuers, or could be produced by them. His letter to his own agent, whether it was shown to Mr Allan or not (and of that disputed fact no evidence has been offered), and whatever may be its legal import, certainly was not delivered to the pursuers or to Mr Allan. And the bond founded on, whatever may be its effect otherwise, does not either express or imply an obligation to the pursuers, to be equally answerable with them for whatever other debts might be contracted in making the road.

" As Dr Williamson did not deliver to the pursuers any such written obligation, neither did he, or any agent whom he authorized, attend any meeting at which such an obligation could be contracted. Whatever may have been the impression under which Mr Allan assumed authority to state himself as appearing for Dr Williamson, he certainly held no mandate from him, nor is it said that he had such a mandate even from Mr Scott, supposing that to have been competent.

" The liability must, therefore, be made out by facts and circumstances, that is, by inference from circumstances in the conduct, partly of Dr Williamson, and partly of Mr Scott his agent. This might be done ; but it is not easy, especially where there is no question with creditors ; and the conduct of the other parties must also be taken into view. The case of the pursuers seems to stand thus : Mr Allan's letter to Mr Scott of the 5th December, 1825, intimated to him the general design of the other gentlemen, mentioning that they intended to grant a joint and several bond for the money required, and expressed a wish that Dr Williamson would allow Mr Scott to add his name to the list subjoined. Mr Scott communicated this to Dr Williamson, but suggested a doubt whether he

effectually bound, along with the other parties subscribing the bond, for No. 127.  
his share or proportion of the principal sum of £1025, contained in the

Feb. 2. 1837.

Earl of

Traquair v.

Williamson's

Executors.

would think it expedient to join in the proposed bond. Dr Williamson answered to his own agent in general terms, consenting to Mr Scott adding his name to the list. It is a matter in dispute, whether this letter was communicated to Mr Allan or not; and in the state of the cause it cannot be assumed. But it is admitted, that Mr Scott, told Mr Allan generally, that Dr Williamson was favourable to the scheme; and it might be implied that he did not refuse to assist in it. Then the meeting of the 24th March, 1826, took place, at which Mr Allan, no doubt imagining that he had authority, put his name in the sederunt for Dr Williamson as well as for himself. The resolutions of that meeting constitute the undertaking of the parties. The minute never was communicated to Dr Williamson, nor was it communicated to Mr Scott by the pursuers or by their order, though in the case of Sir James Suttie, for whom appearance was made by another, this was expressly done, and the act was confirmed by him in the minutes. But, in consequence of Mr Scott having offered to negotiate a loan of part of the money, a copy of the minute came accidentally into his hands, and after seeing it, without making any objection, he prepared the bond for £1025, inserting Dr Williamson's name as a party obligant, and bearing that the subscribers, 'considering that we have formed the resolution of making a road,' &c. and 'of borrowing money for the accomplishment thereof,' have accordingly borrowed the sum of £1025. The bond in these terms was sent to Dr Williamson for signature, and was returned duly subscribed by him, and held by Mr Scott thereafter as agent of the lender. Soon after this Dr Williamson died. This seems to be the substance of the case against the defenders; but, though it leaves an impression at first as if Dr Williamson had fully committed himself to the undertaking, it seems to the Lord Ordinary that there are serious defects in it for making out the liability maintained against him. When the proposal was first communicated to Dr Williamson, it was of a very general nature, no meeting having been yet held, no plan fixed upon, and no sum mentioned; and though Mr Allan had said that the gentlemen proposed to grant a joint and several bond, that is not what was done; nor was any bond for the whole money ever laid before Dr Williamson. It does not appear that any further communication was made to him, except Mr Scott's letter acknowledging the receipt of Dr Williamson's, and saying that he should communicate his intention to Mr Allan; till the bond for £1025 was sent for signature. The narrative of that bond imports no more than that in general the parties had agreed to make the road, and to borrow money for the purpose. But neither in that bond, nor in Mr Scott's letter accompanying it, is there any thing to inform Dr Williamson that he was supposed to have agreed to join in as many bonds as the other parties might propose, or that, whether he chose to join in them or not, and whether he lived or died, he was to be answerable for an expense exceeding £6000. When he signed that particular bond, therefore, there was no ground to suppose that individually he meant to undertake the extensive liability now maintained against his representatives. The terms of his original letter would not warrant this. Indeed the Lord Ordinary doubts whether his real meaning was not somewhat in conformity with his agent's recommendation, believing that he reserved entirely for his own consideration what bond or bonds he might think fit to subscribe; and the terms of the bond which he did subscribe, can only be construed with reference to the obligation which he thereby contracted, it being merely an engagement to a third party.

The plea of the pursuers, therefore, seems to be reduced to this,—that Mr Scott, the agent, having seen the minute of the meeting, though not directly communicated to him, and though no confirmation was asked of him, must be held to have recognised all that was done as really in Dr Williamson's name and by

127. bond libelled on, with all interest falling due thereon; and that the defender Mrs Williamson, as representing him, and the defender Scott, as his executor, are liable in a question with the pursuers for a share or proportion of the said sum, and the interest thereon; and decerns in terms of the conclusion of the libel to that effect; but sustains the defences against the other conclusions of the libel, assolizies the defenders, and decerns: Finds expenses due to the defenders, and renders the account, when lodged, to the auditor to be taxed."

The pursuers reclaimed.

LORD MEADOWS BANK considered, that, under all the circumstances, Dr Williamson had become a party to the undertaking, which was carried into execution on the faith of all who concurred being responsible for a share of the expenses so that he could not have stopped it by drawing back if he had been alive, and that his death could not alter the nature of the engagement.

LORD MADWYN concurred with the Lord Ordinary.

his authority; and that, through him, without any other act, Dr Williamson and his representatives thus, by silence, became answerable in every event in the most extent of debt which might be contracted. The Lord Ordinary would have the greatest hesitation in acceding to this, even though nothing more had passed. It is inferring an extent of undertaking which was never put before Dr Williamson at all, from the mere acts of the pursuers themselves, and at the most the repugnance of an agent. But there is more in the case. For it does appear to the Lord Ordinary that there is real evidence that neither the pursuers nor Dr Scott supposed that any such unlimited or continuous liability had been undertaken. After Dr Williamson's death, the various additional loans were negotiated but, though Mr Scott was the executor of Dr Williamson, and some of the loans went through his hands, the idea was never suggested that he, or the representatives of Dr Williamson, must join in the bonds. The bonds were made exclusively by the other parties; and it was not till a long time after, when the adventure was found unproductive, that the idea was taken up of making the representatives liable for a share of the loans, in which they had not been asked to concur. And, even after the notion was adopted, and after the pursuers had had the advice of counsel, Mr Allan, by his letter of 31st May, 1832, distinctly intimated that they did not mean to claim more than Dr Williamson's share of the bond for £1025.

"Now, although the Lord Ordinary would hesitate to find upon that letter that there was a complete release from the claim, if otherwise well-founded except as it might fully warrant Mr Scott to distribute the executry estate, thinks that, combined with the previous conduct of the pursuers, it is very material, as showing that the pursuers themselves had not supposed at that time that Dr Williamson had undertaken any general liability for the debt. They say that they did not then know that Mr Scott had received any copy of the minute; but this is the very circumstance which is most against them. They had never furnished the minute to Mr Scott; and, judging of the case on that state of the facts they had made no claim on the executor at first, and gave it up after they had advanced it; and thus the claim comes to be rested on a circumstance quite adventitious, on which the pursuers could have no right to infer that such a responsibility had been created.

"Though the case is doubtful, the Lord Ordinary thinks that expenses are due, both on account of the situation of the executors, and the departure of the pursuers from the resolution which they themselves had intimated."

Lord GLENELG was also for adhering.  
 Lord JUSTICE-CLERK was absent.

No. 127

Feb. 3, 1834  
 Hay v. Hill.

The Court adhered.

T. BAUCH, Junier, W.S.—C. B. SCOTT, W.S.—Agents.

GRACE HAY OF ANDERSON, and HUSBAND, Pursuers.—*A. McNeill*.  
 JAMES HILL and OTHERS, Defenders.—*Rutherford—Paterson*.

No. 128

*Public Officer—Reparation—Process—Jury Trial*.—1. A summons of damages was raised against magistrates of a burgh and others on account of alleged misconduct in regard to legal procedure of a criminal nature; the summons did not contain the words "maliciously and without probable cause," and the magistrates claimed the protection of the statutes (43 Geo. III. c. 141: 9 Geo. IV. c. 29: and 11 Geo. IV. and 1 Will. IV. c. 37) limiting their liability to twopence of damages:—Held that the pursuer was not entitled under such a summons to take an issue containing the words "maliciously and without probable cause." 2. Terms of a summons to which this rule was applied. 3. Question, whether, if a summons contains an allegation of such facts as cannot be true without the existence of malice and the want of probable cause, but does not contain these precise words themselves, an issue would be objectionable as disconform to the summons, if such issue contained these words.

GRACE HAY OF ANDERSON, wife of David Anderson, residing at Feb. 3, 1834: Airdrie, raised an action concluding for damages to the amount of £5000, against James Hill and others, magistrates and procurator-fiscal respectively of the burgh of Airdrie, and Thomas Main, blacksmith there. After defences were lodged, and a record made up, the Lord Ordinary, in advising with the Court, "opened the record, and found that the summons must be held to be laid on charges, against the defenders, of misconduct in regard to procedure of a criminal nature; and found that the summons, so construed, is defective in precision; and therefore appointed the pursuers to amend the same."<sup>1</sup> An amended summons was then framed, which libelled that Hugh M'Culloch, the procurator-fiscal of the burgh, without having preferred any complaint, or obtained any warrant, caused Grace Hay, the pursuer, to be cited on Sunday 27th April, 1834, to appear next day before James Hill and others, the magistrates, to answer to an accusation of having used a pump-well, contrary to the wishes of the said magistrates and Thomas Main; that she appeared, being ignorant that there was no warrant to cite her; that M'Culloch

\* The death of Lord Balgray was this morning intimated by the Lord President to the clerk of Court, who was directed to record the intimation in the books of Sederunt.

<sup>1</sup> May 21, 1834 (ante, XIII. 607).

No. 126.

Feb. 3, 1837.  
Iay v. Hill.

and Main both appeared as prosecutors; that M'Culloch produced a complaint which had been only prepared on Monday, and contained no warrant of citation, and had no list of witnesses appended; that she denied the allegations in it, but the defenders, "being determined most wrongfully, illegally, causelessly, and oppressively to crush and punish her, under pretext of the said complaint, which they were conscious was totally unfounded, took no notice of her denial, but, contrary to all truth and justice, pretended to hold that she had admitted some part of the complaint;" that she offered to prove she had only acted according to her just rights; that "the defenders being resolved to carry their said illegal, wrongful, and oppressive purposes into effect, would not allow her to prove any thing, and threatened to commit her witnesses to prison, if they did not instantly leave the court:" that her witnesses were actually driven from the court; that the subject of dispute was a civil right, and the procurator-fiscal and magistrates had no jurisdiction; that M'Culloch and Main led no proof excepting what related to a different matter from the complaint, being some alleged abusive words used by the pursuer to Main, and the magistrates refused to hear her counter evidence, and "wrongfully, illegally, and oppressively ordered her witnesses out of court, and threatened to lock up or confine them, and one of the witnesses was laid hold of by the officer for imprisonment, under the direction of the said magistrates, and they thereafter wrongfully, illegally, and unwarrantably pronounced sentence against her for the sum of 2s. 6d, with 2s. of expenses, and unjustly, illegally, and incompetently and oppressively granted warrant for imprisoning her till she should make payment of the sums decerned for:" that, on the day following, she was imprisoned, and detained in prison, where she was cruelly treated as a most abandoned criminal, till the following Saturday, when she was set free; that the complaint against her was loose, inaccurate, and incompetent; that the whole proceedings were illegal, and, in particular, the sentence "was wrongful, illegal, and oppressive, and altogether beyond the powers of the defenders;" that her place of imprisonment was not a legal jail for debtors or criminals; that, after her liberation, the town-clerk of Airdrie, and the procurator-fiscal, refused to allow her an inspection of the complaint or warrant against her; that although she had demanded reparation for the injury occasioned "in the illegal, incompetent, unjustifiable, and oppressive manner particularly before detailed," yet this was refused; "that the whole of the proceedings on the part of the defenders were grossly illegal, incompetent, wrongful, oppressive, and not within any privilege on the part of the said defenders:" and therefore the five defenders should be found liable, jointly and severally, in £5000, or each in £1000, in name of damages.

Defences were lodged, and a record was made up, after which the following issue was prepared and was approved by the Lord Ordinary, for trying the cause.

"Whether, on or about the 28th of April, 1834, the defenders, or any of them, maliciously, and without probable cause, wrongfully apprehended and imprisoned in the jail of Airdrie, or wrongfully caused to be apprehended and imprisoned as aforesaid, the pursuer, Grace Hay or Anderson, or maliciously and without probable cause detained, or caused to be detained, the said pursuer from or about the said 28th day of April till on or about the 3d day of May, 1834, or during any part of the said period, to the loss, injury, and damage of the said pursuer?"

No. 128.

Feb. 3, 1837.

Hay v. Hill.

Two of the magistrates and the procurator-fiscal thereon enrolled the cause before the Inner-House, "to object to the issue settled by Lord Fullerton, Ordinary, for the trial of the cause, in respect that the said issue is disconform to the summons, and relative record, in so far as it is not averred in the summons in said action, that the acts complained of were done by the defenders, maliciously and without probable cause, while the issue is approved of, on the assumption that malice and want of probable cause had been so averred."

The pursuer took an objection that it was incompetent to enter on the discussion of this motion, as the record had not been printed and boxed to the Court, but merely the summons. The defenders answered, that as the objection rested on disconformity between the summons and the issue, it was not necessary to box the record for the information of the Court; and there was no necessity in point of form, for boxing the record.

The Court repelled the objection; and the defenders (magistrates) then pleaded that it was enacted by 43 Geo. III. c. 141, § 1, in regard to actions of damages against justices of the peace, on account of convictions, &c. made by them, that the pursuer "shall not be entitled to recover any more or greater damages than the sum of twopence, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, and which shall be in an action upon the case only, that such acts were done maliciously, and without any reasonable and probable cause." That it was enacted by 9 Geo. IV. c. 29, § 26, that the provisions of 43 Geo. III. c. 141, "shall extend to all inferior judges and magistrates in Scotland, in regard to any sentence pronounced, or proceeding had, in any criminal trial." And that it was enacted by 11 Geo. IV. and 1 Will. IV. c. 37, § 13, that the statute 9 Geo. IV. c. 29, "in so far as it provides for rendering all inferior judges and magistrates more safe in the execution of their duty, shall extend to all acts done by any such judge or magistrate in apprehending any party, or in regard to any criminal cause or proceeding, or to any prosecution for a pecuniary penalty." In this case it had been fixed by a final interlocutor that the summons was laid on charges of misconduct "in regard to procedure of a criminal nature," and therefore the defenders were fully within the protection of these statutes. If the pursuer meant either to claim higher damages than twopence, or to claim costs



No. 128.

Feb. 3, 1837.  
Hay v. Hill.

of suit, she was therefore bound to have "expressly alleged" in the summons that the acts complained of "were done maliciously and without any reasonable and probable cause." But as the summons was not so framed the issue must correspond with it, and these words "maliciously and without probable cause" must be struck out of the issue.

The pursuer answered, that if the summons contained a charge of such proceedings as could not be true unless they were done maliciously and without probable cause, there was no incongruity between such a summons and the existing issue, although the mere words "maliciously and without probable cause" did not occur in the summons. These words were but descriptive of what was essential; and if the substance of what was essential, was embodied in the summons, that was enough, though none of these descriptive words were added. This principle was applied in the case of Kelly.<sup>1</sup> But the summons did contain such a charge, as it averred that the pursuer was cited on a Sunday, and without a warrant; that though she denied the charge against her, and the defenders were conscious it was unfounded, yet they, for the purpose of oppressively crushing her, pretended to hold that she had in part admitted it; that they refused to allow her to prove her case, and drove her witnesses out of court; and in the end fined her, and cruelly imprisoned her in a place which was no legal jail; and that the whole of these proceedings were "grossly illegal, incompetent, wrongful, oppressive, and not within any privilege on the part of the defenders." These allegations in substance amounted to a charge of acting maliciously and without probable cause, and that was enough to sustain the existing issue as conform to the summons.

**LORD PRESIDENT.**—The magistrates who are defenders here are entitled to the benefit of the statutes quoted by them, and it is, for their protection, enacted by these statutes, that any summons like this, shall "expressly allege" that the acts complained of were done "maliciously and without probable cause;" otherwise no conclusion for more than twopence of damages, and no conclusion for expenses, can be maintained against them. The action, without that express allegation, may be good for twopence of damages, but for nothing else. On looking at the terms of the statute, I think it provides that malice shall be expressly charged, and that there is no equivalent which can supply the place of that essential word, or of the words "want of probable cause." Indeed, if I were asked what is the true equivalent of the "want of probable cause," I am afraid I know but one answer to it: it is, "the want of probable cause." Now as the technical words required by the statute are omitted, we can neither supply them, nor substitute any thing else for them. There are plenty of strong words in the summons, but the essential words are wanting: And, as the summons now stands, the existing issue will not come under it. I think it must be amended, by striking out of it the words "malicious-

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<sup>1</sup> Jan. 22, 1833 (ante, XI. 287).

ly and without probable cause,' which amendment will render it consistent with the summons. In regard to the case of Kelly, arising under one of the Edinburgh Police Acts, it affords no precedent to this, as it depended on the construction of the terms of that police act, just as the present case depends on the construction of the statutes founded on by the defenders. No. 128.  
Feb. 3, 1837.  
Hay v. Hill.

**LORD GILLIES.**—I am of the same opinion. In reference to the terms of the statutes founded on by the defenders, which are different from the local statute in Kelly's case, I am satisfied that malice and want of probable cause must be expressly alleged. There is no equipollent term which can be substituted for them; and even if there were such terms, I do not think they are used in this summons. As to the use of any terms from which, it is said, a charge of malice is to be inferred, I cannot hold that these will satisfy the statute: and therefore the summons in this case is just a relevant summons for two pence of damages, against these defenders, because it wants what the statutes declare to be essential to render it relevant for any other or higher conclusion. And as the issue contains the words "maliciously and without probable cause," it is at variance with the summons, which is altogether unwarrantable. It should therefore be amended by striking out these words, so as to be made to correspond with the summons.

**LORD MACKENZIE.**—I do not think the case of Kelly a precedent to this; but I feel this to be a very difficult question. If it were the abstract question whether an issue, containing the words "maliciously and without probable cause," was essentially disconform to a summons, which, without containing these actual terms, nevertheless contained the substance and the thing which these terms describe, viz. a charge of such proceedings as, if true, must have been malicious and without probable cause, then I should have great doubt whether such issue was at all objectionable for disconformity. Suppose, for example, that a summons which did not contain the words "malice, &c." contained a charge that a magistrate, actuated by a spirit of revenge, or having taken a bribe, wilfully found facts proved which he knew to be not proved and not true, and, in respect of these facts, imposed a fine or imprisonment, I cannot but think that under a summons of damages charging these proceedings, the pursuer would be entitled to an issue, whether such proceedings were had maliciously and without probable cause, and that he would not be barred from such an issue, by the want of these precise words in the summons. Substantially, such an issue would rather seem to be conformable to the summons; as it would be going too far to hold that no words can be allowed to get into the issue unless they have the warrant of first being used in the summons. However, I do not think that that very general point arises here. It is narrowed, first, by the special terms of the statutes referred to, which may be thought to require the very words "maliciously and without probable cause," to be engrossed in the body of the summons; and it is farther narrowed by the specialty that it is doubtful here, whether the allegations in the summons are really tantamount to a charge of malice and want of probable cause; especially the latter of these things. And, on the whole, the leaning of my opinion is to concur with your Lordship and Lord Gillies, in directing the words to be struck out of this issue; which order, at most, will go no further than a finding that the statutes require the ipsissima verba of malice and want of probable cause, to be inserted in any summons which is to be insisted in for more than two pence of damages, against any magistrate who is within the protection of the statutes.

- No. 128. THE COURT pronounced this interlocutor:—"Find that the terms of the summons do not warrant an issue of malice and want of probable cause, and in respect thereof, disallow the issue in this case, and remit to the clerk to prepare issues of new."
- Feb. 4, 1837.  
Taylor v.  
His Creditors.  
Bryden v.  
Gibson.
- G. DUNLOP, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

- No. 129. ——— TAYLOR, Pursuer.—*Smythe*.  
HIS CREDITORS, Defenders.—*Thomson*.

- Feb. 4, 1837. *Cessio*.—Where it was necessary for the pursuer of a cessio, who was in prison, to have an inspection of his books, which were in process, and his creditors were apprehensive lest he might make erasures or alterations in them, the Court ordained the inspection to take place, in jail, at the sight of a certain party, whom the creditors agreed to pay for discharging that duty.
- 1st Division.

Agents.

- No. 130. MRS ESTHER CRAIG OF BRYDEN, and HUSBAND, and OTHERS, Pursuers.  
*G. G. Bell*.  
MRS MARY CRAIG OF GIBSON, and HUSBAND, Defenders.

*Heirs-Portioners—Property—Partition—Judicial Sale*.—Where a heritable subject was the property of four heirs pro indiviso, and three of them raised against the fourth, a summons of declarator that the subject was incapable of division, and that it was necessary and proper to sell it and divide the price, the Court, although no opposition was made, directed a proof to be taken as to the necessity or propriety of the sale; and, after a proof that the subject was incapable of division, the Court found and declared that it must be sold for division of the price; and remitted to the Lord Ordinary to allow a proof of the value of the subject, and to proceed as should be just.

- Feb. 4, 1837. By postnuptial contract between Alexander Craig, residing at Hall-dykes, and his wife, Mrs Esther Stewart, he disposed to her in liferent and to his six children, nominatim in fee, share and share alike, certain heritable subjects in or near the town of Moffat, the principal subject being an inn, with its yard and offices. Mrs Esther Stewart died in 1834. There were four surviving children, all of whom were daughters and three of them, with concurrence of their respective husbands, raised a summons of partition and sale against the fourth, who resided in England stating that the subjects, to which they had a pro indiviso right, were incapable of division, and that they should therefore be sold, and the price divided. They concluded for declarator "that it is necessary and proper that the said subjects should be sold, and the price thereof divided as aforesaid, and full power, warrant, and authority should be granted by
- 1st Division.  
Ld. Corehouse.  
B.

the said Lords to dispose of the same, heritably and irredeemably, by public roup, in such manner, and under such conditions, as they shall direct: And the pursuers and defenders should be decerned and ordained to execute, subscribe, and deliver to the purchaser or purchasers of the same, dispositions, &c.”

No. 19  
Feb. 4, 18  
Railton v. Gray.

Great avizandum was made with the summons to the Court. No appearance was made for the defenders. The cause came first before the Court on 1st December, 1836, at which advising Lord Balgray observed that it was proper to have some evidence laid before the Court to prove that there was a necessity for the sale.

*G. G. Bell, for Pursuers.*—The principal subject is an inn, with its yard and stables. There are four pro indiviso proprietors; and it would appear that there is thus real evidence of the necessity of a sale as the subject cannot be divided.

*LORD BALGRAY.*—Since this is a proceeding in absence, it is peculiarly liable to challenge afterwards if any irregularity be committed, or any looseness of procedure allowed. I think we should remit to the Lord Ordinary to allow a proof as to the expediency and necessity of a sale, before we go farther.

The other Judges were of the same opinion, and the Court remitted to the Lord Ordinary, who “allowed the pursuers a proof of the necessity or propriety of the proposed sale.”

A proof was led, in which witnesses well acquainted with the property deponed “that it was impossible to divide the same into so many portions.” This proof was reported to the Court, who pronounced this interlocutor, “in respect of the foregoing report, and having advised the case, find that the subject in question cannot be divided, and must be sold for the purpose of division, and remit to the Lord Ordinary, to allow a proof of the value of the subject, and to proceed farther in authorizing a sale, as shall be just.”

W. STEWART, W.S.—Agent.

EDWARD RAILTON, Advocate, and JOHN PULLMAN, and MANDATARY, No. 1.  
Compearers.—*D. F. Hope—Patterson.*

ALEXANDER GRAY, Respondent.—*M'Neill—Penney.*

*Personal Objection—Diligence—Bankruptcy.*—Circumstances in which the Court held, that a party who unduly impetrated from one of the creditors of an insolvent, an assignation to his debt, was barred from founding on that assignation in applying for an interdict of a poinding of effects of the insolvent, at the instance of that creditor.

This was a question of a special nature. John Pullman, merchant in Glasgow, for a creditor of Henry Jacques, bootmaker in Glasgow, for including a bill for £102, 10s. Jacques failed to make the bill when it fell due, and it was put into the hands of

Feb. 4, 18  
1st Divi  
Ld. Core  
B.

- No. 131. Edward Railton, agent in Glasgow, to raise diligence on it. His register-  
 1837. tered it in the Burgh Court books, and gave a charge on it to Jacques,  
 v. who soon after declared his insolvency, and called a meeting of his creditors. An offer of composition of 7s. per pound, payable at six, twelve, and  
 ra. and eighteen months, was accepted by many of them, and among others by Pullman, who received three composition-bills from Jacques. Jacques fled the country, in utter insolvency, without paying any of his composition-bills to Pullman, and it did not appear that all the creditors had ever acceded to the offer of composition. Some steps, towards concerting general measures among the creditors were taken, but neither Pullman nor his mandatory Railton, were parties to these, and Railton, in the mean time, as the composition had fallen to the ground, executed a pointing of the shop goods of Jacques, for behoof of Pullman, proceeding on the bill for £102, 10s. The late Robert Muir, writer in Glasgow, acting on behalf of the creditors who wished to pursue joint measures, sent a circular to Pullman, along with the other creditors, recommending an assignation of their debts to Alexander Gray, accountant in Glasgow, for the common behoof, and Pullman granted, in favour of Gray, an assignation of his debt and the three composition-bills. Before this assignation arrived from London, Railton had carried through a sale under the pointing of the shop goods; and, as a balance of £86, 5s. still remained due under the bill for £102, 10s., he, in about a month afterwards, being in ignorance of the assignation by Pullman to Gray, executed another pointing; as for Pullman's behoof, of certain furniture belonging to Jacques, and was taking steps for selling it, when Gray obtained an interdict from the Sheriff of Lanarkshire. Railton made appearance to oppose the interdict, and, in the course of the discussion, Pullman recalled the assignation he had granted to Gray, and homologated Railton's whole proceedings. The Sheriff granted interdict against Railton's proceeding with the sale, whereupon he brought an advocacy, in which Pullman sisted himself as a party. The Lord Ordinary was of opinion, that, for a month prior to the date when the second pointing was executed, the authority of Railton to raise diligence on the bill was at an end, in consequence of Pullman's assignation of his whole debt to Gray, as acting for the general creditors; and that if Railton had no authority, as Pullman's mandatory, to execute the pointing at the date when he did so, it was invalid, and this want of authority could not be supplied by Pullman's subsequently recalling the assignation granted to Gray; his Lordship therefore repelled the reasons of advocacy, and remitted simpliciter to the Sheriff. Railton and Pullman reclaimed, and the Court considered it a case which was attended with difficulty, but, as it appeared to their Lordships, in all the circumstances, that the assignation by Pullman to Gray had been unduly impe-  
 trated by Muir in favour of Gray, and would not have been granted if all the facts had been made known to him, as they ought to have been, they held that Gray could not found on such assignation as a bar to Railton's

proceeding with his poinding. Their Lordships, therefore, altered the interlocutor of the Lord Ordinary, and found Railton entitled to proceed with the poinding; and found Railton and Pullman entitled to their expenses.

No. 13  
Feb. 4, 1833  
Ure v.  
Hamilton.

J. CULLEN, W.S.—H. TODD, W.S.—Agents.

MASTERTON URE (Sir John Lowther Johnston's Trustee), Pursuer.—*Robertson.*

JAMES HAMILTON, W.S., Defender.—*Forsyth.*

Et e contra.

*Process—Record.*—Mutual actions of count and reckoning were raised prior to the passing of the Judicature Act, defences to which were given in, and a remit made to an accountant, who reported accordingly; after the passing of the act, various procedure took place in the Outer House, without a record being made up; a reclaiming note against certain interlocutory judgments of the Lord Ordinary praying the Court, inter alia, to ordain a record to be made up in terms of the Judicature Act and Act of Sederunt, refused; and observed, that his Lordship, if he thought it necessary, might order a record to be so made up.

THESE were conjoined actions of count and reckoning raised some years prior to the passing of the Judicature Act in 1826. Defences had been put in and a remit made to an accountant, who reported accordingly; and thereafter various procedure took place without any record being made up. In the summer and autumn sessions of 1836, a protracted discussion took place as to the sisting of a mandatary for Mr Ure. The party proposed was objected to "in respect he was not a solicitor in the Supreme Court, but merely a clerk of Mr J. J. Fraser, and not of a sufficiently high grade." The Lord Ordinary, however, "held him duly sisted;" and thereafter found Ure liable in the expenses incurred in the discussions regarding the sisting of a mandatary, and, at the same time, appointed the parties to lodge notes of their objections to the accountant's report.

Feb. 4, 1833  
2d Division  
Lord Jeffrey  
T.

Against these interlocutors Ure presented a reclaiming note, praying the Court to recal them, and, "in respect no record has been made up in the said conjoined actions, to remit to the Lord Ordinary to ordain a record to be made up accordingly, in terms of the Judicature Act and relative Acts of Sederunt; and to find the respondent liable in the expenses of the discussion relative to sisting the mandatary."

In support of the prayer of the note as to having a record made up, Ure referred to the provisions of the Judicature Act and to *Grant v. Taylor*, May 31, 1833.

No. 132. LORD GLANVILLE.—I do not understand what form of process is to make us interfere unnecessarily with the Lord Ordinary.

Feb. 7, 1837.  
Sir J. Boswell.

Macalister v.  
Campbell.

LORD MEDWYN.—This is a case which commenced before the Judicature Act. I think the Lord Ordinary has followed the course of procedure which is adopted in such cases; and it is the best course, and the least expensive. If his Lordship think it necessary, he may order a record to be made up.

LORD MEADOWBANK concurred.

LORD JUSTICE-CLERK was absent.

THE COURT accordingly refused the note, finding additional expenses.

J. J. FRASER, W.S.—JAMES HAMILTON, W.S.—Agents.

No. 133.

SIR JAMES BOSWELL, Petitioner.—*McNeill*.

*Entail—Excambion*.—In making a remit under 6 and 7 W. IV. c. 42, to persons of skill to report on the value of the lands to be excambied—Held unnecessary to resort to the intervention of a Lord Ordinary; and a remit made, at once, to inspectors, to report directly to the Court.

Feb. 7, 1837.

1st Division.

SEQUEL of the petition noticed ante, Jan. 27, 1837, which see. In making a remit to persons of skill to value the lands and report, in terms of the statute, the Court were of opinion that the intervention of a Lord Ordinary was not necessary, and that they should remit at once to persons of skill, who should report directly to themselves. Remit, in these terms, made accordingly.

J. BOWIE, W.S.—Agent.

No. 134. ALEXANDER MACALISTER (with his Curators), Pursuer.—*Rutherford—Anderson*.

JOHN CAMPBELL and DAVID STEWART GALBREATH, Defenders.—*D. F. Hope—J. Miller*.

DUGALD CAMPBELL'S TRUSTEES, Defenders.—*D. F. Hope—G. G. Bell*.

*Property—Seashore—Regalia—Title to Pursue*.—The proprietor of an estate on the seacoast, was infeft in the lands, “with parts, pendicles, and pertinents;” he raised a declarator of his sole and exclusive right to the whole shell-sand, wreck, or seaware on the shores of his lands, and concluded for interdict prohibiting certain parties from carrying away any part thereof; he averred that he and his predecessors had had constant, peaceable, and uninterrupted possession and use of the shell-sand, &c., past the memory of man, which was never interfered with, until lately, by the defenders; the defenders pleaded that in respect his titles did not contain an express grant of the shore, nor describe his lands as bounded by the sea, he had not condescended upon any title in virtue of which to prescribe a right by possession to the seashore, or to the shell-sand, &c. as accessories of such right: Held that the plea should be repelled, and the pursuer’s title, in reference to his allegation of possession, sustained.



**ALEXANDER MACALISTER** of Loup, was proprietor of the lands of Ballivean, Tangietarvie, and others, all lying along part of Macrihanish bay, on the west coast of Kintyre. The lands of Kildalloig, belonging to the trustees of the late Dugald Campbell, lie along the rest of the bay. The lands of Craigs and others, belonging to John Campbell and David Stewart Galbreath of Glensaddell, are in the vicinity of the shore of the bay, but not contiguous to it. Alexander Macalister was infeft in the lands of Ballivean "with houses, biggings, grazings, shealings, mosses, muirs, meadows, woods, fishings, parts, pendicles, and pertinents;" in the lands of Tangietarvie "with houses, biggings, yards, tofts, crofts, grazings, shealings, parts, pendicles, and universal pertinents thereof whatsoever;" and in his other lands with a clause of "parts, pendicles, and pertinents thereof whatsoever." He, (with consent of his curators, as he was a minor,) raised an action of declarator against the proprietors of the lands of Kildalloig and Craigs and others, alleging that they wrongfully carried off shell-sand, and wreck or seaware, which was valuable for kelp and manure, from the shore of his property; that no party had any right to do so except the pursuer and his superior, the Duke of Argyle, under a servitude reserved in the feu-right; and concluding for declarator that he "has the sole and exclusive right to the whole shell-sand, wreck, or seaware, growing, or that may be cast or found upon the shores of the said lands, under burden of the foresaid servitude, in favour of his superior, his Grace, George William Duke of Argyle; and that neither the said trustees of the said Dugald Campbell, nor the said John Campbell, or David Stewart Galbreath, or their said tenants, nor any other person claiming under them, have any right or title to carry away any of the said shell-sand, and wreck, or seaware, or to trespass upon the said estate, or the shores thereof, for that purpose: And the said defenders ought and should be decerned and ordained, by decree foresaid, to desist and cease from coming themselves, their tenants, or servants upon the shores of the pursuer's said lands, and from carrying off any shell-sand, seaware, or wreck, therefrom, in all time coming."

In making up a record, Macalister averred "that in virtue of his titles, he and his predecessors and authors, and their servants, tenants, and others, authorized by them, have been in the constant, peaceable, and uninterrupted possession and use of the said shell-sand and wreck, or seaware, beyond the memory of man, subject always to a right of servitude over the same, in favour of his Grace, George William Duke of Argyle, the superior of the said lands, and that they have never been interfered with in the possession and use thereof, until lately by the defenders."

The defenders, besides other defences, stated their first plea in law in these terms: "The pursuer has not produced or condescended upon any title in virtue of which he could prescribe a right by possession to the shell-sand, wreck, or seaware to which he now lays

No. 13

Feb. 7, 18

Macalister  
Campbell.

1st Divi

Ld. Full  
B.

No. 134.

1837.  
1837.  
1837.  
all.

The Lord Ordinary "appointed the parties to give in mutual cases, upon the title, and upon the nature and effect of the averments of the pursuer, as to the possession."

The defenders pleaded, 1st, That the seashore, so far as covered by the ordinary tides, was *inter régala*, or was *juris publici*; <sup>1</sup> that a subject of this description was never carried as part and pertinent of a feudal grant of lands, <sup>2</sup> at least where there was no erection of the lands into a barony; and that as the pursuer's titles merely contained a disposition to lands, with part and pertinent, without even stating that they were bounded by the sea or shore, the shore was reserved out of such a grant, and was still belonging to the crown. 2d, If the pursuer had thus no more right to the shore opposite to his lands, than any others of the lieges enjoyed, he had no title to conclude for declarator of his sole and exclusive right to the whole sea-wreck, &c., upon it. Or at least he could not do so, upon the mere avowment of his own peaceable use and possession of the right of carrying off such sea-wreck, &c., for any length of time; because, unless he went farther, and averred that he had immemorially excluded all others from participating therein, his averment resolved merely into an allegation that he had peaceably enjoyed what it was equally competent to any other of the lieges peaceably to enjoy, without acquiring any right of an exclusive character at all.

The pursuer answered, 1st, The shore of the sea, being just a portion of the *solum* of the land, though subject to certain uses for the national objects of commerce and navigation, did truly belong in property to the landowner whose estate was washed by the sea, <sup>3</sup> and accordingly any coal or mineral found under the surface of the shore would undoubtedly belong to him; and so any drift or seaweed, found on the surface of the shore, equally belonged to him as accessories to the right of property which he possessed in the *solum*. It was not necessary for him to have any express grant of shore, or a description of his lands in his titles, as "bounded by the sea," in order to carry all these rights; they were carried by the clause of part and pertinent, and a large number of proprietors along the coast had enjoyed these rights from time immemorial on no other title. 2d, Seeing that the conveyance in the pursuer's titles possessed these legal effects, possession was sufficiently averred to warrant declarator as concluded for, if such possession was proved. It was averred to have been constant, peaceable, and uninterrupted, beyond the memory

<sup>1</sup> 2 Ersk. 6, 17; 2 Ersk. 1, 6; 1 Bankt. 3, 2, and 4; 2 St. 1, 5.

<sup>2</sup> 2 St. 3, 60; 2 Ersk. 6, 16; 2 Bankt. 3, 107, Skene, (de verb. sign.,) voce *Wair of the Sea*.—Ordonn. de la Marine, du mois d'Août 1681 (Louis XIV.) L. 4. Art. 5; Duke of Portland, Nov. 15, 1832, (ante, XI. 14).

<sup>3</sup> 2 St. 1, 5; 1 Bankt. 3, 4; 2 Ersk. 1, 6; 2 Ersk. 6, 17; Fullarton, July 16, 1697 (13524); Bruce, Nov. 25, 1714 (9342); Magistrates of Culroosa, June 13, 1769 (12810); Earl of Morton, June 20, 1760 (13528).

of man, subject only to the servitude in favour of the superior, and never till lately interfered with by the defenders. No. 13

Feb. 7, 183

Macallister

Campbell.

**LORD PRESIDENT.**—I rather think, that in the circumstances of this case, it might have been more satisfactory to have had the precise state of possession cleared up first, before giving judgment as to the pursuer's title.

**LORD MACKENZIE.**—I think the first plea in law by the defenders should be repelled. I consider the heritable right of the pursuer, taken in connexion with his possession as averred on the record, to be sufficient to support his title to pursue.

**LORD GILLIES.**—The question is whether the pursuer has a good title to insist in this action, reference being had to the tenor of his heritable right and to his averments of possession. I think that he has. It has been found that a grant of land which was described as bounded by the sea, was good against a subsequent special Crown grant of the seashore. That must imply that the first grant comprehended the seashore. But then it is said that the pursuer's lands are not described in his title-deeds as bounded by the sea. But de facto they are notoriously part of the coast, and washed by the sea, and have been so for centuries. In such a case it would be a very serious matter indeed if this Court were to hold that the shore was reserved out of the grant, wherever it was not expressly inserted in it. I see no warrant for so construing a grant of lands on the seacoast. Take the case for instance of any island on the west coast, the island of Stronsay for example, and suppose that a disposition of that island was executed, but without inserting the words "bounded by the sea." Is it to be held that the omission of these words would produce the effect of reserving out of the conveyance of the island, a circle of seashore, which would have been contained in it, if the disposition of the island, had added that it was bounded by the sea? I do not think that any such effect would result from the omission of the words in question; and the mention of the sea-boundary should as little be material in the present case where it lies along one side of the pursuer's estate, as in the case supposed, where it surrounded the whole subject conveyed. I hold therefore that the conveyance of an estate, which is notoriously bounded by the sea, conveys the shore as effectually as if the words "bounded by the sea" were in the charter. And considering the great value of sea-wreck to properties lying along the coast, amounting often I believe, on the coast of the Forth to 15s. or 20s. per acre of what is next to the coast, it would be a very serious matter to cast a doubt on this doctrine, as I think it probable that the titles of many of the largest proprietors there may contain no words whatever expressly stating that the sea is their boundary, which is nevertheless notoriously the fact.

**THE COURT** then "repelled the defenders' objection to the title of the pursuer;" and remitted to the Lord Ordinary, to proceed, reserving expenses.

**M. M. MACDONALD, W.S.—A. CLASON, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.**  
—Agents.

1834

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1834

Y35. DANIEL KERR GRAY, Pursuer.—*D. F. Hope—Penney.*  
 1837. WILLIAM KERR, Defender.—*Rutherford—W. Bell.*  
 v. Kerr. And  
 WILLIAM KERR, Pursuer.—*Rutherford—W. Bell.*  
 MRS ELISABETH KERR and OTHERS, Defenders.—*M'Neill—Nesbitt.*

*Acquiescence—Personal Objection.*—Circumstances which held to infer acquiescence, and to bar a party, personal exceptions, from claiming a share of a division of which he was originally in right.

*Process—Conjoining Actions.*—A party having brought an action of reckoning and payment, the defender in which raised an action of relief against other parties,—Held incompetent to conjoin the two processes.

1837. By a settlement executed in 1773, the late Daniel Kerr of Greenock made over to his children certain heritable subjects, being the half estate of which he and one Ninian Spence, his partner in business, joint proprietors. Of one of these children, the pursuer, Daniel Gray is the son and representative.

Disputes having arisen between the representatives of Kerr and Spence as to their respective successions, and an accounting between them ensued, the defender, William Kerr, was in 1808 appointed judicial factor on the estate for the purpose of collecting the rents; and in this he continued till the end of 1823, when he was removed therefrom. At the commencement of his factory, a report had been given in by an accountant showing a balance due to the Spences by the Kerrs, upon which, while not yet approved of by the Court, Kerr paid over the whole rents to the Spences. A new remit, however, having been made by another accountant (Mr C. Ferrier), which terminated in a submission by that gentleman, the result as brought out by his decret-arbitral in 1824 was, that the Kerrs were entitled to receive one half of the rents of the property intromitted with by William Kerr, amounting to a sum of £10,000. Proceedings were thereupon instituted against him, for payment of the sum, which issued in a compromise, whereby he agreed to pay £7000 to Daniel Kerr's representatives in full of the balance found due to the pursuer by the accountant; and thereafter on payment, received a discharge.

Daniel Kerr Gray, who was a writer in Greenock, had in 1824 signed under his own hand, a disclamation of any interest in his grandfather's estate. He had been appointed factor on the property after the removal of William Kerr, and acted as such for a year, when he resigned in consequence of the embarrassed state of his affairs. He was at that time ignorant of his rights as a grandson of Daniel Kerr, and was cognizant of the subsequent proceedings of the other members of the family, in which, though not a party to them, or paying any share of the attendant expense acquiesced. He corresponded with their law-agent and adviser in 1824

burgh on the subject of the family affairs, and recommended and sanctioned the compromise with William Kerr on the terms and conditions which were ultimately agreed on.

No. 131

Feb. 7, 183

Gray, v. Ke

Gray having thereafter raised a question as to his right to a share of the balance which had been made over to Daniel Kerr's representatives, they offered to pay to him, notwithstanding the disclamation by him in 1824 and subsequent acquiescence, his just proportion of what had been realized from the succession of their common ancestor, on his contributing his share of the expenses thereby incurred, and accounting for his own intromissions while factor. Not regarding this offer, Gray raised action against William Kerr, concluding, as one of the representatives of Daniel Kerr, for his share of the sum found due by Mr Ferrier to these parties, and for a count and reckoning in regard to his intromissions, while factor.

In defence against this action it was pleaded, inter alia—

In a question with the defender the pursuer is barred personali exceptione from insisting in the conclusions of the present action, in respect that rebus ipsis et factis, and in particular by his own express disclamation of all interest in the deceased Daniel Kerr's succession, and by knowledge of and non-appearance in the judicial proceedings therewith connected, as well as by his knowledge of and non-interference with the settlement which the defender made with the parties who had been all along put forward, even by the pursuer himself, as the representatives of Daniel Kerr, he is not now entitled to come forward and assert a right to which heretofore he has not only made no claim, but has expressly repudiated.

Two months after the raising of this action, William Kerr brought an action of relief against Mrs Elisabeth Kerr and the other representatives of Daniel Kerr who had concurred in the submission to Ferrier and the settlement with himself, concluding that the defenders should be ordained to free and relieve him of the sum concluded for in the former action, and of the alternative conclusion for count and reckoning.

Against this action it was pleaded in defence :—

1. The present process ought to be sisted till the issue of the principal action at Gray's instance.

2. The defenders are not, under the circumstances, bound to warrant the pursuer in the manner and to the extent now claimed; and in particular, they are not bound to warrant him indefinitely against the ascertainment of a large balance on a scrutiny of his factory accounts, the accuracy of which the defenders have never scrutinized, and which they are unable either to determine or to prove.

3. The pursuer having been the party who procured and produced, in a question with the defenders, the letter by Gray renouncing his interest in this succession, the defenders were entitled to rely on the validity of that letter as extinguishing Gray's claim.

4. The claim by Gray being to all appearance groundless, and the

1835. pursuer being in possession of materials sufficient, *prima facie*, to prove it so, the defenders are at least not bound to interfere in *hoc statu*.

1837.

Kerr.

The Lord Ordinary conjoined the two actions, in both of which a record was made up and closed, and pronounced the following interlocutor, with the subjoined note\* :—" The Lord Ordinary having heard

\* " The Lord Ordinary has proceeded on the assumption, that by the conjunction of the two processes, the defenders in the action of relief are substantially made co-defenders with William Kerr in the original action (in which it appears to him that they ought to have been the only defenders), and that it is, therefore, quite competent to settle the whole merits of the question as between them and Daniel Kerr Gray, the original pursuer in the conjoined processes. If he had not been satisfied of this, he would have found it unnecessary to give any judgment on the merits of the action of relief, in respect of the decree of absolvitor in the original action, and probably (though not without hearing him farther as to the competency) found Daniel Kerr Gray liable to both parties for the whole expenses of the conjoined actions, which had been occasioned entirely by his improper proceedings.

" On the merits, there seems no room for doubt. It is clear that the proceedings between the Kerrs and Spences embraced from the beginning, and indeed as their principal subject, the heritable property, the rents and profits of which are here in question, and that this fact, as well as his own relationship to the family, and contingent interest in the result of these proceedings, was all along known to the pursuer; though he might not have been correctly informed either as to the settlement of his grandfather, or the state of his mother's titles, up to a comparatively recent period. In consequence of the liberal concession of the other members of the family, it is now unnecessary to consider the effect of his absolute disclamation of any interest in his grandfather's succession in 1824, or of his proceedings when appointed judicial factor on the property but a few months after. What the Lord Ordinary rests upon is this, that there is complete evidence under his own hand, that after he was fully aware of his own rights, and of the whole proceedings in the submission, and while it appears, indeed, that he was privately contemplating his own probable interest in the result, he did not merely acquiesce in the management and proceedings of the other members of the family, but did, by his correspondence with Mr Macdonald, their law-agent in Edinburgh, advise, direct, and encourage them to settle and compromise with William Kerr, the defender, *on the very terms and conditions* on which they did ultimately settle with and discharge him. The proceedings he recommends in 1830 and 1831, and the compromise he advises in the end of that year (see letter of 29th December, 1831), were all of them measures which could only be carried through by those other members of the family who alone were parties to the submission at the former period, and alone entitled either to enforce the decree-arbitral, or to proceed with the accounting at the latter. By thus recognising them as administering, with his consent, for the general interest, and on the most favourable view for him, as taking burden on themselves for him, as well as the rest, he was obviously barred from objecting to any settlement they might come to with his acquiescence, or rather as the case is, with his approbation and advice, and in an especial manner, from afterwards coming against the *third party*, with whom they had so settled, and who had onerously purchased his discharge from the only parties legally entitled to deal with him, and on terms which the pursuer himself had previously sanctioned and approved.

" If, notwithstanding his express renunciation and long taciturnity, he was still entitled to claim any share of the family succession—which, but for the ~~honest~~ and honest admission of its other members might well have been questioned—it was clearly against *them* only, and not against the original holder of that succession, with whom they had openly settled, that his claim should have been directed.

parties at great length on the merits of the action at the instance of Daniel Kerr Gray against William Kerr, defender, and also on the state of the relative action of relief at the instance of the said William Kerr against Elizabeth Kerr and others, representatives of Daniel Kerr, deceased, and having made avizandum, and resumed consideration of the said processes, with the closed records, correspondence, and whole productions in each of them respectively, together with the minute given in to the original process in behalf of the defenders in the said action of relief—Conjoins the said two actions; and in the action by Daniel Kerr Gray against William Kerr, sustains the defences of the said William Kerr; assoilzies him from all the conclusions of the said action, and decerns: Finds the said Daniel Kerr Gray liable in the whole expenses incurred in the said original action: Allows an account thereof to be given in, and remits the same, when lodged, to the auditor, for his taxation and report. In the conjoined process, quoad ultra, and in the action of relief, finds that the defenders can only be liable in relief, or to the said Daniel Kerr Gray, to the extent and on the terms on which they had offered to settle with him before any litigation, and to which they have adhered on record, videlicet, to pay over to him his just share of

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And such, accordingly, appears to have been his own impression; for in his remarkable letter to Mr Macdonald, of 6th August, 1834, though very much dissatisfied with William Kerr for actually paying over the money without consulting him individually, he evidently does not contemplate the possibility of any recourse upon him, but merely intimates his determination to raise an action of count and reckoning against *‘all the participators in that fund.’* The answer of his respectable correspondent, 13th August, 1834, is of itself a sufficient ground for the Lord Ordinary’s judgment. This old friend and honest adviser of the family, though himself a little out of humour at the sudden conclusion of the business before his own account was adjusted, points out to him confidentially the folly of his projected litigation, tells him that *‘his former disclamation of the succession was a sufficient reason for not consulting him before entering into the transaction;’* and that he himself, though put to inconvenience by the proceeding, was satisfied *‘that it had been done for the best, and found no fault with it;’* and ends by stating that there could be no need for litigation, and *‘that it was but fair that when you do claim the succession, you should pay your proportion of the expenses of procuring it.’* In the course of the same year, the representatives intimated formally, by letter of 4th December, 1834, that they were ready and willing to settle with him on these terms; and the result was, that in a month after, viz. 6th January, 1835, he, in order to avoid this equitable adjustment, passes by *them* altogether, and signets his summons against *William Kerr only*, against whom he concludes, without qualification, for his full share of the fund which had been realised at the expense of the other parties, and by whom he knew it had been wholly received, and onerously discharged. In the Lord Ordinary’s opinion, there could scarcely be a more reprehensible proceeding.

“If the interlocutor is taken to review, the party reclaiming should print the letters above referred to, especially those from the pursuer of 29th November, 1830, 29th December, 1831, and 6th August, 1834, Mr Coll Macdonald’s answer to that last letter, of the 13th August, and subsequent letter from the agent of the other representatives of Daniel Kerr, of 4th December, 1834, together, of course, with any other letters he may think material.”



**No. 135.** what had been realized from the succession of Daniel Kerr, their common ancestor, by and through the suits at law and submissions to arbiters referred to, upon his contributing his just share of the expenses incurred in thus realizing the said succession, and accounting for his own intrusions while acting as judicial factor on the property in dispute. But before further answer, appoints the cause to be enrolled, that parties may be heard as to the best way of ascertaining what may now be due to the said Daniel Kerr Gray under the preceding finding, and also on the claims for expenses (not herein before disposed of) by the parties generally, including therein the original defender, William Kerr's, claim against the said Daniel Kerr Gray, for the expenses of the action of relief, and those of the defenders in that action of relief, against both the said Daniel Kerr Gray and the said William Kerr."

Feb. 9, 1837.  
Lockhart.

Gray reclaimed.

THE COURT had no doubts of the Lord Ordinary's interlocutor being well founded as to the principal cause; but held the conjunction of the two actions incompetent to the effect of rendering the conjoined process an action of count and reckoning at the instance of Daniel Kerr Gray against the other Kerrs.

THEIR LORDSHIPS accordingly pronounced as follows:—"Adhere to the interlocutor of the Lord Ordinary in the original action of count and reckoning at the instance of Daniel Kerr Gray, of new find the defender, William Kerr, entitled to expenses, allow the account to be given in, and thereafter taxed in common form; quoad ultra, recal the conjunction of the process of relief with said process of count and reckoning, and the other findings of the interlocutor, and remit to the Lord Ordinary to proceed farther in the said process of relief as to him shall seem just."

E. & A. M'MILLAN, W.S.—CAMPBELL & MACDOWALL, S.S.C.—C. & D. MACDONALD, W.S.  
—Agents.

**No. 136.** SIR NORMAN MACDONALD LOCKHART, and OTHERS, Petitioners.—  
*Miller.*

*Process—Intimation—Entail.*—Where a petition for carrying into effect a private Act of Parliament, relative to an entail, has been intimated under the notices required by the act, the Court will not allow its prayer to be altered without ordering a new set of notices, in terms of the act.

Feb. 9, 1837.  
1ST DIVISION.

A PETITION was presented by Sir Norman Macdonald Lockhart, heir of entail in possession of Lee and Carnwath, and John M'Neille of Bally-Castle and others, trustees for carrying into execution a private Act of

had been discovered which would cause an additional sum to be carried to the credit of the last heir's representatives. The petitioner had prayed, inter alia, for warrant to uplift and pay certain sums of the state of accounts then made up; and the minute now granted in terms of the amended state of accounts. The leading of the petition, which was for authority to execute an entail of the purchase of which had been previously approved by the Court, unaltered by the minute.

MACKENZIE.—I think it would endanger the whole procedure if the petition was granted in terms which were at all varied from those which had been intimated under the notices prescribed by the act. Even the least variation would be perilous. The petition necessarily required to be so intimated; and it has been intimated but the petition as originally presented. There is nothing before us which we can regularly grant.

HILLIES.—I am of the same opinion. The alteration now proposed is not warranted by the prayer of the petition as it stands. But we cannot go beyond the prayer; we cannot grant what is ultra petita. And if the prayer of the petition is not granted at all there must be a new set of notices in terms of the act.

THE PRESIDENT concurred.

The petitioner then intimated that he would amend the petition in his next minute, and give a new set of notices of the petition as amended, which was accordingly allowed.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

JAMES THOMAS MURRAY, Petitioner.—*Marshall.*

No. 137.



- . 138. MRS SUSAN ROWE and MANDATARY, Pursuers.—*Rutherford*  
*Maitland.*  
 2, 1837. ALEXANDER MONYPENNY (late Earl of Buchan's Trustee), De  
 iv. —*D. F. Hope—Keay.*  
 Penny.

*Entail—Clause—Adjudication.*—The prohibitory clause in an entail executed in 1664, was thus expressed: "It shall noways be lawful to any of the heirs and provision above specified to sell, dispose, or wadset the lands above any part thereof, or any annual rents, or yearly duties to be uplifted furth saimen, or to set tacks for longer space than their own lifetimes, or to contract for which the samen may be apprized or adjudged, or to do any other fact in prejudice of the said tailzie and of the persons above named, and the saids;"—Held, that this clause contained an effectual prohibition against the succession.

- 2, 1837. ON the 4th of November, 1664, Sir James Stewart of Strath  
 Division. executed an entail of these lands. By that deed he bound himself "William Stewart, my second lawful son, and the heirs-male fully to be procreated of his body," and a certain order of heirs of The prohibitory, irritant, and resolute clauses were in these terms: "And it shall noways be leisome nor lawful to any of the heirs and provision above specified to sell dispone and wadsett the baronie and others above written or any part thereof or any annual or yearly duties to be uplifted furth of the samen, or to sett tacks for longer space than their own lifetimes, or to contract debt for the samen may be apprized or adjudged, or to do any other fact in prejudice of the said tailzie and of the persons above named aforesaid, and if my saids daughters, and their heirs or any of heirs of tailzie and provision above specified shall in any time failzie therein, or do any thing contrair to this my destination pointment, then and in that case the person or persons sua failzie doing in the contrair hereof and the heirs of their bodies shall alose their right and haill benefit of this present bond of provision feftments following hereon, and of the haill lands baronie and others written, and the samen shall in all time thereafter pertain belacress to the next person for the time, who be virtue of the said and provision would have succeeded to the saids lands and estate, ing the saids persons contraveners and the heirs of their bodies dispositions and other deeds whomsoever made or done contrasaid provision and destination with all that shall follow thereon ipso facto voyd and null without any declarator and shall noways nor burden the saids lands baronie and others above written or thereof as if the samen had never been done, with and upon the

reservations provisions and conditions respective above mentioned I have made and granted thir presents, and no otherways." No. 138.

Under this entail the succession opened to the late David Earl of Buchan, who was served heir of entail and provision in 1768. After enjoying the lands on this title till 1819, his Lordship, being advised that the entail was invalid, executed a procuratory for resigning the lands in favour of himself, his heirs, and assignees. He then obtained a charter of resignation, and made up a title as unlimited fiar, after which he executed a trust-conveyance of the estate to Alexander Monypenny, W.S. After his Lordship's death, the next heir under the entail of Sir James Stewart was Henry David, now Earl of Buchan. Mrs Susan Rowe of London-Colney, in the county of Herts, being a creditor of the present Earl, adjudged his whole right and interest in the lands contained in the entail, and particularly his right to reduce the deeds executed by David Earl of Buchan to the prejudice of the entail. She then raised a reduction of these deeds, and pleaded, that, as there was no set form of words or style essential to an entail, and as the entail of 1664 contained distinct and substantive prohibitions against selling, contracting debt, or doing "any other fact or deed in prejudice of the said tailzie, and of the persons above named and their foresaids," this last prohibition was clearly and effectually directed against the alteration of the order of succession. There were many entails, and especially that of Roxburghe, in which a similar clause had been so construed, both here and in the House of Lords. The three essential prohibitions being thus expressed, they were duly fenced by irritant and resolute clauses which, although general in their terms, yet directly and necessarily applied to the whole prohibitory clause. And thus the entail was perfectly valid, and the deeds of David Earl of Buchan were ultra vires and must be reduced.

The defender pleaded, as his first defence, that, in construing an entail, every clause which was susceptible of more than one interpretation, must be read in the sense least favourable to the imposition of fetters: and, in particular, if there was not a substantive and express prohibition against each of the three distinct acts of selling, contracting debt, or altering the succession, no such prohibition could be reared up by any inference or implication. The mere prohibition to do any deed "in prejudice of the tailzie, and of the persons above named," did not, either necessarily or naturally, imply a prohibition to alter the order of succession, more than it implied a prohibition to sell, or a prohibition to contract debt, or a prohibition to commit a crime inferring forfeiture of the estate, all and each of which might most truly be said to be "in prejudice of the tailzie and of the persons above named." But if this were true, there was no substantive prohibition against altering the succession, there were no other words in the deed which could apply to it, but a prohibition against "prejudice of the tailzie:" and, unless it

Feb. 9, 1837.

Rowe v.

Monypenny.

136. could be maintained that these general words were enough to supply the place of any substantive prohibition to sell, or to contract debt, &c., there was no ground for holding them tantamount to a substantive prohibition against altering the order of succession. The entail was therefore defective in this essential particular, and the late Lord Buchan having, by resignation, obtained an investiture in favour of a different order of succession, had withdrawn the lands from under the entail, and, as a fee simple proprietor, had validly executed the deeds under reduction.

The second defence was rested on an alleged defect in the irritant clause.

The Lord Ordinary found "that the entail on which the action had been raised does not contain any effectual prohibition against altering the order of succession; therefore, sustained the first defence, assoilzied the defenders, and decerned; and found the pursuers liable in expenses."

The pursuers reclaimed, and printed for the use of the Court the terms of the prohibitory clause in the Roxburghe entail, and several other entails. That of the Roxburghe entail was thus expressed:—"To make or grant any alienation, disposition, or other right or security whatsoever, of the said lands, lordship, baronies, estate, and living above specified, nor of no part thereof, nather zitt to contract debts, nor do our deeds qrbv the samen, or any part thereof, may be appraisit, adjudgit, or evicted fra them, nor zitt to do any other thing, in hurt and prejudice of their prtis, and of the foresaid tailzie and succession, in hail or in part."

In the argument under the reclaiming note, the defender attempted to shake the authority of the Roxburghe case, and also contended that the structure of its prohibitory clause was materially different from that of the prohibitory clause in this entail, particularly as the three substantive prohibitions were distinctly marked as such by the introduction of the words "nor yet" between each of them, so as to make them distinct and separate clauses, each referring to one of the three main subjects of prohibition.

The pursuer answered, that the authority of the Roxburghe case was impregnable, and that its prohibitory clause was not distinguishable in any material particular from the prohibitory clause in this entail.

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\* "NOTE.—After the repeated discussions which this class of cases has undergone, the Lord Ordinary conceives that it would be idle to attempt to give any exposition of the general principles in the structure of entails, or in their interpretation. Under the operation of these principles, each case must depend on its own particular words; and he need only say, on examining the terms of this deed, and comparing it with the others on which the Court has decided on the efficacy of prohibitory clauses, he can find no ground for holding that there was a valid prohibition against altering the order of succession. This being sufficient to dispose of the case, he has abstained purposely from considering the second defence."

**LORD PRESIDENT.\***—I have gone through every case that has followed since the passing of the act 1685, every case that I could find in the books, and I was sorry to see that your Lordships' decisions are by no means uniform or consistent; and I think that this has happened very much from wandering out of the Act of Parliament, and making use of phrases not mentioned in the act. There is not in the act 1685, c. 22, one word about altering the order of succession positively and specifically; neither is there any thing, as in the case of Roxburghe, about a distinct positive clause. In that case the words of the entail were, "nor zitt to do any thing, in hurt and prejudice of their prties;" but the words of the statute are just of the same import, "or do any other deed whereby the samen may be apprysed, &c.," the same as in this tailzie here. The act goes on, "or the succession frustrate or interrupted." Now that clearly implies that not only a positive absolute alteration of the succession by a specific deed is prohibited, but that it also applies to any other deed, whether a voluntary act or an act on which diligence has followed. It is not said in the act that the order of succession shall not be altered; but that the succession shall not be frustrated or interrupted, and I am persuaded if our predecessors had attended to the words of the act, there would not have been that discrepancy in the decisions which I am sorry to find. Here are the words of the act, "or do any other deed whereby the samen may be apprysed, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrate or interrupted." That is any deed whatever, whether a voluntary deed or some deed on which diligence follows. I did think at first on looking at the case of Roxburghe, that the words "nor zitt" repeated, did make something like a separation, but when I referred to the Act of Parliament, I saw that was not required. The terms of it are that you must not allow the estate to be apprized, adjudged, evicted, &c. or any other deed done by which the succession may be frustrate or interrupted. Now what are the words here, "or to do any other fact or deed in prejudice of the said tailzie, and of the persons above named and their foresaids." The words are disjunctive; and what are "their foresaids" but the substitutes; and to make it plainer it goes on to prohibit any thing done "contrair to this my destination and appointment." And then it goes on at page eighth, "and all dispositions and other deeds whatsoever, made or done contrair to the said provision and destination with all that shall follow thereon, shall be ipso facto voyd and null, &c." In short, I can make no distinction between this and the case of Roxburghe. There may be some other cases of a contrary import, because the decisions are not uniform. I saw one in the year 1728, in which it is said expressly, although I do not know whether that would do now, that a prohibition to alter the order of succession might be implied. I do not know whether that would be found now, but it was found then; and, therefore, recurring to the words of the Act of Parliament, which I think we should always recur to, there is not indeed a positive clause about altering the order of succession, but there is one against the same being frustrate or interrupted. On the whole, I propose that the interlocutor of the Lord Ordinary be recalled.

**LORD GILLIES.**—I concur with your Lordship in the conclusion you have arrived at. I am afraid there is too much truth as to the inconsistency, or apparent inconsistency, of some of those decisions; but, amidst this inconsistency, I

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\* These opinions were revised by the Judges.

No. 138.

Feb. 9, 1837.

Dow v.

One penny.

am glad to look at the case of Roxburghe, the judgment in which was most deliberately pronounced, and adhered to, on a petition and answers, and finally affirmed by the House of Lords. I consider that decision as a sort of resting place, and I see that, in all the cases that have since occurred, it has been always admitted that the judgment was a sound and a proper judgment. I have only therefore, to look at the Roxburghe case and this case, for I think they are identical; and though there may be some difference in the verbal expression, yet the correct grammatical import and logical effect of the words is exactly the same in both. "To do any other fact or deed" is the prohibition in the one case, while in the other, the Roxburghe, it is "to do any other thing." Now, is there such a difference between "thing" and between "fact or deed?" In the Roxburghe case it is "in hurt and prejudice of their parts and of the present tailzie and succession," and here it is "in prejudice of the said tailzie." Now, I conceive "tailzie" to be vox signata, because "tailzie" means a destination of heirs different from the legal order. Again, there does not appear to me to be any distinction between beginning the sentence with "nor" or with "or." I may say I have had no difficulty in this case, either on reading those papers or in hearing the counsel; or, I may say, I have not had any difficulty in reading those papers, nor yet on listening to the able argument of the Dean. Therefore, as to the "nor yet" and the "or," I am not able to see that, whether the one expression or the other be used, it makes the smallest difference on the true meaning or legal import of the clause. In short, it appears to me that the two cases cannot be distinguished. And holding, as it has always been held, that the judgment in the Roxburghe case was right, I am forced to conclude that the interlocutor in this case is wrong. Resting, therefore, on the case of Roxburghe, which I consider to be perfect authority, I think we must alter the interlocutor of the Lord Ordinary.

LORD MACKENZIE.—I agree with the opinion expressed by your Lordship. I think, whether looking at the statute or the case of Roxburghe, that opinion is right. The statute provides that, in entails, there shall be prohibitions of alienation, contraction of debt, and against doing any thing by which the succession may be frustrate or interrupted. It does not require three clauses entirely separate and distinct. The words of the statute are, "that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispoise the said lands, or any part thereof, or contract debt, or do any other deed whereby the same may be apprysed, adjudged, or evaded from the others substitute in the tailzie, or the succession frustrate or interrupted," &c. Now, here the prohibitions are not entirely separated, and we cannot, therefore, hold that they must be so in entails sanctioned by that statute. Then it cannot be argued that it was necessary in deeds of entail to use the precise words expressed in the statute. It is quite fixed that prohibitions in substance agreeing with those expressed in the statute are sufficient; and in the present instance, indeed, it would be particularly hard to require that, because this deed was made in 1664, previous to the statute. As the statute did not annul such entails, it must have sanctioned them, though made in words differing from those which were not in existence to be copied by the entailers. The question then is, whether this entail does not contain expressed in substance those statutory prohibitions? I agree with



your Lordship, that it does contain them. The statute requires a prohibition No. 138  
 against selling or disposing the lands, or contracting debt, or doing any other Feb. 9, 183  
 deed whereby the same may be apprized, &c., or the succession frustrate or inter- Rowe v.  
 rupted. The clause in the present entail, after the prohibition of alienation and Monypenny  
 contraction of debt "prohibits to do any other fact or deed in prejudice of the  
 said tailzie and of the persons above named and their foressaids." Now I can see  
 no solid argument by which it is possible to deny that the words "in prejudice  
 of the said tailzie" are in substance the same as the words of the statute "or  
 the succession frustrate or interrupted." I think "prejudice" equal to "frustrate  
 or interrupt," and "tailzie" equal to "succession." Under this statute, even if  
 it were an open question, I should have held that such an entail as this was valid.  
 It is said that the words "altering the order of succession" should have been used,  
 but these are not the words of the statute, and I do not know that "altering the  
 order of succession" is a perfect expression. There may be deeds frustrating  
 the succession which may be said not to be alterations of the order of succession,  
 and if an extremely rigid line of argument were used, it might perhaps be held  
 that a prohibition of alteration was not sufficient under the statute. The words  
 used in this entail seem better. And I may further observe that the clauses used  
 here are exactly in the order of the statutory prohibitions. First, there is un-  
 doubtedly a prohibition of alienation, then there is a prohibition against the con-  
 traction of debt, and then, exactly as in the statute, there is a third prohibition,  
 not entirely separated from the second, but just as much so as the statutory pro-  
 hibition of frustrating or interrupting the succession. In the next place, I agree  
 with Lord Gillies in thinking that the Roxburghe case is a precedent fully in  
 point. The use of the words in the Roxburghe entail, "nor zitt," I consider to  
 be of no consequence whatever. Your Lordship has observed that they are not  
 in the statute, nor can I see that "nor yet" is at all better than "or." Neither  
 can I think that "prejudice to the tailzie" is at all different in effect from  
 "prejudice to the tailzie and succession." I therefore think the Roxburghe case  
 quite in point, and I am not aware that it has ever been attempted to overturn the  
 authority of that case.

THE COURT pronounced this interlocutor:—"Alter the interlocutor of the  
 Lord Ordinary reclaimed against; find that the entail, on which the action  
 has been raised, contains an effectual prohibition against frustrating the suc-  
 cession, and therefore repel the first defence; find the defenders liable to the  
 pursuer in the expense of this part of the litigation, and remit to the audi-  
 tor, &c.; quoad ultra, remit to the Lord Ordinary to proceed farther in the  
 cause as shall be just."

G. DUNLOP, W. S.—MONYPENNY & DAIGLIESH, W. S.—Agents.

**No. 139. MRS M'MIKIN TORRANCE and HUSBAND, Petitioners.—*Cowan.***

Feb. 9, 1837.  
Torrance.

*Process—Entail—Stat. 6 and 7 Wil. IV. c. 42.*—An application to the Court under the 6th and 7th Wil. IV. c. 42, for authority to sell entailed lands for the purpose of paying the entailer's debts having been intimated in the newspapers as provided by the statute, the Court farther appointed the petition to be intimated in the minute book and on the walls for eight days, and granted warrant for serving it on the next heir of entail, not being a descendant of the petitioner's body.\*

Feb. 9, 1837.

1<sup>st</sup> DIVISION.  
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By the act 6th and 7th Wil. IV. c. 42, it is declared to be lawful for the heirs of entail in the possession of any entailed estate liable to be adjudged or evicted for the entailer's debts to apply by summary petition to the Court to have so much of the lands sold as will produce a sum adequate to discharge the debts so affecting the estate. The Court are by sec. 8th "authorised and required, upon such petition being presented, to direct due notice, according to the practice of the said Court, to be given of such petition to all concerned." By section 21st, provision is made in regard to the notices to be given of the intended sale in the newspapers; "and where such application shall be to the Court of Session, the said Court or the Lord Ordinary shall, if they or he shall see cause, cause such further intimation thereof to be made in the minute-book of the said Court, or on the walls of the Parliament House, or otherwise, as the said Court or Lord Ordinary shall think proper."

The late John M'Mikin executed an entail of the estate of Kilsaintninan on certain heirs of his body, whom failing, in other heirs. He died in 1801 leaving debts to the amount, as was afterwards ascertained, of £8200, to meet which there were no funds other than the entailed property. In a declarator brought by his sister, Mrs M'Mikin Torrance, the petitioner, to whom the succession opened, the Court found that the entailer's debts formed a charge against the estate and against the heirs of tailzie succeeding thereto.

Mrs Torrance, being desirous to have as much of the property sold as should be sufficient to discharge the debts, took steps for having an application to that effect made to the Court in terms of the act above-mentioned, and caused notice thereof to be inserted in the proper newspapers.

She thereafter presented an application in terms of the statute, praying the Court "to take the foregoing application into consideration, and to direct such notice of it to be given to all concerned, and to cause such farther intimation to be made in the minute-book, or on the walls or otherwise, as accords with the practice of the Court, and as your Lordships shall think proper;" and thereafter to take an account of and ascertain the amount of debt affecting the estate, and authorize such portions thereof to be sold as should be sufficient to discharge the debt.

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\* See ante, No. 116, p. 425.

suers.—*D. F. Hope—Cheape.*ROBERT MONTGOMERIE, Defender.—*Rutherford—Cowan.*

*gn—Res Judicata.*—A foreign decree founded on for execution in this affords only prima facie evidence of the truth and justice of the claim of ner, and is liable to be impugned on cause shown by the defender.

ie year 1808, the pursuers, John and Wright Southgate, mer- Feb. 9, 1837.  
in Virginia, United States, had certain transactions with a com-  
the island of St Thomas, of which two persons of the name of 2d DIVISION.  
and M'Gregor were partners. In liquidation of a debt due to the Lord Jeffrey.  
ates, Eivers drew a bill for £420, of date 20th June, 1808, on the F.  
of Burke and Company of Cork, in favour of M'Gregor, who in-  
it over to the Southgates. The bill having been dishonoured was  
ed and returned on these parties, who transmitted it, through a Mr  
on of Baltimore, to the defender, Montgomerie, then a merchant  
Danish island of St Croix, adjoining St Thomas, in order that he  
recover payment from Eivers, the drawer. Eivers and Montgo-  
were at this time engaged in a joint-adventure, and entered into an  
ement by which the amount of the bill was to be paid out of the  
the proceeds of the adventure falling to Eivers, who on 16th May,  
granted an acknowledgment to that effect, and had the bill thereafter  
ed to him. In July, 1811, Montgomerie transmitted £200 to  
ates in part payment of the bill, which now amounted to £515, and  
ed over to them Eivers' obligation for the balance. No farther pay-  
was made by Montgomerie, who, when required to do so, alleged  
e result of an accounting and settlement in 1815 between himself

**No. 140.** friendly transaction between that gentleman and ourselves, we exonerate him, as well as his agent in the West Indies (*i. e.* the defender), from all claim and responsibility, as regards the delivery of the said protested bill of exchange, to the drawer thereof, and the acceptance of the note of hand above recited still considering and holding the maker and indorser of the said protested bill of exchange responsible to us for the amount of the same, with all damages, interest, charges, &c., (less the amount of £200 sterling, which has been received in part payment of the same), in like manner as if the bill still remained in our possession; because the arrangement made by Mr Montgomerie with Owen Eivers was totally unwarranted and unauthorized by us." (Signed) "John and Wright Southgate."

In 1817, Southgates, Montgomerie being nominal plaintiff, instituted proceedings against Eivers in the Supreme Court of New York, where he then resided, for recovery of the balance remaining due under his obligation of 16th May, 1810, transferred to them by Montgomerie. The plaintiff was nonsuited owing to his failure to prove that the appropriated fund for the original payment of the claim had failed.

A second suit was raised in the same court by the pursuers, also in name of the defender as nominal plaintiff, and the proceedings in that suit resulted in Eivers being assolized with costs (April, 1822); three of the jurors, to whom a reference was made, having reported that there remained in the hands of Montgomerie, funds belonging to Eivers, arising out of the joint-adventure, sufficient to have paid in full the whole sum contained in the obligation of 16th May.

Pending these proceedings, Eivers raised action against Montgomerie (January, 1820) in the town-court of Frederick-Stadt in St Croix, for payment of an alleged balance due to him on account of the joint-adventure, which ended in a judgment (November, 1820) finding that, credit being given for the payment of £200, there remained a certain balance due to Montgomerie. To this action the Southgates were in no way parties.

Having failed in their suit against Eivers, the Southgates, in 1822, filed a bill in the Court of Chancery of New York against Montgomerie and Eivers as co-defendants, concluding for payment by one or other of them of the balance still due on the bill of exchange. Montgomerie, who was out of the jurisdiction of the Court, being still resident in St Croix, employed a professional adviser and consented to put in answers to the bill; these were sent to him with a commission from the Chancellor at New York to take his affidavit as to their verity, and were lodged in the course of 1824. Eivers also appeared as a defendant in the suit. In his pleadings it was stated that funds of his to a great extent still remained in the hands of Montgomerie; and a view of his accounts was given, in regard to the joint-adventure, at variance with the result of the judgment in the court of St Croix, of which he denied the authority. In May, 1828, the bill was dismissed, in so far as it related to Eivers. In Novem-

by the Court of Chancery on the 31st December.

after, Montgomerie having come to reside in Scotland, the South-  
d their mandatary raised action against him, founding on the pro-  
in the Court of Chancery of New York and the final decree  
pronounced, of which he produced authenticated copies, and con-  
for payment of the sum which had been found due to him by that

gomerie, in defence, setting forth the original transaction and  
subsequent proceedings in substance as above detailed, maintained  
pursuer's claim was groundless; and he pleaded—

is incumbent on the pursuers to establish that the claim pursued  
his action is well founded, notwithstanding the foreign decree  
; or at all events to show that their proceedings in the foreign  
are fair and regular, and that the decree pronounced was consistent  
: justice and equity of the case.

the circumstances under which it was pronounced the decree  
on does not afford even prima facie evidence that the debt in  
is due by the defender.

sto, That the decree affords prima facie evidence of the debt, still  
ender is entitled to show that no such decree ought to have  
ronounced consistently with the principles of justice and equity  
ple to the case.

The decree of the Court of St Croix conclusively fixed that the  
er, by paying the £200 to the pursuers in July, 1811, had more  
hausted the share of the nett proceeds of the joint adventure in  
ids, which Eivers, or the pursuers in his right, could claim, and  
ubsequent questions relative to that matter of accounting ought to  
en. and must still be held as excluding further investigation into

No. 140.

Feb. 9, 1837.

Muthgate v.  
Montgomerie.

2. Even supposing that judgment not to be conclusive against the defender in the present action, it must at all events be held to constitute a *prima facie* case against him, to the effect of throwing upon him the burden of proving that the said judgment is erroneous.

3. The facts stated by the defender, so far as they are well founded, do not show the said judgment to be erroneous; but that, on the contrary, all the facts of the case go to show the justice and equity of it.

4. In the circumstances of the case the sum pursued for must have been held to be due either by the defender or by Eivers, according as it might appear that the proceeds of their joint-adventure was or was not sufficient for the payment of it.

The Lord Ordinary, after ordering cases, pronounced the following interlocutor, with the subjoined note: \*—" Finds that the judgment

\* " 1. The doctrine of the pursuers would put foreign decrees entirely on a footing with final decrees of our own courts; for even those are *examinable* in all the particulars as to which they would allow the others to be examined. That is, as to their authenticity, the competency or jurisdiction of the court; their being in absence, or being chargeable with material irregularities. There might be great convenience in such a rule, on account of its precision and simplicity; and there is no doubt an appearance of authority for it in some late English cases. But the Lord Ordinary cannot discover that the *comitas* (on which the whole authority of foreign judgments rests) has ever been carried to this extent in Scotland, and the most recent of all the English decisions, that given by the Lord Chancellor in the appeal, *Houlditch v. Lord Donegal*, on the 8th and 16th July last, 1834, in which the whole matter was very deliberately considered, seems to limit it very nearly as in the preceding interlocutor, and as the Lord Ordinary humbly thinks it must be limited, in order to reconcile the general principle with justice, or different particular judgments with each other.

" To understand the nature of these limitations, certain distinctions must be attended to, and it is apprehended to be pretty clear, that the apparent conflict of some of the decisions and judicial dicta that have been cited, may be satisfactorily explained by referring to these distinctions.

" Where the facts are admitted, and the law to be applied to them is confessedly that of the court which issues the decree, the rule laid down by the pursuers may in general be safely applied. If such a case (from a change in the defender's residence) had come for decision in the courts of another country, the law of the state where the cause of action arose must have been put in evidence and applied, without regard to its discrepancy with that of the other country. But as there can in general be no better (or scarcely ever so good) evidence of a foreign law, as the final decrees of the courts which daily administer it, the mere production of such a decree, with an admission of the facts, should, in most cases, exclude all further enquiry, and warrant the instant interposition of the local authority for its execution; and upon this ground, accordingly, many decisions have apparently been given. But, even in this class of cases, it might be hazardous to hold the rule as absolutely fixed and inflexible. As to the decrees of *supreme* courts, in large and instructed communities, it would scarcely ever admit of question; but, in less civilized states, judgments, of inferior tribunals especially, may proceed on the grossest mistakes of their own law, and, while the means of domestic review may be lost, by change of domicile or otherwise, the Lord Ordinary sees no principle on which the courts of other countries should be excluded from allowing such error to be established, by reference to living autho-



l of the Court of Chancery of the State of New York, being a No. 140.  
decree, is not of the same authority as a final decree of the

Feb. 9, 1837.

~ Southgate v.  
Montgomery.

that foreign law, confessedly of greater weight than the judge whose decree  
ght before them.

t there is another description of cases, where the right to question the  
of a foreign decree seems still more necessary and undeniable. Suppose  
brought to trial in France between two Scotchmen domiciled in that coun-  
arising out of transactions in Scotland, and confessedly to be decided by  
of that country; and suppose the law of Scotland to be put in evidence  
gely, by the testimony of lawyers; but that, either through their ignorance,  
misapprehension of their testimony by the court, judgment is given, pro-  
according to the law of Scotland, but really in opposition to its best  
hed principles. The judgment, however, is final, the court undoubtedly  
ent, and the procedure regular. But before it is carried into effect, the  
return to their own country, and application is made to the courts here  
ction on this foreign decree. Could it possibly be maintained that our  
e courts shall be bound to give effect to a plain mistake or perversion of  
wn law, to the prejudice of their own subjects, because embodied in a  
decree? This the Lord Ordinary should humbly think a very clear

at there are others, more likely perhaps to occur (and he believes the pre-  
be substantially of this description), in which it might often be necessary  
y the same principle; where the law according to which the case should be  
l is *neither* that of the country in which the decision is given, nor of that  
h execution is craved, but a foreign law, as to *both*: In such a case, the  
pronouncing the decree has no prerogative, or presumptive advantage, over  
which it is proposed to be reviewed; and the question comes to be, more  
y than in any other situation, one of pure comitas on the one hand, and of  
to do complete and substantial justice on the other. In such a situation,  
d rather seem that no positive or inflexible rule could be safely adopted,  
at the matter must be left to the sound discretion of the court applied to,  
ng to the circumstances of each particular case. If the court issuing the  
be one of high authority, and belong to a country closely connected with  
which the cause of action arose, its judgments should scarcely be question-  
a court of inferior authority, and with less occasion to know the law appli-  
o the cause. A judgment of the Court of King's Bench, upon a question  
tch law, might be implicitly adopted in Sicily or South America without  
of injustice. But it would be a very different thing if the judgment of a  
t Messina or Valparaiso, on a point of English law, should be presented to  
urt of Session as sufficient per se to warrant an order for execution, without  
amination of its merits.

ich are the considerations which arise when a foreign decree is impugned as  
or of *law*, and the course is not much clearer where error of *fact* is im-

Evidence newly discovered, it is presumed, must always be admitted  
: such a decree; for upon such evidence final judgments of our own courts  
e opened up, and new trials granted after verdict. But in the case of a  
decree, should the strict tests of *noviter veniens* be applied? or should a  
called on to grant execution *ex comitate*, be debarred from looking at con-  
evidence (suppose written evidence) of its injustice, tendered to them  
with it, although it should appear that such evidence might possibly have  
roduced before the decree was issued? The *competency* of the evidence  
y produced (or rejected) is matter of *law*, and falls under the former head.  
e credit to which it is entitled, or its *sufficiency* (though believed) to sup-  
e allegations of the party, belong to a different category, and can scarcely  
luded from the cognizance of the court whose interposition is sought by



No. 140. courts of this country, and can only be considered as affording prima facie evidence of the truth and justice of the claims of the pursuers; but is  
 Feb. 2, 1837.  
 Loughborough v. Loughborough.

the successful party. If the evidence is not upon record, the presumption may be nearly insurmountable, that it was sufficient to warrant the decision. But if it is accessible, the Lord Ordinary is inclined to think that it may always be looked at by the Court before granting execution, and that it should not be granted if it be palpably and plainly insufficient to support the judgment. A foreign decree has authority enough, if, in so far as it proceeds upon facts, it is put upon a footing with a verdict obtained in our own courts. But such a verdict may be quashed as contrary to evidence (or to the justice of the case), although there is no other record of the testimonies than the notes of the presiding judge.

"2. It is upon these views that the preceding interlocutor has been framed, and it is easy to explain their application. The first peculiarity in the case is, that the cause of action arose, not in the state of New York, but in the Danish island of St Croix, or St Thomas, and that the defender was not amenable to the jurisdiction of the New York Chancery. The law applicable to the case, therefore, was not the law of New York, but the law of the Danish island, and the courts of New York had originally no power over the defender. It has been stated, indeed, that the defender prorogated the jurisdiction of the court by voluntarily appearing and pleading before it, and the Lord Ordinary is inclined to think that this is a good answer to the last part of the speciality referred to. Even this, however, is not free from doubt; and it seems certain, that, in submitting himself to its jurisdiction as a co-defender with Eivers, he had no thought of consenting to have his case tried as the sole defender, after Eivers had been assimilated, or to peril the result on Eivers' testimony as the only witness in the cause. By consenting to plead at all, he probably exposed himself to this consequence. But the consideration of its never having been intended, appears to the Lord Ordinary (along with the foreign nature of the transaction) to put this decree in a far lower rank as to authority than if it had been pronounced in a suit between two residents in New York, upon a transaction occurring within the bounds of the state.

"But what has mainly weighed with the Lord Ordinary, in requiring further examination into the grounds of this decree, is the strong impression he has of the force of the evidence against it, and the utter insufficiency, as it appears to him, of that upon which it seems to have proceeded.

"The Lord Ordinary is not of opinion that the St Croix decree can be regarded as a proper *res judicata* between the present parties, or that the Court of New York should have dealt with it as a foreign decree of binding authority, because the suit in which it was pronounced, though involving precisely the same question, was not between the same parties; but, short of being absolutely conclusive of the cause, it does appear to him a document of the very highest authority, and entitled to much more regard than all the other evidence he can find in the cause.

"The whole question at issue at New York was, Whether the defender had any funds belonging to Eivers unaccounted for in his hands? If he had, he was bound to pay them to the pursuers; if he had not, Eivers was bound to make good the deficiency. Now, in order to settle this very question, Eivers himself, in contemplation of the pursuers' second suit against him, had, in 1820, raised an action of accounting against the defender in the island of St Croix, where the defender is domiciled; where all the dealings between them had occurred; and where Eivers himself was personally present when the action began; and in this action he had exhibited an account showing the defender to be indebted to him in the sum of 8245 Danish dollars, after giving him credit for the whole amount of the pursuers' original debt of £515, 11s. The defender, on the other hand, had exhibited his state of the account, by which he showed that, after taking credit

to be impugned on the part of the defender, not merely by proof No. 140.  
 of jurisdiction in the court from which it issued, or of its having

Feb. 9, 1837.  
 Southgate v.  
 Montgomerie.

more of the pursuers' debt than the £200 which he had actually paid them, was *his debtor* for about 200 dollars.

A court thus selected by Eivers, and unquestionably the radical and proper for such a question, appears to have gone very minutely into the account, taking the benefit of the proceedings in a previous reference to arbiters of the parties, ultimately gave judgment *in favour of the defender*, and that, by the payment of £200 to the pursuers, and the other payments established, he had more than exhausted all the funds belonging to Eivers in his hand and was his creditor for a balance of 191 dollars; and in this judgment *acquiesced*, in so far, at least, as never to seek to have it reviewed or altered to the present day.

Between Eivers and the defender, therefore, this *was* a proper *res judicata*, as produced in any foreign Court where those two parties might afterwards meet, was, beyond all dispute, a foreign decree of the first class of authority. Both these parties *were litigants* in the New York Court of Chancery; and they stood there as co-defenders, yet the point at issue with the pursuers by the *very same* with that in the suit between those two defenders, as adversaries, at St Croix, viz. What was the true state of accounts between them, whether the present defender still held funds of Eivers unaccounted for in his hand.

But not only was the *question* the same as in the St Croix suit, but in the *interest* was the same also; the only interest at issue at New York, that of the two co-defenders, *as against each other*. *The debt of the pursuers was not disputed*; and the *only* point to be decided, therefore, was, which of the defenders should be liable for it? It was the converse of a multipointing, in which the pursuers had no proper opponent, and the whole litigation was between those called as defenders; whatever was *res judicata*, therefore, or a binding decision as between them, was substantially decisive of the cause; and though it might not, perhaps, be strictly sustained as absolutely binding on the pursuers, it was near it as possible, and, at all events, afforded evidence which seemed to admit of contradiction.

Now, as the Lord Ordinary reads the proceedings in the New York Chancery, he cannot find that the authority of this decree against Eivers is impugned by any evidence *but the evidence of Eivers himself*; and he certainly cannot reconcile it with notions of justice, that it should be rebutted, or held to be overruled, by the testimony. The pursuers say, indeed, in their case, that there was other evidence produced in the Chancery, which is not noticed in the record, and may be inaccessible. If this be so, the Lord Ordinary expects that they will make necessary explanations and offer of proof at the enrolment. But at present he cannot understand how it should be so.

The exemplification in process is produced by the pursuers themselves, as a *copy* of all the proceedings; and it certainly contains abundance of use-  
 less tails and repetitions; and, as all depositions of witnesses, in a Court of equity, are understood to be taken in writing, it is not easy to suppose that any of this kind has been omitted. There are references, no doubt, in the depositions and answers, to evidence produced in the two former suits against Eivers *not law*; but as the defender was no party to those suits, they cannot affect him, therefore, looking through the whole voluminous proceedings, the Lord Ordinary really sees nothing to oppose to the St Croix decree but the oath of Eivers, the real party in the cause.

The nature of that oath, too, is not a little remarkable. While still a joint defender with the present defender, he made oath (as was necessary) to the verity of the statements, which contained the substantive averment, that the defender had the funds to a great extent in his hands; and when afterwards called as a

140. been pronounced in absence of the defender, or of material irregularities and informalities in the course of the proceedings, but also by proof of its having proceeded on error of fact, or even on error of law, more especially where the law applicable to the case was not the proper law of the country where the suit was tried and determined: Finds that the defender in this case has already impugned the said decree, on several of the grounds above stated, to such an extent as to make it necessary that its merits, in those particulars, should be farther enquired into and examined; and, therefore, before further answer, appoints the cause to be enrolled, that parties may come prepared to state what further evidence or argument they respectively require on the points mentioned in the third part of the annexed note, or on any other points in the cause."

1837.  
Evers v.  
Knapley.

The pursuers reclaimed.

When the case was first put out for advising (June 19, 1835), the Court, considering the general point involved in it, as to the effect to be given to a foreign decree when founded on for execution, to be one of great importance, ordered a hearing.

*Argued for the Pursuers:—*

The rule of law applicable to the present question is thus laid down by

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witness for the pursuers, he produces *the very account* upon which he had libelled his unfortunate action at St Croix in 1820; and, after swearing generally that it was correct, proceeds, in the rest of the deposition, to explain and maintain the whole of the different items of which it is composed; and so makes out, *by his own oath*, that the balance then unsuccessfully claimed by him of 3245 dollars was notwithstanding justly due. The account is engrossed, first at page 81 of the exemplification, as part of the St Croix decree, and again at page 106, as exhibit No. I. produced at Eivers' deposition in the Chancery of New York. The two copies are verbatim et literatim the same, and the last as well as the first bears date at St Croix, 24th January, 1820, being the very date of instituting the action in that island. To the Lord Ordinary it appears incomprehensible how, *without any reference to oath*, the single and unsupported deposition of a party to the verity of a claim, which, after full investigation, had been totally rejected by the decree of a competent Court, should, though receivable, be held *as better proof of the fact* than that final and unchallenged decree.

"3d, The points to which the Lord Ordinary wishes the parties to speak at next calling are,—1st, The pursuers to state and explain what *further evidence*, beyond the deposition of Eivers and relative accounts, was produced to the Chancellor at New York, and how such evidence (if there was any) is to be recovered. 2dly, To state and explain what further evidence *they can now bring* in support of their decree, and to rebut the effect of the judgment at St Croix in 1821. 3dly, The defender to be farther heard (if he shall so desire) upon his pleas, that the Chancellor of New York *had no jurisdiction* over him after Eivers ceased to be a co-defender—his prorogation of the jurisdiction being only on the supposition that *he* was to continue a party, and, consequently, not to be made a witness against him—and on this plea, that the St Croix decree was truly *res judicata* in such a case as this, even as against the pursuers. 4thly, The defender to explain farther what he offers to prove as to the extinction of the pursuers' claim against him through lapse of time, supposing it otherwise good. 5thly, To state what farther proof, beyond the St Croix decree, he is now ready to bring in support of his defence."

Lord Braxfield in *Watson v. Renton*,<sup>1</sup> and the course of recent decisions No. 14  
 has tended practically to fix the point in conformity with his opinion:— Feb. 9, 18  
 “ I have a *res judicata* in England freeing me from a demand; I come Southgate  
 to Scotland; can I be taken up there on an action upon the same ground? Montgomerie  
 No. A *res judicata* is good all the world over. The Courts here have  
 no right to review this final judgment. On the other hand, if I want  
 execution on an English decree, the other party cannot defend himself  
 against it, otherwise than by showing that the decree is unjust by the law  
 of England. If the decree be liable to review, it must be reviewed in  
 England. If there be a judgment in the last resort, it can go no farther.  
 A man cannot be forced to go through every country in Europe with his  
 defence.” Unless it can be shown by the defender that there is some-  
 thing objectionable in a foreign decree founded on for execution, either  
 with reference to the authority of the Court by which it was pronounced,  
 the mode in which it was obtained, or the matter to which it relates, it  
 would be inconsistent with general principle, and contrary to authority  
 to refuse it effect, or examine the grounds on which it rests.<sup>2</sup> There is  
 great practical difficulty in the way of the application of a contrary prin-  
 ciple; a foreign judgment being generally founded on the law of the  
 country where it was pronounced, by which law it must be tried, it is  
 impossible to suppose that better evidence can be had than the judgment  
 itself, of its being according to law and justice: And the same holds,  
 when the judgment rests on the ground of certain facts having been con-  
 sidered as legally established in the foreign court; for the facts of the case  
 (the legal meaning of the expression) must depend essentially on the law  
 of evidence peculiar to the foreign state, and the party called to support  
 his decree may besides be unable to get at the original evidence. The  
 view according to which a foreign judgment is to be regarded as afford-

<sup>1</sup> Jan. 21, 1792, *Bell's Cases*, p. 107.

<sup>2</sup> Voet, *de re judicata*, § 41; Huber in *rat. ad leg.* 75, *De Jud.*

(1. *Scotch Cases*).—*Goddart v. Swynton*, Dec. 3, 1713, M. 4533; *Hamilton v. Dutch East India Company*, July 24, 1731, M. 4548; *Wilson v. Brunton*, Jan. 7, 1756, M. 4549, and 5 Sup. 841; *Laycock v. Clark*, July 22, 1767, M. 4554; *Johnston v. Crawford*, Dec. 13, 1776, M. 4544; *Wedderburn v. Keith*, 1760, not reported; *Brown v. Welsh*, Feb. 16, 1808, *Session Papers*; *Chitty v. Inverarity*, 1810 (not finally decided), Lord President Hope's Notes, and *Session Papers*; *White v. Halyburton*, 1818, Lord President's Notes; *Leith v. Hay*, Jan. 17, 1811, F.C.; Findlater, reported in a note to preceding case; *Sinclair v. Fraser*, July 14, 1768, as in the *Appeal Cases*.

(2. *English Authorities*).—*Houlditch v. Lord Donegal*, 1834, 2 Clarke and Fenelly's Reports (the terms of the judgment being in the House of Lords' *Appeal Cases*), and 1 Lloyd and Gould, 82; *Martin v. Nichols*, April 30, 1830, 3 Symons, 448 (where all previous authorities reviewed by Vice-Chancellor Shadwell); *Kennedy v. Lord Cassilis* (note), 2 Swanston, 323; *Calvert v. Beaumont*, 7 Darnl. and East, 523; *Molyneux*, 2 Camp. 502; *Henley v. Soker*, 2 *Law and Eq.* 153; *Aligou*, 4 Tyr. at p. 758 (Justice Park's dictum as to *Mar-*  
*Starkie on Evidence*, l. 228.

40. ing *prima facie* evidence in favour of the party holding it, and throwing  
 837. the onus probandi on the other side,<sup>1</sup> is liable to the same objections;  
 R v. for example, taking the case of a party pursuing a declarator founded on  
 Inola. a decree of absolutor obtained in a foreign Court, the onus remains here  
 exactly as it was in that Court, and the party has no benefit from being  
 possessor of the decree. But, although it ought not to be reviewed on  
 the merits, the *regularity* of a foreign judgment is a proper matter to be  
 examined into; and it is probably in this sense that most of the autho-  
 rities, according to which a foreign decree is held to be examinable, are  
 to be understood: if, for instance, there is any circumstance in reference  
 to the proceedings in the foreign court, which is alleged to render the  
 judgment null, according to the law of the country where it was pro-  
 nounced, and by reason of which it is said that execution could not there  
 have passed upon it, an enquiry into the formality of the judgment would  
 be competent and proper.

The decree in the present case is perfectly regular, and has all the  
 requisites of a complete foreign decree; the defendant, *Montgomerie*,  
 having made appearance in the cause voluntarily and deliberately,—the  
 Court of New York being the proper tribunal for trying the question,—  
 and the judgment being final, as no appeal has been taken to the Supreme  
 Court of the United States. The specialties founded on by the Lord  
 Ordinary in the second part of his note as going to impugn the decree  
 are not such as can have that effect. The judgment in question therefore  
 being regular and complete, the general rule as above laid down ought to  
 be applied, without regard to the hypothetical limitations thereof referred  
 to by the Lord Ordinary in the first part of his note, which are not recon-  
 cilable either with the general views of jurists or with the course of deci-  
 sions. The objection to a foreign decree when founded on by way of  
*action* receiving effect, while yet effect is given to it when pleaded by  
 way of *defence* rests on no solid principle; and the distinction taken by  
*Kames*<sup>2</sup> between a decree absolutor and a decree condemnatory is equally  
 baseless. The sentence of a competent court, by which both parties are  
 equally bound, should be equally available to the one party and to the  
 other; and it can scarcely be contended that a judgment should be merely  
*prima facie* evidence for a party who endeavours to recover his debt by  
 way of action, but should be conclusive in his favour, if he uses it as a  
 defender by way of set off. According to the whole analogy of the law  
 of Scotland, which so far deviates from the Roman law, there is no such  
 distinction recognised as that which must be contended for by the defen-  
 der, between the *actio et exceptio rei judicatæ*.

*Argued for the Defender:—*

<sup>1</sup> As held by the House of Lords in *Sinclair v. Fraser*, M. 4542.

<sup>2</sup> *Principles of Equity*, III. 8, 6.

There are no grounds either in the law of Scotland or in international law for the position taken up by the pursuers that a foreign decree, however pleaded, if formal and regular, is not traversable either on fact or law; but the rule as laid down by the House of Lords in 1771, in the case of *Sinclair v. Fraser*, has been ever since recognized as law, viz. that such decree when pleaded by way of action affords only *primâ facie* evidence of a debt and is examinable. This is consistent with principle, for admitting the justice and equity of the rule *res judicata pro veritate habetur*, so long as it is applied to the decrees of one state inter se, it cannot apply to foreign decrees, so as to render it incumbent on the courts in this country in all cases to put in execution what may be essentially unjust or contrary to the standard of natural right adopted by civilized states. This rule is modified by a distinction now of long standing between foreign decrees founded on by way of action, and pleaded by way of exception; no examination of the decree being competent in the latter case.<sup>1</sup> And the grounds on which the distinction is admitted are sound, for when the *exceptio rei judicatæ* is pleaded, the Court are not asked to exercise any active power, but only not to review the judgment of the foreign court; and in giving effect to the plea, the Court does no more than uphold a decree pronounced in the forum originally chosen by the party who wishes to set it aside. In the case of a foreign *res judicata* brought to the courts of this country for execution, the decree is reviewable, according to the precedents both in Scotland and England;<sup>2</sup> though, in a question such as the present, the law of England ought not to be of great authority. The exceptions which are admitted to the general rule do not trench upon it, but only go to show that great weight is given to the foreign court having been in all respects *forum compe- tens*, and that, in certain cases, it is so difficult to examine a foreign decree, that the Court absolutely refuse to allow it. Thus, judgments of the Courts of Admiralty are not examinable, such courts being of co-ordinate jurisdiction throughout the whole of Europe; and an interference with the sentences of the respective Admiralty Courts being a matter entering deeply into the politics of the different states. So also, where courts have a peculiar and appropriate jurisdiction, as in questions

<sup>1</sup> *Erskine*, IV. 3, 4; *Kames*, ut supra; *White v. Haliburton*, sup.; *Wilson v. Brunton*, sup.; *Laycock*, sup.; *Hamilton v. Dutch East India Company*, sup.

<sup>2</sup> *Cochrane v. Earl of Buchan*, 1698, M. 4545; *Goddart*, supra, and *Robertson's Appeals*, 162; *Edwards v. Prescott*, 1720, M. 4535; *Sinclair v. Fraser*, sup.; *Brown v. Welsh*, sup.; *Chitty*, sup.; *Findlater*, sup.; *Brown v. Brown's Trustees*, May 27, 1825, ante, IV. 41 (new ed. 43), and 4 W. and S. 28; *Houl- dach* (Lord Chancellor's judgment), supra; *Walker v. Witter* (Lord Mansfield's dictum), 1 Douglas, 1; *Philips v. Hunter*, 2 Henry Blackstone, 415; *Tarleton v. Tarleton*, 4 Maule and Selwyn, 12; 2 Swanston, 325 (Lord Nottingham's judgment); *Newland v. Horsman* (note), 1 Vernon's Reports by Rathby, 20; *Mes- sin v. Lord Massareene*, 4 Term Rep. 493.

40. of marriage and status,' and in particular questions under the English or  
 887. Scottish Bankrupt Acts, and also in the instances referred to in the  
 1 v. Lord Ordinary's note, the Court, having particular regard to the com-  
 petency of the forum, would hold the decree as standing on grounds so  
 good, that it is impossible to suppose it could be placed upon better,  
 and therefore ought not to be examined. These exceptions, so far from  
 trenching on the general rule that foreign decrees are examinable, go to  
 destroy the principle contended for by the pursuers. In the present  
 case, the decree founded on comes under none of the exceptions which  
 have been mentioned; but, looking to the circumstances under which it  
 was obtained, and the irregularity and injustice appearing *ex facie* of  
 the proceedings, it does not afford even *prima facie* evidence that the debt  
 sued for is due by the defender.

The cause was this day put out for advising.

LORD MEDWYN.—The present question is one of rare occurrence, and proper to be deliberately discussed. By the act 1487, c. 105, the King and Council are declared to be the peculiar court, for the causes of "strangers of uther realmes." The Court of Session succeeded to this jurisdiction, and a particular day of the week was assigned to such causes. Foreign contracts were sustained and enforced when according to the *lex loci contractus*.<sup>2</sup> So, on the principle of contract, assignment to a trust-deed for creditors abroad was held effectual to preclude arrestments used in this country against the debtor.<sup>3</sup> In like manner, that species of contract by which parties submit a dispute to arbiters is sustained, and their award enforced and given effect to without examination.<sup>4</sup> This is a strong advance towards supporting and giving effect to the decree of a foreign court.

When a foreign judgment is pleaded on in another country in which the opposite party is now resident, it may be of different descriptions; either a decree condemnator, founded on in order to be enforced, or a decree absolutor pleaded in defence, or a decree condemnator already carried into effect. The present falls under the first class. Since a foreign contract or a decree-arbitral is enforced, if regular according to the *lex loci*, and not inconsistent with morality or religion, it may be thought to follow that the decree of a foreign court should also in every case be enforced, as founded on the quasi contract of *litiscontestation*. But we find that Kames, Bankton, and Erskine, though on somewhat different grounds, all say that, before a court can be called on to enforce a foreign decree, it is entitled and bound to examine the decree, in case there should be ground in law or equity for refusing to enforce it as unjust on the merits; and this in accordance with the decision in *Sinclair v. Fraser*, confirming what had been previously found in the cases of *Goddard* and *Edwards*.

<sup>1</sup> Lord Stowell, in *Sinclair, v. Sinclair*, 1 Maggard's Consistory Reports, 297: and, accordingly, Lord Hardwicke and other English Judges adopt the exception while recognising the general rule.

<sup>2</sup> Fortoun, 1610, M. 4429; Lamington, 1627, M. 4443, &c.

<sup>3</sup> Rhones v. Parish, Aug. 6, 1776, M. 4593.

<sup>4</sup> Johnston, Dec. 13, 1776, M. v. Arbitration, App. No. 1.



It is not on the principle of contract, then, that a foreign decree comes to be regarded in the courts of another country. In the case of *Chitty*, in 1810, which is the last judgment on the point in dispute, Lord Newton found, "that a decree of the Court of Madras was *prima facie* evidence of the debt libelled on, but that it was competent for the defender to impeach the same upon the head of iniquity." This interlocutor was adhered to by the Second Division of the Court, but, on a reclaiming petition being given in, a hearing was ordered, which never took place, the defender having returned to Madras.

Where a foreign decree is pleaded upon in defence, giving rise to the *exceptio rei judicatæ*, it is clear law that we ought to give effect to such decree without attempting to review it on the merits. Even here, however, an exception has been admitted, that if, on the face of a judgment *absolvitor*, it appear to have been given because the proper document was not before the court, but only a copy, such judgment will be no good defence, if the original document is produced and founded on.<sup>1</sup> But where no such objection occurs, it appears, from a series of decisions, commencing with the case of the Dutch East India Company, and concluding with the case of *White*, in 1820, that such decrees afford the plea of *exceptio rei judicatæ*, and are not examinable. The interlocutor of the First Division in the last-mentioned case is instructive:—"Find that the final decree-*absolvitor* and the final and executed decree-condemnator pronounced by the State of South Carolina, which court was a proper court for the trial of the interests of the competing parties, and to which court the pursuer did herself carry her claim of succession, are final and conclusive decrees between the said parties, and that it is not competent for this court to enquire into the grounds or reasons of the said decrees, or to open up the said decrees and try the same question again, between the same parties, in respect of an allegation of iniquity."

I am not disposed to think with the pursuers, that there is no sound principle in the distinction which is thus established between being called to enforce a foreign sentence, and sustaining it in defence, when it is an *absolvitor* or a decree already put in execution. In the latter case, we are not asked to grant the exentorials of our law to invert the state of possession. Each party remains in the state in which they have been placed by a court having power to adjudicate their rights, to which the pursuer resorted for redress, and which court has not seen cause to give the redress which was asked. But if a court in one country is required to enforce a decree pronounced in another country which ordains the defender to pay or perform, it seems fit that the court which, not *ex necessitate* but *ex comitate* only (for it cannot be on the doctrine of contract between the parties), interferes with the view of doing justice, should enquire if what is to be enforced be just, otherwise the court may be enforcing what is unjust; and so the law seems to be fixed, that a foreign decree is not to be enforced if it can be impeached on the ground of irregularity or iniquity.

But the rule as to the *exceptio rei judicatæ* will not account for every case where a foreign decree is not examinable.

Certain exceptions are admitted; but still I think they do not trench upon the general rule. Such are Admiralty decrees, which, on grounds of international law, are of great authority among commercial states; judgments in cases of pecu-

No. 1.  
Feb. 9, 18  
Southgate  
Montgome

<sup>1</sup> *St William Binning v. Lord Carse*, 1688, 12232.

140. liar jurisdiction, such as questions of status—the reason for the last, if a well  
 1697. founded exception, being to be found in the admitted expediency of having such  
 1827. questions settled once and for ever in the courts to which the parties were at first  
 1840. amenable, and also in the obedience which in former times was given to the eccle-  
 siastical courts throughout Christendom in matters within their jurisdiction. None  
 of these exceptions embrace the present case.

In an international question of this kind, it is important to consider how the law stands in other countries. The law laid down by Lord Mansfield in *Walkerv. Witter*, that “foreign judgments are a ground of action every where, but they are examinable,” and by Chief-Justice Eyre and Justice Buller, as noticed in *Phillips* (I. p. 349–350), seems to be supported by Lord Brougham in the case of *Hemditch*, and recognised as the law of England. The American law adopts this view likewise,<sup>1</sup> in so much that it required an act of Congress in 1790 to make the judgments of the different State Courts have faith and credit in the other States, which prior to that they had not. France, in the last revision of her code, has altered a former ordinance, which expressly declared that judgments of foreign courts could not receive execution in France. They may now be executed in France, but they are examinable.<sup>2</sup> It does not appear that greater effect was given to the judgments of the courts of the respective States under a foederal government in Germany and the United Provinces.<sup>3</sup>

But while thus concurring with the Lord Ordinary that this decree is examinable, it seems difficult to say how far and to what extent it is to be so. I do not see that precise rules on this subject have any where been laid down. The Lord Ordinary seems inclined to give much less effect to the judgment in this case than I am disposed to do. (His Lordship then referred to the American proceedings above mentioned.) While I agree, therefore, with the first part of the Lord Ordinary’s interlocutor, I cannot concur in the second finding.

LORD MEADOWBANK.—I have felt the difficulty of this question, and after a consideration of the authorities, have come to the result that neither in England nor Scotland has the general principle been definitively settled. The point was fully argued in the case of the Duchess of Kingston, decided three years after the decision in *Sinclair v. White*, when the House of Lords, after taking the opinion of the twelve Judges, waived the general question, and decided the case upon specialties. And in *Houlditch v. Lord Donegal*, we have Lord Brougham declaring that if the case had required to be decided on general grounds, he would have called in the twelve Judges. Looking to the authorities in Scotland, and especially to the Lord President’s opinion in *Chitty’s case* in 1810, when a hearing on the point was ordered but never took place, the law does not seem to be more settled here.

LORD GLENLEE.—I have much the same opinion as Lord Medwyn. It is plain that the pursuer’s plea that this decree cannot be impeached at all, but must be held *pro veritate* is not well-founded. As to the other view, that it is to be taken as *prima facie* evidence and to stand good if no grounds are shewn for opening it up, it will be difficult to fix a general abstract rule for every case, and I shall abstain

<sup>1</sup> 2 Kent. 118.

<sup>2</sup> Story, Conf. Leg. 514.

<sup>3</sup> Haas de Exc. Rei. Jud. § 12; Groenwegen de Leg. Abrog. p. 118.

ing down the law in precise words, holding by the maxim "*periculosa est jure definitio.*" I hesitate as to agreeing with some of the cases stated  
 ord Ordinary. In certain cases, no doubt, a foreign decree may be opened  
 am inclined to think there would be no justice in doing so in the present  
 No. 140.  
 Feb. 9, 1837.  
 Southgate v.  
 Montgomerie

The first thing to consider is the nature of the pleas. (His Lordship referred to the facts of the case in connection with these pleas.) Upon this, I see as yet no grounds for opening up the decree in this case, though no doubt that a foreign decree may be examined.

JUSTICE-CLERK.—This question appeared to us to be one of international law. In addition to the able cases for the parties, we have had an elaborate argument from the bar. The object I chiefly had in view was to form my opinion on the general question, and on that alone, I am now to state my opinion, but not the merits of the case. I was desirous of knowing whether there had been any change in the recent decisions from what was formerly held to be law in regard to a foreign decree when pleaded in this country to enforce a claim. If it were to be held as fixed that the law laid down in the case of *Fraser v. Fraser* had been departed from in England, I am free to admit that the House of Lords might be disposed to give great weight to such departure; but I have not been able to discover the evidence of this alleged alteration in the law. In that House of Lords declared "that the judgment of the Supreme Court of Scotland ought to be received as evidence *prima facie* of the debt, and that it lies on the defendant to impeach the justice thereof;" and the principle so fixed, which is in perfect conformity with the opinion of Lord Mansfield in *Walker v. Witter*, and which has been held to be law by Kames, Bankton and Erskine. Whether it might not be a more convenient rule to hold that the decree of a foreign Court, a correct extraction of which is produced, should in all cases have effect given to it as res judicata, I shall not say; but no such rule has ever been adopted in Scotland, and there may have been cases leaning that way, yet there is no such series of authorities in favour of this view, to which, as a judge, I am bound to bend. I add, Mr Story, in his valuable work on the conflict of laws, after going through the authorities, and advertent to Lord Kenyon and Lord Ellenborough having indicated a different opinion from that of Lord Mansfield, does say,—“There is much reason to contend that the present inclination of the English courts of common law is in the conclusiveness of such judgments,”<sup>1</sup> but I cannot think the decided authorities establish that any such departure from the former state of the law has yet taken place. The case of *Tarlton v. Tarlton*<sup>2</sup> in 1815, will be found, when examined by no means to go so far as is supposed. The plaintiff there had been bound, by fear of a sequestration, to pay a certain sum, for which he had held indemnity from co-partners; and when he sued for his relief, the defendant, one of the partners, wished to shew that a decree in Granada, which had fixed a debt on the co-partners, and which that plaintiff had been compelled to pay, was erroneous, the account having been incorrectly taken. But this was not allowed: Lord Ellenborough said,—“I thought I did not sit at *nisi prius* to try a writ of habeas corpus upon the proceedings in the court abroad. The defendant had not attended to the proceedings, and should have appeared and made his defence. The plaintiff, by this neglect has been obliged to pay the money to avoid a sequestra-

140. tion." And Justice Bailey observes,—“How is this plaintiff to be called upon to unravel these proceedings? as between the parties to the suit the justice of it might be litigated, but as against a stranger it cannot. The defendant was a party to the suit, and by his not appearing has concurred in suffering the plaintiff to be damaged.” Now when the nature of this case and the opinions are considered, it cannot be held as decisive against the doctrine of Lord Mansfield in *Walker v. Witter*. In the former case in *Durnford and East*<sup>1</sup> (1791) the rubric is, “The defendant having suffered judgment by default in an action of assumpsit on a foreign judgment, the Court would not refer it to the Master to see what was due, and give the plaintiff leave to order up final judgment for such sum without executing a writ of inquiry.” Mr Justice Buller said,—“Though the debt will lie on a foreign judgment, the defendant may go into the consideration of it.” No doubt, in the late case of *Martin v. Nichols*, decided by the Vice-Chancellor in 1830, his Honour concludes a very full opinion by saying,—“The old authors and the opinions of Lords Ellenborough and Kenyon, greatly overweigh the proposition to be extracted from the judgment of Lord Mansfield, and the expressions of opinion by Mr Justice Buller. If I were to allow this bill to stand, I should be in effect saying, that the judgment obtained in Antigua may be overruled in the Court of Common Pleas.” But this is a single judgment, and was not reviewed by the Lord Chancellor. It seems to have been brought under the notice of Lord Brougham in the case of *Houlditch*, where his Lordship thus expresses himself, apparently with reference to it:—“In *Martin v. Lucy* (which I suppose to be the same case) the Vice Chancellor pronounced a decree which I could not affirm; but that at least shews that it might have been made a ground of proceeding, though it was not conclusive.” Although, therefore, in *Houlditch v. Lord Donegal*, the decree of the Chancellor of Ireland refusing to entertain or give any effect whatever to the order of the English Court of Chancery was reversed, yet it is manifest that Lord Brougham's opinion on the general question does coincide with those of Lord Mansfield and Mr Justice Buller, and the principle laid down in *Sinclair v. Fraser*. The recent decisions in our own Courts, which have been referred to, do not appear, as far as we have evidence of them, to contravert this principle. I think it is quite clear no different principle was established in the case of *White v. Halyburton*; the parties having mutually chosen the American forum, and judgment having been thus obtained and extracted, it fell necessarily to have effect given to it here. I see nothing in the cases of *Brown*, or *Chitty v. Inverarity*, that can be viewed as at all deciding this point. In the latter, so far as it went, the Court confirmed the decision in *Sinclair's* case. Thus I cannot hold that there has been any alteration in the law as formerly settled in accordance with the principle laid down by the Lord Ordinary in the first part of his interlocutor. Whether, while holding that the decrees of the Court of New York cannot be enforced in terms without the defender being heard in objection to it, his Lordship has not allowed too wide a field of examination to be gone into, may be questioned. Till the general principle is fixed, I hold it to be premature to enter on the discussion of the objections to the decree already stated by the defender. I cannot, therefore, agree with the latter part of the Lord Ordinary's judgment, though arriving at the same conclusion with him that the decree is examinable.

<sup>1</sup> 4, 493.

THE COURT pronounced the following interlocutor:—"Adhere to the inter-locutor of the Lord Ordinary, submitted to review, in so far as his Lordship finds 'that the judgment libelled of the Court of Chancery of the state of New York, being a foreign decree, is not of the same authority as a final decree of the Courts of this country, and can only be considered as affording prima facie evidence of the truth and justice of the claims of the pursuers;' but recal in hoc statu that interlocutor quoad ultra, and remit to his Lordship to hear the defender on his objections to the judgment of the foreign Court, and reserve all questions and claims of either party to expenses of process for his Lordship's determination."

No. 140.

Feb. 10, 1837.

Wilson v.  
Struthers.

THOMAS LEHURN, S.S.C.—WILLIAM PATRICK, W.S.—Agents.

JOHN WILSON and SON, Pursuers.—*Rutherford—Wilson.* No. 141.  
BERT STRUTHERS and SON, Defenders.—*D. F. Hope—Monteith.*

*of—Judicial Remit.*—Where a remit had been made by a sheriff to a per-skill, in which the parties acquiesced, though without expressly consenting, afterwards had the referee examined as to the meaning of his report;—Held they were precluded from afterwards entering upon a proof of the facts which the subject of the remit.

the year 1829, the defenders, Struthers and Son, ordered a quantity of wire-cloth from the pursuers, Wilson and Son, conform to a certain pattern. Struthers refused to pay the price of the wire-cloth when demanded, alleging that it was not according to the pattern. A reference made to arbiters, which came to no result, and thereafter Wilson brought an action before the Sheriff of Lanarkshire for payment of the price of the cloth. The sheriff, before answer, remitted to Mr Andrew Lidbrassfounder, to report whether the wire-cloth was in conformity with the pattern.

Feb. 10, 1837.

2<sup>d</sup> DIVISION.  
Lords Jeffrey  
and Cockburn.  
T.

The pursuers neither represented against the interlocutor ordering the remit, nor attempted to advocate on the mode of proof. The referee proceeded under the remit, and reported specially to the sheriff, that the wire-cloth was not according to the pattern. He was afterwards, at the instance of Wilson, appointed to be examined on the subject of his report at one, if not more, of the meetings for which purpose, both parties were present. Thereafter, Wilson applied to be allowed a proof of his averments as to the article furnished having been conform to the pattern, but the sheriff dismissed the action, with expenses, and the wire-cloth was subsequently sold in the course of a multiplepoinding raised in pursuance of Struthers by Wilson's agent.

Wilson and Son then brought an action against Struthers and Son, to have the sheriff's judgment reduced and set aside, on the ground that they had not been allowed a proof of their averments in the inferior

141. court, and had been improperly held by the sheriff to be foreclosed by the remit to Liddell.

1837.

In defence against the action, it was pleaded:—

1. The judgment of the sheriff is in all respects valid, it having been both competent and regular for him to make the remit to Liddell, and afterwards to take his evidence on oath.

2. Supposing the defenders to have had a right to object to the course pursued by the sheriff, they failed to do so either by representing, or by advocating upon the mode of proof; and, on the contrary, acquiesced in the remit, and homologated it by applying to have Liddell re-examined on the subject of his report, of which re-examination they were prepared to take the benefit.

3. As no objection was made to the remit at the time, and the parties acquiesced in the proceedings under it, it must be taken that both consented to be bound thereby, and it would be contrary both to legal principle and to good faith to allow the defenders to depart from it and enter on proof of facts which were the subject of the remit.<sup>1</sup>

The pursuers answered:—

It is not yet a settled point, though a party in the inferior court should consent to a remit, whether this will bind him, if, on coming into the Court of Session, he should be otherwise advised; in the present case, the pursuers ought not to be bound, as they gave no valid consent, and, in the circumstances of the case, there is no ground to bar them from opening up the sheriff's judgment and resorting to other proof.<sup>2</sup>

The Lord Ordinary (Jeffrey), before answer, "allowed the pursuers to examine Liddell farther as to the import and bearing of his report;" and, particularly, to put to him two questions which the sheriff had refused to allow to be put. The result of this re-examination was likewise unfavourable to the pursuers. Thereafter the Lord Ordinary (Cockburn) repelled the defences, and reduced in terms of the libel, adding the subjoined note.\*

<sup>1</sup> *Dickson v. Monkland Canal Company*, 1 W. and S. 636 (Lord Gifford's opinion, p. 655).

<sup>2</sup> *Duke of Buccleuch v. Queensberry Executors*, May 17, 1827, ante V. 632.

\* "Assuming that remits, not expressly consented to, but acquiesced in, are as conclusive in an Inferior as in the Supreme Court, still the Lord Ordinary cannot bring himself to hold the report as decisive in the very special circumstances of this case;—for, 1st, The main fact on which remits have been held to have been acquiesced in, has been not merely that they were not objected to, but that they were *completely followed out* by the party having proceeded before the reporter. But here no such thing took place. The parties differ as to the exact nature of the proceedings; but even from the account given by the defenders themselves, it is plain that there was no fair discussion, after any due notice, before the referee. The notice directed by the sheriff to be

**LORD JUSTICE-CLERK.**—I had doubts of this interlocutor at first, and they were not been removed. The question is, whether, in regard to small causes which have been dealt with in a certain way in the inferior courts, and where remits have been made, we are to disregard these proceedings? There has been always disposition on the part of this Court to give effect to remits. In the present case, the sheriff has thought that the most expedient course were to make a remit; which, certainly, there is no minute of consent on record, but there is likewise objection. It is clear that the proceedings under the remit were not *ex parte*. The sheriff received the report, which he caused Liddell to verify on oath. This is a circumstance not in the Monkland Canal case, which was a judgment to be effect, that when a remit has been made by the Court to a man of skill, no need at large as to the subject-matter of the remit will be afterwards allowed. His party then, having allowed the report to be given in and verified, next comes in to get quit of it. The Lord Ordinary suggests certain questions which are to be answered by Liddell, who is satisfied that there has not been a fulfilment of the contract of parties. It is also material to consider the impossibility of recovering the wire-cloth, which has been sold since the proceedings in question. Looking to the whole matter, therefore, I am for altering the interlocutor.

**LORD MEDWYN.**—This is an important case for the proceedings in inferior courts. Where a remit has been made, it is held that, if a party do not object, he is bound thereby. This party might have advocated as to the mode of proof, but he acquiesced. When he comes into this Court, he acquiesces once more, when he might have reclaimed against the interlocutor allowing additional questions to be put to Liddell. Because the farther examination of Liddell supports the sheriff's judgment, are we to reduce it? I agree with the chair therefore, and I am for altering.

**LORDS GLENLEE and MEADOWBANK** concurred.

THE COURT accordingly altered, sustained the defences, and absolved with expenses.

W. MARCES, W.S.—HUNTER, CAMPBELL, and Co., W.S.—Agents.

given was confessedly not given; and though it be said that one of the pursuers and his agent attended one meeting before the referee, it is not distinctly alleged that that was the occasion on which the merits of the case were discussed, and indeed it is admitted that a more nice examination (being the only factual one) afterwards took place. 2dly, When Mr Liddell was examined, in explanation of his report, the sheriff refused to put two questions to him, which were proposed by the pursuer. By an interlocutor pronounced in this action by Lord Jeffrey, 15th November, 1834, it was found that these questions ought to have been put, and they have been put since the case came into this Court. But it is thus fixed that the sheriff's judgment was pronounced upon evidence on which it ought not to have been rested. Considering these peculiarities, the Lord Ordinary thinks that the general rule about remits is not interfered with by withholding effect from this one, and that the justice of the case requires that it be not taken as decisive. Remits fairly gone into should be abided by, but there is no satisfaction in catching a party in them."

No. 141.

Feb. 10, 1837

Wilson v. Strathern



v. 142.

10, 1837.

OF C.

R.

SIR PATRICK WALKER, Pursuer.—*D. F. Hope—Anderson.*JAMES JOHN FRASER, Defender.—*Rutherford—Maidment.*

*Cautioner.*—A party having come under a cautionary obligation, which in terms and substance bore express reference to certain stipulations contained previous minute of agreement between the principal debtor and the creditor. Held to be relieved of the obligation in consequence of the stipulations having been without his knowledge contravened through the act of the creditor.

10, 1837.

DIVISION.

Jeffrey.

T.

THE estate of George Pentland of Perth was sequestrated in the year 1826; the sequestration was thereafter recalled and a trust-conveyance of the estate granted in favour of the defender Fraser and Charles Campbell Stewart, W.S., for the purpose of realizing the estate and discharging the claims on it. In 1831, a new arrangement was made and a minute of agreement entered into, whereby Fraser and Stewart agreed to transfer the whole trust-management to Messrs Sandeman and Paton as trustees; they, on the other hand, becoming bound to repay to Fraser Stewart whatever advances had been made by them for behoof of Pentland. By this agreement it was stipulated that the claims of these parties amongst each other should be settled and ascertained by Messrs Kinnear and Clephane, advocates, as arbiters; and that all claims and objections should be brought forward by the parties within three months from the date of the agreement, the party failing to do so being held to discharge his claim; and it was farther declared, "that in the event of the submission above mentioned proving abortive by any unforeseen circumstance so that no decree-arbitral shall be pronounced therein, it is agreed, the judgment to be pronounced by a court of law, on the failure of the submission, shall, to all intents and purposes, have the same effect in regulating the rights of the parties as a decree-arbitral." In the event of the submission proceeding and not being allowed to fall, it was declared "that in adjusting the claims betwixt the said James J. Fraser and Charles Campbell Stewart, or either of them, all commission and professional charges connected with the said George Pentland's affairs notwithstanding any docquets or discharges which he may have signed be still held open by the arbiters or oversman to examination and investigation, as if said professional charges and commission had never been docquetted or approved of." On the other hand it was provided that "in the event of no submission being entered into, or the same proving abortive, and the parties proceeding to settle their disputes at law, in that event the said docquets and discharges shall remain in all respects unaffected by this minute." It was also provided that Sandeman and Paton should grant a bond in security for repayment of advances made by Fraser and

for the sum of £6000, and for such additional sum as should be No. 142.  
 re; but it was conditioned that the granting of such bond should Feb. 10, 1887.  
 claim against Sandeman and Paton beyond the sum which the Walker v.  
 should, after an adjustment of all claims and questions under the Fraser.  
 ion, find to be legally due by Pentland. Sandeman and Paton  
 be entitled to make the same claims, and insist in all rights and  
 ns which Pentland could do, and without any consent from him  
 effect, and such rights and objections were not to be affected by  
 anting their bond in the character of trustees for Pentland.  
 rms of this agreement, to which it bore special reference, a bond  
 nted in favour of Fraser and Stewart by Sandeman and Paton.  
 being entertained of their sufficiency, it was attested by two par-  
 cautioners; and, this additional security being still held insuffi-  
 he sufficiency of the debtors in the bond and also of these cautioners  
 ewise attested by the pursuer Sir Patrick Walker, and Dr John  
 Robertson, who further bound themselves "as cautioners and  
 , subsidarie along with them," and "that they should imple-  
 d fulfil the whole obligations and conditions incumbent on them  
 he agreement mentioned in the bond." This obligation was under-  
 he day after the submission was finally executed by the parties.  
 fter a submission was entered into by Fraser and Stewart, with  
 and consent of Pentland, on the one part, and by Sandeman and  
 on the other part, to the gentlemen above-mentioned, the time  
 which the decree-arbitral was to be pronounced, being limited to  
 and a day. The submission was subscribed by Pentland. The  
 ade reference to the minute of agreement, declaring, inter alia,  
 n case of the present submission proving abortive by any unforeseen  
 stance, so that no final decree-arbitral shall be pronounced therein,  
 reed that a judgment to be pronounced by a court of law, on the  
 of this submission, shall, to all intents and purposes, have the same  
 n regulating the rights of the parties as a decree-arbitral." The  
 were by the deed empowered to prorogate. They accepted the  
 sion, and issued an order for claims, which Fraser and Stewart  
 o lodge. At the end of three and six months respectively from  
 e of the submission, these parties obtained prorogations for lodging  
 laims. Thereafter Fraser borrowed the deed of submission, grant-  
 eceipt therefor to the clerk, but failed, notwithstanding repeated  
 tions, to return it; whereby the submission expired. Fraser de-  
 to renew the submission on the ground that Pentland refused to give  
 sent. The ground of Pentland's refusal was subsequently stated  
 by Mr Fraser in a judicial pleading:—"Such is Mr Pentland's  
 sent to the laws of his country, that the prospect of all future ques-  
 ting buried, as it were, in a submission, was too much for his peace  
 and, therefore, to quiet his fears, the trustees were forced to

142. grant a positive obligation, securing to him the full benefit of a lawsuit in every question that might afterwards arise in the affairs of the trust."

Fraser and Stewart then raised an action of count and reckoning against Sandeman and Paton and the attesters of the bond, to have the amount of their claims ascertained, and payment thereof made to them. The credit of the parties to the bond, with the exception of Sir Patrick Walker and Dr Robertson having thereafter failed, and the trust estate having been attached by diligences at the instance of Fraser and Stewart, Sir Patrick brought an action of declarator against these parties, setting forth Pentland's trust-conveyance in their behalf, the minute of agreement in 1831, the bond following thereon, and the subsequent proceedings as to the submission, and alleging, inter alia, that the conditions and stipulations contained in the minute of agreement and the relative bond and cautionary obligation come under by him had not been adhered to, and that by the acts of Fraser and Stewart, his right of relief as against them, and the prior cautioners had been impaired without his consent, and concluding to have it found and declared that the pursuer was only cautioner subsidarie for Sandeman and Paton, and that Fraser and Stewart by their own acts had liberated the pursuer from all liability under the above-mentioned obligation, which was in consequence thereof extinguished.

Fraser pleaded in defence, inter alia, that both parties were equally bound by the stipulations in the minute of agreement to which the cautionary obligation in question bore reference; that the defender redeemed his obligation to submit by signing the submission, and as it was no part of the previous agreement that it should be renewed in case of falling, but was, on the contrary, specially provided, that in such event the defender's claim should be settled by a court of law, he was warranted in having recourse to legal proceedings for that purpose; and that in the whole circumstances of the case the action was unfounded.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note: \*—"Finds, I mo, That it was a condition of the agree-

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\* "There were several aftergrounds, on which the pursuer claimed to be freed from his cautionary obligation, as to which the Lord Ordinary has not thought it necessary to give judgment, though he is far from thinking that they might not, to a considerable extent at least, have been sustained. It was no doubt very plausibly urged by the defender, that the *State* annexed to the agreement should be considered as his *claim*, and that he was not therefore within the sanction of the provision, as to claims not lodged within three months. But the very particular terms of the *first* prorogation of that period, in which the sanction is anxiously repeated, and the admitted expiry of the second and only other prorogation, together with the consideration that Fraser was *in petitorio*, and, in the first instance, the only party by whom a *claim* could properly be brought forward, and that, after the submission was accepted, he was bound at all events to have exhibited, as a claimant, the

July, September, and November, 1831, and also of the relative No. 142.  
 which the pursuer, of the last of these dates, became a party, as  
 or attester for some of the prior obligants, that the claims of the Feb. 10, 1831  
 James John Fraser, and the state of accounts between him as Walker v.  
 the estate of George Pentland, and Messrs Sandeman and Fraser.  
 succeeding trustees, should be discussed and determined in a  
 to Messrs Keay and Clephane, advocates; and that it was

touchers of the first large article of £8900, throw a very considerable  
 the validity of this defence.

the arrestments, the Lord Ordinary is of opinion that, though the  
 could not have been compelled to have used them, he was not entitled,  
 were once laid, to discharge them (especially for a benefit to himself in-  
 without the consent of the cautioner; and that, upon this ground also,  
 would be entitled to be freed from his cautionary, though only (he is  
 think) to the extent of what was actually covered by such arrestments.  
 from the schedules produced, that they did not cover debts due to the  
 trustee merely, but extended also to all debts owing to him as an indi-

the defence mainly relied on by Fraser, viz. That the parties for whom  
 was bound were as much to blame for the falling of the submission as  
 that he is therefore barred from founding, as against the defender, on  
 on neglect, the Lord Ordinary is satisfied that it is entitled to no atten-  
 It is not true, in point of fact, the defender and Pentland (on whose  
 devoted attachment to the laws of his country he founds in so judi-  
 cial manner), being evidently resolved from the beginning to defeat the submis-  
 the principals of the pursuer, or at least one of them (Bennet), were  
 to go on with it. 2d, Any obligation the pursuer may have come  
 his principles should go on with the submission, was plainly an obliga-  
 the defender alone had a right to enforce, either against principals or cau-  
 even if the fact had been that he had merely released the principals  
 obligation, it would plainly have been quite incompetent for him to have  
 founded on it as still subsisting with regard to the cautioner. 3d, The  
 itself is palpably irrelevant in the circumstances of the case;—since the  
 of the principals in any proceeding of the opposite party, by which,  
 knowledge or assent of the cautioner, his obligation is varied to his  
 must have the effect of entirely releasing him, although it imported a  
 the part of such principal of the precise obligation which the cautioner  
 himself he should perform. This indeed is always the case in the  
 instances where cautioners are freed by the creditors giving time, or other  
 to the principal, at his request, but without the cautioner's consent.  
 principal, in consequence of such indulgence, does not pay at the time  
 fixed, he plainly fails in that which the cautioner had undertaken he  
 But when this is by consent and arrangement with the creditor, it is  
 subjecting the cautioner, that it liberates him *in toto*. Finally, There  
 been some pretext for thus founding on the alleged participation of the  
 principals in the abandonment of the submission, if they had been the  
 movers in that operation, and if the defender had been all the while com-  
 mending them to go on with it,—though, even then, the Lord Ordinary  
 thinks that he could not have come against the cautioner, unless (having  
 opportunity to do so) he had given him notice of the principal's mal-  
 and afforded him the means of forcing them to do their duty, while it was  
 The actual case, however, is manifestly, and beyond all doubt, ex-

[ 142. the true meaning and purport of the said agreement, that the parties thereto should be bound, not only to enter into such submission without delay, but also to do all that in them lay to have their said claims and accounts adjusted and finally determined by the said arbiters : Finds, 2do, That this submission having been finally executed by these parties on the day before the pursuer became a party to the said bond and agreement, and having been subsequently accepted by the arbiters, must be held to have been in contemplation of the said pursuer, and relied on by him at the time of his so becoming a party to the said bond ; he having a plain and important interest in having the said accounting determined under that submission, rather than in a court of law : Finds, 3tio, That it is sufficiently instructed that the defender Fraser did not only wilfully and knowingly allow the said submission to expire without any decret-arbitral being pronounced, or any proceeding being had with a view to such decret, but did actually and intentionally use means to obstruct any such proceedings, and to bring about the expiration of such submission, without the knowledge or consent of the said pursuer : Finds, 4to, That the alleged refusal or unwillingness of the said George Pentland individually to go on with the said submission, is no relevant defence of this conduct on the part of Fraser, in respect that the said Pentland was no necessary party to the submission, and that his individual refusal to concur in the proceedings under it would not have affected the validity of such proceedings, it being expressly provided by the 12th article of the original agreement that his consent should in no respect be necessary to the adjustment of the claims and accounts of the parties to that agreement : Finds, 5to, That there is no evidence that the pursuer at any time approved of the abandonment or defeasance of the said submission, or of the action at law subsequently raised by the defender Fraser in this Court, or in any way forfeited or abandoned his right to found on the improper neglect and discontinuance of the said submission : And therefore, and on the whole matter, Finds that the pursuer is liberated from the obligations incurred by his subscribing the said bond as attestor or cautioner for the other obligants : Repels the defences for the said James John Fraser, and decerns and declares in terms of the conclusions of the libel : Finds expenses due."

Fraser reclaimed, and contended that the principal ground on which the interlocutor proceeded was that the submission had not been brought to a close, and that its failure was to be attributed to the defender ; but the deed empowered the arbiters to grant prorogations, and supposing the submission to have been retained by the defender, they might have prorogated on a paper apart, which was matter of common practice, and which they never were required by any of the parties to do ; and thus the submission had not fallen by the fault of the defender but by the negligence of all parties ; that Pentland was admitted to have been a party to the

abmission, and if it should be said that after it had fallen he was bound to have renewed it, and yet refused to do so, the defender was not called upon, nor was it his duty to take that step.

No. 142.  
Feb. 10, 1837  
Walker v.  
Fraser.

The pursuer answered, that, looking to the connexion between the minute of agreement, the bond and obligation in question, he was not bound thereby, unless all the provisions in the minute were acted upon: but the settlement of the accounts by arbitration therein contemplated had been rendered abortive by the defender retaining the deed and refusing to return it that the submission might be prorogated in the usual form, and this could not be considered an "unforeseen circumstance" such as to justify a recourse to judicial proceedings—and that the pursuer was liberated from his obligation by reason of the conditions in reference to which it had been undertaken being without his consent extravened.<sup>1</sup>

**LORD JUSTICE-CLERK.**—I have come to a conclusion in accordance with the Lord Ordinary's interlocutor. Sir Patrick Walker, by the attestation in question, became bound as cautioner for implement of the bond. We have to look then to the obligations laid on the parties by this bond, which bears to have been granted with reference to certain conditions embodied in the previous minute of agreement. Whatever these conditions are the parties are bound by them. (His Lordship then referred to the heads of agreement above narrated). The provision that he claims between Stewart and Fraser, and all docquets or discharges and accounts which had passed between them, should be open to the arbiters for investigation: the submission, but that they were not to be liable to be opened up should no submission be entered into or the same prove abortive and the parties go to law, is an important provision, and contains the very essence of the case. In regard to the event provided for, of the submission coming to an end by an unforeseen circumstance, is Fraser entitled to say that such has been the case? I have come to the conclusion, from the letters and other evidence in process, that impediments are purposely thrown by Fraser in the way of the submission being brought to a satisfactory close. It is clear that Sir Patrick Walker had an interest in the claims being settled in a submission where the discharges and accounts were to be open for investigation. If, then, the proceedings as to the submission have taken place without his knowledge, and so a change of circumstances has been caused in reference to the obligation undertaken by him, it follows that he ought to be relieved from it. I can arrive at no other conclusion than that the expiry of the submission was caused by the intentional act of Fraser, and that he is not entitled to avail himself of the clause which provides for its falling through an unforeseen circumstance.

**LORD MEADOWBANK** concurred.

**LORD GLENLEE.**—I am of the same opinion. I cannot help thinking it an extraordinary account which Fraser gives of his ground for not renewing the submission. His keeping up the submission till past the term of its expiry was a

<sup>1</sup> See *v. Campbell*, Feb. 14, 1831 (ante, XII. 447, Lord Balgray's Opinion).

- No 142. most tortious act, and which cannot be defended. This may have been unforeseen by Walker, but not so by Fraser. His not returning it was the true cause of the actual expiry of the submission. I am for adhering to the interlocutor.

1837.  
Hog.

LORD MEDWYN.—I differ from the rest of the Court. Looking to the whole circumstances of the case, I am of opinion that Fraser, with a view to his own interest, could not proceed in the submission without Pentland. He had a material interest to carry Pentland along with him, and as the latter refused to proceed with the submission, the "unforeseen event" occurred in the fact of his refusal. With the knowledge we have of the way in which submissions are conducted, there seems to be no ground for saying that what here occurred was to be an absolute bar to Fraser bringing his claim in a court of law. I do not dispute that Sir Patrick Walker's interest was affected by the submission having fallen, but I see no evidence of the failure of the submission having been owing to Fraser.

THE COURT adhered, finding additional expenses.

ALEX. GULDIE, W.S.—JAMES JOHN FRASER, W.S.—Agents.

No 143.

ALEXANDER HOG, Pursuer.—*J. Murray.*  
ROBERT HOG, Defender.—*Marshall.*

*Process—Sheriff Court—Consuetude.*—An action of removing, under A. S. December 14, 1756, was raised in the Sheriff Court of Fife; after defences and replies were lodged, the Sheriff, on 3d March, "appointed the defender against the 10th March current to give in a condescendence," &c.: the 10th of March was a Court-day, and, the cause being in the roll, the Sheriff "having heard parties' procurators, in respect the defender has failed to obtemper the order in the preceding interlocutor of 3d March current, held him as confessed, and decreed against him in terms of the libel:" the defender raised a reduction, in respect the decree was pronounced before any default was committed:—Held, after an enquiry into the practice of the Sheriff courts, which was not uniform, that no default was incurred until after the expiry of the 10th day of March, against which the condescendence was ordered; and that the decree must be reduced, although pronounced according to the practice of the Sheriff Court of Fife. 2. The first reason of reduction libelled was that "the decree was disconform to the warrants upon which the same proceeded:" in the record, the tenor of the interlocutor was stated, and the above plea was included in the pleas in law; held, that it was competent so to state them under a libel thus framed, in respect the decree of 10th March referred in gremio to the tenor of the interlocutor of 3d March, as one of its chief warrants, and was disconform to the tenor thereof.

- Feb. 11, 1837. ON 1st December, 1834, Robert Hog, of Little Balgonie, raised a summons of removing, founded on A. S., 14th December, 1756, against Alexander Hog, tenant in Little Balgonie. Defences were lodged, followed by replies, after which the Sheriff, on March 3, 1835, "appointed the defender, against the 10th March current, to give in a condescendence."

1st Division.  
J. Cockburn.  
D.



dence in terms of the Act of Sederunt." The 10th of March was a Court day, and the cause being in the roll, and the process being returned by Alexander Hog's agent without any condescendence, the Sheriff, on that day, pronounced this interlocutor:—"Having heard parties' procurators, in respect the defender has failed to obtemper the order in the preceding interlocutor, of 3d March current, holds him as confessed; decerns against him in terms of the libel; and finds him liable in expenses."

No. 143.  
Feb. 11, 1837  
Hog v. Hog.

This decree was extracted, after which Alexander Hog, who had made no attempt to be reponed against it, raised a reduction of it, libelling, as the first reason, "The said decree is disconform to the warrants upon which the same proceeded, and is not subscribed or authenticated." On the record he stated the tenor of the interlocutors of 3d and 10th March, and added a plea in law, that the decree of 10th March "was incompetent and illegal, having been pronounced before the lapse of the time within which the paper in question was ordered to be given in." Other reasons of reduction were stated on the merits of the case.

In support of the first reason of reduction, Alexander Hog pleaded, 1st, That as the decree purported, in gremio, to proceed upon his failure to obtemper the order of 3d March to lodge the condescendence, it was disconform to its warrant, if the tenor of that order showed that no such failure had taken place; and 2d, That there had been no such failure, at the date of the decree, because the condescendence was ordered "against the 10th of March," so that he had the whole of that day allowed to him for lodging his paper, whereas the procurator of Robert Hog had moved the Sheriff for decree by default in the middle of that day, and had obtained such a decree, dated 10th March, which was therefore pronounced before the default could have occurred.

Robert Hog answered, 1st, That the plea respecting the premature date of the decree was not embraced within any of the reasons of reduction contained in the summons; because the first reason, as there set forth, had a technical and limited signification, which did not cover this plea; and 2d, That if it could be competently stated, it was ill-founded, because the word "against," when prefixed to a given day, prescribed a limit antecedent to the commencement of that day; or, at least, it was a term capable of having its meaning so regulated by practice, as to be made perfectly definite to that effect; and, according to the established practice of the Sheriff Court of Fife, an interlocutor ordering a paper to be lodged "against" a given Court day, warranted a decree by default when the case was called in the Court roll of that day, if no paper was lodged. If this practice was erroneous, an Act of Sederunt might be made to regulate it for the future; but the decrees hitherto pronounced be overturned. And in this particular instance, as the pursuer had not applied to be reponed, and as the interlocutor of

143. the Sheriff was pronounced after "having heard parties procurators," so  
 I, 1837. that there had been some oral discussion before him, the pursuer's al-  
 Hog. leged reason of reduction was entitled to the less regard.

The Lord Ordinary "repelled the reasons of reduction, assolizied the defender, and decerned; and found the pursuer liable in expenses."\*

Alexander Hog reclaimed. The note was first advised on 26th November, 1836.

**LORD GILLIES.**—I think the plea that the decree by default was prematurely pronounced admits of being quite correctly stated under the first reason of reduction. The decree under reduction sets forth, on the face of it, that it is pronounced "in respect Alexander Hog has failed to obtemper the order in the preceding interlocutor of 3d March current." On looking back in the record to this interlocutor of 3d March, I find the order referred to in the decree, which order appoints the condescendence to be lodged "against the 10th March current." Now as the decree expressly refers to the terms of this interlocutor, as warranting the issue of a judgment by default, I am satisfied that it is competent to look at the tenor of the interlocutor, for the purpose of discovering whether the decree is conform, or disconform, to this material part of the warrants on which it proceeds. It is another question, whether the plea is well founded; but I strongly incline to think it is. This was a decree by default, a penal judgment, and it appears to me to have been given by construing the terms of the order of 3d March, in a manner different from that in which this Court would have construed such an order, and different from that in which it would have been construed by any other Court that I know. I am, therefore, extremely disinclined to listen to the practice of the Sheriff Court of Fife as any reason for our giving to that order an interpretation which appears to be clearly erroneous. If it could be shown that the same practice prevailed in all the Sheriff Courts in Scotland, that would deserve more serious attention.

**LORD BALGRAY.**—I have always understood that in interpreting such an order as that of the 3d March, the day "against" which the paper was ordered, was one of those upon which the paper might be lodged; and that the whole day must expire before the default had occurred. But I should wish to consider the state of alleged practice a little farther. There might be an opening up of an immense number of decrees of this Sheriff Court, if such a practice as occurred here has long been acted on. I think a minute as to the practice should be allowed.

**LORD MACKENZIE.**—I think the plea is quite competently introduced into the record, under this summons, and had it not been so, the defender could have had it struck out of the record, a thing which he never attempted to do, just because it is regularly and competently stated there, in reference to the terms of the summons. In regard to the alleged practice of the Sheriff Court of Fife, and also whether it has reference to any express and published regulation of court, I should

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\* "NOTE.—The point in the pursuer's first plea, if it were correctly raised would not be free from doubt, but it is plainly not within the grounds of action. The rest of the case is clear."

wish to have farther information. I should also wish to know whether it is a practice confined to the county of Fife, or common to the other counties in Scotland. I by no means hold that I must be bound by the practice even if proved: but I wish to see the nature and extent of it before deciding this question, and if any long established or general practice be shown, it would become a case of very great hardship, to say the least, if this decree and an immense number of others, shall now be held liable to be set aside.

The LORD PRESIDENT was not present.

The Court “recalled the interlocutor reclaimed against, and found that the first plea in law is within the grounds of action; and before answer, allowed the defender to lodge a minute, containing a specific statement of the practice of the several sheriff courts of Scotland in pronouncing decree by default when a paper is ordered to be lodged against an appointed day.”

Under this order, the defender's agent addressed a letter to all the sheriff-clerks of Scotland enquiring what was the practice of their courts in regard to such decrees by default. Answers were received from almost all the sheriff-clerks, but, in a considerable number of these, the expressions used were not free from ambiguity. It appeared, however, that, in a good many counties, a similar practice prevailed to that of the county of Fife; and in a good many of them, an opposite practice prevailed, and decree by default was not pronounced until after the expiry of the day against which an order was to be obtempered. It did not appear from these letters that an express written regulation of court existed on the subject in any county but that of Dumfries. A regulation, dated 30th November, 1830, there provided that where a paper was “ordered to be lodged by a particular court day,” it must be lodged “by twelve o'clock of the court day” or the clerk could not receive it. And after that hour, decree by default might be taken. But when an order was pronounced to lodge a paper “by an appointed day,” which was not a court day, no decree by default could be pronounced till after the lapse of the day so appointed.

The Court resumed consideration of the case along with a minute and answers in reference to the practice thus appearing.

LORD GILLIES.—I am afraid that the decree must be reduced. It appears that the practice in the sheriff courts is just the reverse of being uniform, and I think that, in general, this court has too great a tendency to make the law bend to the irregular practices of local courts. It does not appear to me to be suitable to the advanced state of the law to have one practice in one county, as to the interpretation of the same words in an interlocutor, and an opposite practice in the adjoining county; and when that interpretation, which is manifestly erroneous, is brought under our review, I do not see how we can refrain from dealing with it as an unsuitable and erroneous practice requiring to be immediately checked.

49. I do not think that our reducing this decree will have the effect of setting aside as many others, as the defender has alleged; but, even if the consequences were of a serious nature, that must not restrain us from setting aside a procedure which is clearly erroneous, otherwise the very magnitude of an error would be pleaded in its defence, and we should just be told that if the rectification of it would produce bad consequences for a time it must never be rectified. In this way, the greater the error committed, it would be the more improper to correct it. I cannot listen to a doctrine which leads to this result. In this case, a party against whom a penal decree by default has been taken, is before us, asking redress, because there had been no default committed by him at the time when that decree was taken. I am satisfied that according to the just interpretation of the interlocutors of the sheriff, the pursuer's averment is true, and that he had then committed no default. I do not understand how the interlocutors can be otherwise construed. I cannot refrain therefore from holding that the judgment ought to be set aside. It is true that he might have got himself reponed against the decree in a cheaper and speedier manner than this reduction can accomplish; but it was optional to him to take that mode of redress or not, and though he did not seek it, I cannot hold him barred from the remedy of a reduction.

LORD PRESIDENT.—I do not think the question free from difficulty. This party had an easy remedy by applying to be reponed if he had chosen to avail himself of it, and although the circumstance of his not doing so cannot be pleaded so high as to bar his right of seeking his remedy in another way, by this reduction, still I cannot lay the circumstance altogether out of view in looking at the other points in the case. It is a serious matter to set aside a decree which has been pronounced consistently with the practice of a sheriff court, and I am very reluctant to do so. But I rather incline to think that the practice in this instance is so decidedly erroneous that it cannot be supported. And there is not the same practice prevailing throughout all Scotland. The practice is of a partial sort; and I cannot approve of our administering the law, in a question like this, so that there shall be one law and practice in one county, and another law and practice in the adjoining county. On the whole, therefore, I incline to the opinion that the decree must be reduced.

LORD MACKENZIE.—The practice on this subject, though not uniform throughout Scotland, is plainly not limited to the county of Fife, but prevails in many other counties, and is apparently of some standing. I should therefore have the greatest difficulty in pronouncing any judgment which would overturn such a practice, and which consequently would set aside a number of decrees, great beyond calculation, all of them obtained by what was understood at the time by all parties to be the correct and established form of procedure. Suppose that this case had come from a court such as that of Dumfries, where an express written regulation had been framed by the sheriff relative to the procedure in his court, declaring that where a paper was ordered against a certain day, being a court day, the term within which leave was given to lodge the paper should come to an end at twelve o'clock on that day, and decree by default might immediately afterwards follow. If such a regulation were published for the government of practitioners, and if it were acted on for a series of years, I am not prepared to say that I see any good ground in law for setting aside a decree by default which should be pronounced after twelve o'clock on the day specified. But the present case is nearly

identical with that supposed. Because, although no express regulation was drawn up on the subject, yet the established practice of the court, as known to all the procurators, and acted on by them, was precisely what would have been expressed in such a regulation. But being as publicly known by them all, they knew the effect and import of the order on 3d March to lodge a paper against the 10th, just as fully as if there had been such a regulation as I have supposed, and the words of that order seem entitled to the same construction in this case as in the other. In these circumstances, I think the true import of the terms of that interlocutor is competently and effectually explained by the practice of the Court, especially as the word "against" does not in itself seem necessarily, or perhaps even naturally, to be repugnant to such a practice. It rather appears to me that when a paper is ordered "against" a day, it naturally means against the arrival or approach of the day, rather than against the arrival of the day after it. I am afraid that if we hold the decree under reduction to be a nullity, on this reason of reduction, our judgment will have the effect of overturning an immense extent of procedure in many counties in Scotland, and will lay the foundation of numberless actions of damages. I do not, in all the circumstances, feel myself warranted to set aside the decree.

No. 14

Feb. 11, 18  
Welsh v.  
Barstow.

THE COURT reduced the decree, but refused to award expenses in favour of the pursuer.

LAWSON and GILMOUR, W.S.—J. MELVILLE, W.S.—Agents.

MISS **ELIZABETH, ANN, and GRACE WELSH**, Petitioners.—*Whigham*. No. 14  
**CHARLES MURRAY BARSTOW** (Judicial Factor on Muirhouse, &c.)  
 Respondent.—*M'Neill*.

*Entail—Confusio—Right in Security*.—1. A deed of entail reserved power to the heir in possession to grant bonds of provision in favour of younger children; a bond was granted under this power, together with a disposition of a corresponding annual rent out of the estate, and also a disposition of the lands themselves in security; the younger children made their right real by infeftment; the bond and security was afterwards acquired by the next heir in possession, who borrowed money on it, and disposed it in security; the disponee took infeftment under this conveyance; the heir's embarrassments subsequently led to the sequestration of the rents of his estates and the appointment of a judicial factor: Held, that, both in regard to the principal sum, and in regard to the interest, no confusio had taken place, and that the creditor holding the right in security was entitled to a preference on the rents of the estate for the annual interest of the sum lent, in competition with the creditors of the heir in possession. 2. Terms of a clause in an entail, relative to the obligation of the heir in possession to keep down the annual interest accruing on bonds of provision, which held not to affect the exclusion of the principle of confusio.

THE late Dr Davidson possessed the estate of Muirhouse under an entail which allowed the heir to grant bonds of provision in favour of his children, but which were "only to be granted with the special

Feb. 11, 18  
1st D-

144. quality, that the same shall never be created to burden the said estate farther than as a security for the sum to which the three years' free rent shall amount, and that the interest and expenses may affect the person of the heirs of tailzie, and the current rents of the tailzied estate, or the separate estates, but shall noways really affect the said tailzied estate, and that the said heirs of tailzie shall be bound and obliged to satisfy regularly pay, and keep down the annualrents of the provisions of the younger children, and thereby disburden the tailzied estate thereof, and not suffer any diligence to pass against the same for arrears, wherein if they fail, the right of the contravener shall, ipso facto, become void and null."

Dr Davidson, in terms of the powers contained in the entail, granted a bond of provision for £8000 in favour of his younger children, together with a disposition of an annualrent of £300 out of the entailed estate, during the non-payment of the bond, and a disposition of the lands themselves in security. The children were infeft under this bond and disposition. After the death of Dr Davidson, the other children and William Davidson, the heir now in possession, with consent of the trustees of the late Dr Davidson, conveyed the bond, to the extent of £4000, to Miss Mary Davidson, one of the younger children, and thereby disposed in her favour an annualrent of £200, being part of the foresaid annualrent of £300, during the non-payment of the principal sum, and they also disposed to her the lands in security. She died in December 1831, without taking infeftment under the precept in the disposition in her favour. She left a general mortis causa disposition in favour of William Davidson, the heir in possession, and he also expedited a service to her as heir of line and provision, in general, in January, 1832. In that year he borrowed £2500, from Misses Elizabeth, Ann, and Grace Welsh, and disposed to them a corresponding annualrent of £125 out of the entailed estate, being part of the said annualrent of £200, and also the entailed lands themselves in security of the principal sum of £2500 besides assigning to them the bond for £4000, for their farther security. In the same year Misses Welsh were infeft under the unexecuted precept in favour of Miss Mary Davidson, which was conveyed by this disposition to them. In 1833 William Davidson granted a charter of confirmation of the bond of provision, and all the subsequent conveyance of it, and infeftments, including that of Misses Welsh. They continued to receive annually, out of the rents of the estate, a sum equal to the stipulated interest on £2500 until Martinmas 1836. In July, 1836, owing to the embarrassed situation of the affairs of William Davidson the rents of the estate of Muirhouse, &c. had been sequestrated by the Court, and Charles Murray Barstow, accountant, was appointed judicial factor. Misses Welsh applied to him for payment of the interest due at Martinmas on their debt, as being preferable on the rents of the estate and as he declined paying without judicial authority, they presented

petition, praying for a warrant and order that he should make payment of the past interest, and of future interests as they should fall due, until payment was made of the principal sum. Barstow stated in answer, that William Davidson was the party primarily liable in payment of the annual interest due under this bond, as originally granted by Dr Davidson; and as he subsequently acquired right to the bond, the principle of confusio must take effect, at least during his lifetime, so as to render it impossible for him by any subsequent conveyance of the bond to separate his liability for the interest, qua debtor, from his right to it qua disponent of the original creditor, whilst he lived. And he contended that the clause in the entail already quoted, which specially imposed on the heir in possession a personal liability for the interest, added force to this plea. The petitioners answered, that, according to many decisions,<sup>1</sup> where an heir in possession acquired right to a debt affecting the estate, such debt was held not to be extinguished confusione, wherever the circumstances did not show that he had acquired the right with the purpose and intention of extinguishing the debt; that all such intention was excluded in this case; and that William Davidson, in acquiring right to the debt, was entitled to use it as a fund of credit to himself by borrowing on the faith of it and disposing it in security. And that the clause in the entail was immaterial to this question, as the heir in possession was bound in all cases, and independently of any such clause, to keep down the annual interest of debts affecting the estate.

THE COURT unanimously granted warrant as prayed for, and allowed the petitioners their expenses.

R. WELSH, S.S.C.—DUNDAS and WILSON, W.S.—Agents.

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<sup>1</sup> 3 Ersk. 4, 27; Cuninghame, Dec. 21, 1680 (3038); Cumming, Jan. 4, 1726 (3042); Murray, Jan. 27, 1728 (3043); Gordon, Dec. 1, 1757 (3045 and 11164); Kerr, Feb. 19, 1758 (15551); Scott, Dec. 20, 1751 (15394); Crawford, March 11, 1809 (F.C.)



145.

JOHN MUIR, Pursuer.—*Keay—M'Neill.*JAMES and ANDREW MUIR, Defenders.—*D. F. Hope—Robertson.*

AND

JAMES and ANDREW MUIR, Pursuers.—*D. F. Hope—Robertson.*JOHN MUIR, and SAMUEL MUIR and Co., Defenders.—*Keay—M'Neill*

*Jury Trial—Proof—Process.*—1. A merchant made advances on a shipment of coffee to the owners of the coffee, and some years afterwards, alleging that the coffee had been sold at Malta, and that the proceeds did not reimburse him for his advances, he raised an action for the balance against the owners; the owners alleging that he was consignee and commission-agent in regard to the coffee, and had failed in his duty as such, raised an action against him for the difference between the amount of his advances and the value of the coffee as shipped; no interlocutor was pronounced conjoining the actions, and a separate issue was taken in each, whether the defender in each action respectively, was liable as alleged by agreement of parties, and with the sanction of the Court, the two cases were tried as one cause, before the same Jury, the pleadings of counsel being conducted, and the evidence being adduced, in reference to this arrangement: the merchant, in leading his evidence, tendered a document purporting to be dated at "Malta, 22d August, 1826," and to be an account of sales and charges and nett proceeds of coffee, sold on his account; this document bore at the end of it, the signature of a third party, confessedly genuine, but which third party, residing abroad, had refused to be examined, under a commission sent out for that purpose; the owners objected to the admissibility of the document, but the presiding Judge admitted it, and directed the Jury to rely on it as evidence of the sales therein set forth: the Jury returned a verdict, in each action, finding for the merchant and against the owners, who presented a bill of exception—Held, 1. That the document was inadmissible, in respect, inter alia, that it was not proved to relate to the coffee in question; that it was not proved who the third party was who signed it, or how he was connected with the transaction; and that it was not proved how, when, or where the particulars of the document were filled up; 2. That, as the reception of the document was important in reference to both verdicts; and also, as the two actions had been blended by the form of trial; both verdicts must be set aside.—Observed, that, if the presiding Judge, during the progress of the trial, allows an inadmissible document to be received and read in the meantime, reserving its effect when he should come to charge the Jury, it is very doubtful whether a subsequent charge, directing the Jury to discard it absolutely from their minds, would have the effect of saving the trial from being vitiated by its having once been laid before the Jury.

b. 11, 1837. IN the year 1823, James and Andrew Muir, merchants in Greenock, made two shipments of coffee from the Clyde, upon the security of which shipments, John Muir, merchant in Glasgow, made advances. John Muir was a partner of Samuel Muir and Co. at Malta, where the coffee was sold, and as he alleged that the proceeds, after paying expenses, left him still in advance, to the extent of £1130, 3s. 9d., he raised an action against James and Andrew Muir to recover payment of that amount. They, on the other hand, alleged that John Muir, and Samuel Muir and Co. were the consignees of the coffee, as commission-agents, and had wrongfully failed in their duty as such, and that they remained liable for £1890, 5s., being the difference between the advances

Division.

Fullerton.

Jury Cause.

made by John Muir, and the actual value of the coffee as consigned. Both actions were sent to the Jury Roll, and the following issues were framed in each of them respectively. (1) In the action at the instance of John Muir: "It being admitted, that, in the month of September, 1823, the defenders shipped from the Clyde 311 bags of coffee, and 298 bags of coffee in the month of November, 1823: It being also admitted that the pursuer, John Muir, advanced certain sums of money to the defender on the said shipments: Whether the defenders are indebted, and resting owing to the pursuer in the sum of £1130, 3s. 9d. sterling, or any part thereof, with interest thereon from the 1st day of January, 1827, as the balance of the said advances." And (2) In the action at the instance of James and Andrew Muir: "It being admitted that, in the month of September, 1823, the pursuers shipped from the Clyde 311 bags of coffee, and 298 bags of coffee in the month of November, 1823: Whether the said coffee, or any part thereof, was consigned to the defenders, or either of them, as commission-agents at Malta, and whether the defenders, or either of them, wrongfully failed in their duty as commission-agents aforesaid, and are indebted and resting owing to the pursuers in the sum of £1390, 5s. sterling, or any part thereof, as the balance of the price or value of the said coffee?"

Both actions came on for trial on the same day, and, by the agreement of parties, with the sanction of the Court, the two cases were tried as one cause, before the same Jury; and the pleadings of counsel, and the evidence adduced, were regulated accordingly.

At the trial, there was tendered in the action at the instance of John Muir, a paper entitled "account-sales, charges on, and nett proceeds of 578 bags coffee, sold on account-current of Messrs S. Muir and Co., Malta." This document purported to state the sales of various parcels of coffee, amounting in all to 578 bags, at different times, in March and April, 1826, partly by auction, and partly by private bargain. It also purported to state the charges and commission thereon, and to exhibit the nett proceeds realized. It bore the date of "Malta, 22d August, 1826," and had a name subscribed to it, which was "Chas. Shaw." It was admitted by James and Andrew Muir that this was a genuine signature; but they objected to the document itself "as not legal or competent matter to be given in evidence by the said John Muir, in proof of the alleged sales and proceeds of the said coffee: But the said Lord Fullerton (presiding Judge) did then and there declare his opinion, that the said account-sales, so proposed and tendered in evidence for the purpose aforesaid, should, in the mean time, be received and read, reserving, when he came to charge the Jury, the effect thereof, or whether the same should be taken into consideration by the said Jury, as evidence of the sales and proceeds of the said coffee: And, thereafter, on charging the Jury, the said Lord Fullerton stated to the Jury, and gave his point of law, that the said account-sales was a document

No. 1.

Feb. 11,

Muir v. Muir.

145. which the Jury were entitled to take into consideration, and to rely on as evidence of the sales therein set forth, and then and there allowed the same to be, and the same was accordingly given in evidence in that behalf: Whereupon the counsel learned in the law for the said James and Andrew Muir, did then and there insist, before the said Lord Fullerton, that the said evidence, so allowed to be given, should not have been admitted, and left to the Jury, or referred to their consideration."

In the issue in which John Muir was pursuer, the Jury found a verdict for the pursuer; in the other issue, they found for the defenders, John Muir, and Samuel Muir and Co. James and Andrew Muir then presented a bill of exceptions, in support of which they pleaded—

1. The document in question was equally important in reference to the issue in each of the actions, and, if inadmissible, both of the verdicts must be set aside. In the action at the instance of John Muir, the account-sales was essential to prove whether any and what balance was due to him; in the action at the instance of James and Andrew Muir, alleging wrongful failure in duty by John Muir, and Samuel Muir and Co., as commission-agents, it was equally essential in regard to the defence set up by them. But, independently of this, though the two causes had not been conjoined by any interlocutor, they had been practically conjoined by the agreement to treat them as one cause before the Jury, and by arranging as to the pleadings of counsel, and leading of evidence on that footing. If the document, therefore, was improperly admitted, in reference to either action, both verdicts must be set aside, and this was imperative by the words of the statute.<sup>1</sup>

2. It was not competent to refer to any matter, not within the bill of exceptions, in aid of the document objected to; and every allegation, which went beyond the bill, was denied. Looking, then, to the bill of exceptions alone, the document in question, even if it proved its own contents, was not instructed to relate at all to the coffee of James and Andrew Muir, more than to any other coffee. Neither did it appear what Charles Shaw was who signed it, except that he resided at Malta, and had refused to be examined as a witness in this cause under a commission which had been sent out to Malta for examining witnesses; and that John Muir had offered him no discharge of any liability which he might have incurred in respect of the sales, so that he had an interest in supporting the propriety of them.

3. But the document was not probative of its contents. For any thing that appeared in proof, it might have been signed as a blank sheet at Malta, and the whole of what was written above the signature, might have been added after it came here. It did not even possess the degree

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<sup>1</sup> It was understood that reference was here made to 55 G. III., c. 42, § 7, providing that "in case the said Division shall allow the said exception, they shall direct another Jury to be summoned for the trial of the said issue or issues."

authenticity belonging to regularly kept books, being merely a loose sheet, and it did not appear in what manner it had been made up. No part of it was supported on oath, and it did not establish the fact that any sale had taken place,<sup>1</sup> nor, of course, the date of the sale, the price received, or the other particulars stated. And as Charles Shaw who signed, had refused to be examined, that only increased the objection to its admissibility; and as John Muir, and Samuel Muir and Co. did not offer to discharge him of ultimate liability for his conduct in regard to these sales, they had not done all in their power to adduce the best evidence which could be had, and were therefore debarred from resorting to secondary evidence. And, generally, whatever effect might be due to such a document in any question between Shaw, and John Muir, or Samuel Muir and Co., it could be of no avail against a third party.

*Pleaded by John Muir—*

1. The two actions had never been conjoined, and, as a separate issue was tried, appropriate to each, and a separate verdict returned on each issue, the reception of an inadmissible document, even if it did take place, could not strike against both verdicts, if it could be shown that the bearing of that document related only to one action. And the account-sales was of no consequence, excepting in the action at the instance of John Muir. In the action by James and Andrew Muir, a sum was claimed, which did not depend on the amount of proceeds stated in the account-sales, but on the difference between John Muir's advances, and the value or invoice price of the coffee as consigned; all which facts were established aliunde. This document, therefore, did not affect the issue in J. and A. Muir's action, and the verdict in it could not be disturbed, whatever might be the fate of this bill of exceptions. And there was no injunction in any of the statutes regulating Jury Trial, which could affect this limitation of the effect of the exception in such a case as this.

2. Though not recited in the bill of exceptions, it was competent to refer to the summons of James and Andrew Muir, which narrated that in January, 1827, they had been furnished with the account-sales in question, as the account-sales of their coffee. And it was also competent to refer generally to the record as instructing that parties were agreed on both sides that the coffee had been sold in 1826, and that no objection had been stated against the authenticity of the account-sales rendered, up to the date of the Jury Trial. It was therefore sufficiently instructed that the account-sales related to the coffee in question; and that Shaw, the party who signed it, and whose signature was admitted, was the party who sold the coffee.

3. Shaw had refused to be examined on oath, though a commission had been sent out to take his evidence; but all the evidence was tendered, of

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<sup>1</sup> Watt, 4 Murr. 575.

145. which the case admitted. The account-sales was conceived in the ordinary terms, and authenticated in the common form, in which such documents pass among mercantile men. In mercantile practice such documents are constantly acted on, as of undoubted authenticity, and unless it was to be received as making faith in judgment, the result would be to throw commercial dealings loose, to a dangerous extent.

1837.  
Muir.

LORD GILLIES.—I entertained great doubt, from the first, respecting the direction by the Judge who presided at the trial, and I now feel satisfied that nothing has been stated which is adequate to remove that doubt. On the contrary, it has become stronger in my mind, as the discussion has proceeded, and I am reluctantly convinced that the verdicts must be set aside, and a new trial granted. One great object of Jury trial is to obtain the judgment and decision of a Jury upon the evidence. But it is the province of the presiding Judge at the trial, to separate that which is evidence from that which is not evidence, when tendered by either of the parties, and to take care that nothing but that which is competent evidence is laid before the Jury. The Judge must determine what is legal and admissible evidence, and exclude every thing else; and then it rests with the Jury to say what weight is due to the evidence so laid before them. In regard to the exclusion of all incompetent documentary evidence, I am not surprised that some difficulty was felt here, when Civil Jury Trial was first introduced. For it had been the practice in the Court of Session to lay every sort of document before the Judges, relying that they, who knew the laws of evidence, would separate those documents which were admissible, from those which were not admissible, and would absolutely discard the latter from their minds, even if they had been obliged to read the documents first, in order to ascertain whether they were admissible or not. But whether this was a safe course or not, in respect to the Judges of this Court, it is a totally different thing to extend such a practice to a Jury. And I feel the greatest doubt as to that part of the proceeding of the presiding Judge, when he directed a document in "the mean time to be received and read, reserving, when he came to charge the Jury the effect thereof, or whether the same should be taken into consideration by the said Jury, as evidence of the sales and proceeds of the said coffee." If, at the end of the trial, his Lordship had been of opinion that the document was inadmissible, he would undoubtedly have charged the Jury to that effect, and have told them to discard it utterly from their minds; but supposing the Jury to have earnestly endeavoured to do so, it does not follow that they could, by any mental effort whatever, efface the impression which had previously been made, or produce within their minds that same view of the case in all its complex bearings and details, which would have been produced if the document had never been at all submitted to their consideration. But although I have thought it right to notice this, as an important subject involved in the proceedings under our review, the question does not turn upon it, as the presiding Judge did not finally direct the Jury to discard the document from their minds, but to receive it as legal evidence of the sales therein set forth, and generally, in terms of the charge as given in the bill of exceptions. And we must now decide whether his Lordship's direction was well-founded.

Upon this point I have formed a decided opinion. The document was not admissible in evidence, as tendered. There is nothing extrinsic of the document to

p in any shape whatever; and, taken per se, it was not admissible. It **No. 145.**  
 at the signature of the name of Charles Shaw is admitted to be genuine :  
 ng more than this is admitted; and nothing more than this proved. It is **F.b. 11, 183**  
 in proof before us that he was the party authorised to sell the coffee of **Muir v. Muir**  
 d Andrew Muir. It is not in proof before us what was his duty or bu-  
 what was his character, in reference to this transaction. Historically we  
 v something of these particulars in consequence of the explanation which  
 laid before us in defending the direction of the presiding Judge: but the  
 not before us in such a shape that we can rest on them judicially in de-  
 on the merits of this bill of exceptions. And it is my opinion that the  
 tendered was not admissible evidence, but should have been rejected.  
 d, however, that the erroneous reception of this document can affect only  
 t on ope of the issues, being the issue in the action at the instance of  
 r, and that it cannot affect the verdict on the issue in the action at the  
 f James and Andrew Muir. It does not appear to me that this limita-  
 de out. The document was tendered in proof of the sales of the coffee.  
 to be proved by it were essential not merely to the action at the instance  
 Muir, for the balance between his super-advances, and the actual proceeds  
 sales; but also, in the action by James and Andrew Muir, which, under  
 of the advances, concluded for the value of the coffee as shipped, in re-  
 reach of duty by the alleged consignees and commission-agents. Now,  
 has been pleaded that the amount of proceeds arising at the sales, could  
 the value of the coffee as shipped, nor the amount of the advances made,  
 quently the amount concluded for in that action; still, the time of the  
 amount realized, and generally the particulars of the sales, entered essen-  
 the question whether the conduct of the alleged consignees and commis-  
 s had been such as to amount to breach of duty, and upon that question  
 claim of James and Andrew Muir hinged. I cannot, therefore, adopt  
 hat this document was of importance only as to one of the verdicts, and  
 olutely no weight at all in respect to the other. I take a very different  
 s importance; and I am confirmed in the opinion that the reception of  
 ent must set aside both verdicts alike, when I consider the form in which  
 tions were tried. The whole evidence was regarded as so completely  
 o the merits of both cases, that they were practically conjoined by being  
 e the same Jury, to be tried at once, under an agreement which was  
 l by the Court, and by which both the evidence adduced, and the plead-  
 unsel were regulated. Accordingly the bill of exceptions now tendered  
 both causes alike; it sets forth their being tried together in the blended  
 mentioned, and then proceeds to state, that "upon the trial of the said  
 counsel learned in the law for the said John Muir, to maintain their  
 r the said issue, did tender" the document in question; again the bill  
 that the opposite counsel "did object to the admissibility of the said  
 itled account-sales, as not legal or competent matter to be given in evi-  
 the said John Muir, in proof of the alleged sales and proceeds of the said  
 ut the presiding Judge allowed it to be received in the mean time, and  
 i charged the Jury that they might rely on the document "as evidence  
 les therein set forth." As there was but one trial and one Jury, before  
 document was laid as proof of the sales in question; and as I hold that

145. it was not legal evidence to that effect, I consider that the result must now be set aside the verdict in both actions.

1897.  
Muir. LORD MACKENZIE.—I concur. There are two questions here; first, as to the validity of the exception; and second, as to the effect which it is to produce upon one or both of the verdicts. In regard to the first question, it appears from the bill of exceptions that the presiding judge at the trial "stated to the jury, and gave his direction in point of law, that the said account-sales was a document which the jury were entitled to take into consideration, and to rely on as evidence of the sales therein set forth, and then and there allowed the same to be, and the same was accordingly given in evidence in that behalf." In regard to the account-sales, nothing is before us in support of it, excepting the admission that the name "Charles Shaw" occurring at the end, is a genuine signature, and that the document appears to be of the same tenor with the account-sales which was sent to John Muir. But we know nothing of the character or duty of Shaw, in connection with this transaction. We do not even know that he wrote the contents of the paper at which his signature now appears. There is nothing else which proves the sales as there stated; on the contrary, Shaw refused to take an oath in support of the account-sales. In these circumstances I cannot but hold that this document was not more producible at the trial than any other paper whatever, which a party might have thought fit to tender. The exception against its admissibility must therefore be sustained.

The next enquiry is, whether this strikes at both verdicts, or at one only. On this subject it has been pleaded by James and Andrew Muir, that under the statutory enactments relative to bills of exception, it is imperative on the Court to order a new trial in both of these actions if we hold that there must be a new trial in either of them. The terms of the statute are certainly very general, but I am not prepared to adopt this construction of them, that in all cases in which two actions have been tried at the same time before one jury, or even in every action where separate issues have been tried, that, if a bill of exceptions be sustained as to any part of the procedure at the trial, the whole must fall together. It may be that there is so complete a separation and distinction between the issues, that the one is independent of the other. They may be absolutely distinct; and if so, it may happen that an exception shall be good against the verdict on one issue, which shall not be good against the verdict on any other. Suppose, for example, that the ground of exception was the erroneous interpretation of the terms of one issue only, and that this erroneous interpretation had clearly no bearing upon the trial of the other issues. Although such exception should be sustained so far as concerned the issue which had been erroneously interpreted, it would be the greatest hardship and injustice to allow it to have the effect of setting aside the verdict on any other issues; and indeed it would seem as unreasonable as to say that if a leak sprung in one ship of a fleet, it must not only have the effect of sinking that one ship, but of drawing all the rest of the fleet after her to the bottom. But although I have been led to advert to this subject, in consequence of the manner in which this cause has been argued, it is a point which does not require to be decided, and I reserve my definitive opinion till then. In this case, the document tendered and received is of manifest importance, I conceive, in both the one action and the other; but it would have been enough merely to say, that it is not demonstrated by John Muir to have had no bearing or effect on the verdict returned in the action at the instance of



James and Andrew Muir. The whole details of the sales of the coffee were evidently of importance in both actions; both were tried at once by the jury; and the erroneous reception of the document purporting to instruct the sales, with the relative charge by the presiding judge, appears necessarily to lead to the result of setting aside both the one verdict and the other.

LORD PRESIDENT.—I concur in thinking that both verdicts must be set aside. The document purporting to be an account-sales, does not even bear in gremio any attestation that it was made up from the books of Shaw, the party who signs it. There is no evidence that that document, as it now stands, was prepared by him. Nor is there any evidence to prove who he was. I think, therefore, the exception must be sustained, and a new trial, in both actions, granted.—And I may add in reference to the clause in the statute referred to by Lord Mackenzie, that I fear its terms are more absolute and binding than his Lordship is disposed to consider them. But it is unnecessary to decide just now on their import.

LORD GILLIES.—It is not necessary now to decide on them, and I have refrained from offering any opinion respecting them.

THE COURT then sustained the exception; set aside both verdicts; and granted a new trial in both actions. Their Lordships also awarded to James and Andrew Muir their expenses since the date of the trial.

ORR and MARTIN, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

ANDREW LOCKIE and OTHERS, Petitioners.—*R. Bell.*

JOHN MASON and OTHERS, Respondents.—*G. G. Bell—Pyper.*

*Bankrupt—Trust.*—Circumstances in which the Court granted a petition for sequestration of a bankrupt, though opposed by the trustees under a private trust-deed for the whole creditors, who were vested both in the heritage and moveables of the bankrupt, and had effected partial sales of the moveables:—in respect, inter alia, (1.) that the creditors who acceded, had done so, under the condition of the bankrupt giving such explanation of his affairs as they should deem satisfactory, and that the petitioning creditors were not satisfied with the explanations given: (2.) that all the creditors had not acceded: and (3.) that, under the private trust, a great deal of litigation was about to ensue respecting alleged preferences by the bankrupt.

ANDREW LOCKIE, JOHN GRAY, and PETER KER, were creditors of John Mason, distiller in Kelso, who became insolvent. He executed a trust-disposition in favour of John Waldie and two others as trustees for behoof of his creditors. Within a few days after this, Mason was rendered bankrupt. Lockie, Gray, and Ker acceded to the trust-deed, but under condition that Mason “made such a statement of his affairs as the creditors

JOHN CUNNINGHAME, Esquire, late Solicitor-General, this day presented the Letter, containing his appointment as one of the Lords of Council and Session in the room of LORD BALGRAY deceased.

ANDREW RUTHERFURD, Esquire, at the same time presented his Commission

146. deem proper." It appeared that some of the creditors of Mason did not accede. It also appeared that preferences had been granted by Mason, which ought to be reduced. On being examined as to his affairs, Mason made an explanation which some of the creditors, including Lockie and others, did not deem satisfactory, and they applied to the sheriff for a warrant to have Mason and all concerned examined on oath. This application was refused as incompetent. In the mean time the trustees, under the trust-disposition, had taken infestment in Mason's heritage, and possession of his moveable effects, and had sold part of the moveables under the trust. Lockie, Gray, and Ker then petitioned for sequestration as being the most effectual means of obtaining a thorough examination into the state of the bankrupt's affairs, and of cutting down all preferences. They pleaded that there was no bar to their application as their accession to the trust-deed was expressly conditional on their being satisfied with Mason's explanation as to his affairs, which however had proved unsatisfactory; and farther because it was an implied condition, in every case of accession, that all the creditors should concur, or none should be bound, and all the creditors had not concurred here. Mason, and the trustees under the voluntary trust, lodged answers, pleading that by § 15, of the Bankrupt Act, if they could show reasonable cause why the sequestration should not be awarded, the Court must refuse it; that the petitioners had acceded to the trust-deed, and, as there had been an actual conveyance by the bankrupt of his heritable and moveable effects vesting them in the trustees, which was followed by partial sales under the trust, there was *jus quæsitum*, both to the bankrupt and the general creditors, to resist any application by the petitioners, which would have the effect of overturning the trust.<sup>1</sup> They also stated that the trustees were about to institute reductions of preferences; and, they alleged that the greater part of the creditors were satisfied with the explanations given by Mason as to his affairs, and contended that the petitioners must show reasonable grounds for dissatisfaction if they meant to found on it.

Parties were at issue whether two out of the three private trustees, had not themselves received preferences; and whether the facts on which this allegation rested, had been discovered after, or before, the deed of accession.

LORD GILLIES.—I am afraid that, in the circumstances of this case, we cannot refuse the petition for sequestration. Private trust-deeds are often convenient, and highly useful; but they are also often frustrated. Such a deed, I conceive, requires the accession of all the creditors, in order to make it permanently binding upon any of them. If, however, it could truly be alleged that these petitioners had unconditionally acceded, and that their present petition was in violation of their agreement to accede, it would have required a very strong case to justify such an applica-

<sup>1</sup> 2 Bell, 495; Watson, Feb. 5, 1724 (6397).

But they acceded only under the express condition that the bankrupt give such explanation of his affairs as the creditors should consider proper and satisfactory. That being the case, it is for the creditors to say whether they are satisfied with the explanations to be so; it is not for us to decide that. If any of the creditors, who acceded under that condition, are not satisfied, they are just as free to say they had not acceded at all. Now it is clear that some of the creditors did think the explanations satisfactory, and even applied to the sheriff for a warrant of sequestration of the bankrupt which was refused, as he had no power to grant it in the precise case therefore occurred, in which the creditors had reserved right to accede without regard to the trust-deed if they chose; and, without entering into other facts of the case, I think the petition for sequestration must be granted, unless reasonable cause to the contrary is shown.

**MACKENZIE.**—I am of the same opinion. The accession to the trust-deed did not include all the creditors; and it would be a very hard thing, as to any creditor, to hold that he was bound up by his accession, while other creditors, by not acceding, were left free to follow what diligence they chose. I do not think that any acceding creditor can be so bound. I hold it is an implied condition in every deed of accession, that all the creditors of the bankrupt shall accede, and are to remain bound. But besides this, the accession in this case contained an express condition, that the bankrupt should give such explanation of his affairs as the creditors should deem proper and satisfactory. The petitioners are creditors who think his explanation unsatisfactory; and it is for them to judge as to that. In view of these decisive circumstances, it appears that the purposes of the private trust cannot be extricated but by several reductions, which the private trustees are to bring, and which may probably lead to a multiplicity of proceedings, and a mass of litigation. I do not consider that, in all the circumstances, it would be safe or just for the Court to refuse the petition for sequestration.

**PRESIDENT.**—I am of the same opinion. Even if there had been an unconditional accession, the petitioners might not have continued bound in the event of a supervening change of circumstances. And, on the facts of this case, I think there is nothing to bar the application for sequestration.

THE COURT granted sequestration as craved.

J. RICHARDSON, W.S.—D. BROWN, W.S.—Agents.

GEORGE GORDON, Senior, and GEORGE GORDON, Junior, Advocators. No. 147.

—D. F. Hope—Forsyth.

MR JAMES GRANT SUTTIE, Respondent.—Keay—Whigham.

—1. A lease of a pottery, and certain premises including a park or enclosure, was granted, for twenty-one years, "with the privilege to the tenant of digging and sagger clay within the said park or enclosure, for the purpose of the pottery:"—held that the tenant had no right to use the clay for making bricks, excepting so far as required for the use of the pottery.—2. Circumstances in which the tenant of a pottery had unwarrantably manufactured a quantity of bricks, and, on caution for the value of the bricks, had been found liable to his landlord in the value of the bricks were manufactured.

147. In 1812, George Gordon, sen., and the late Robert Gordon, potter, took a lease, from the late Countess of Hyndford, of a pottery, "as all and whole the park or inclosure at Morrison's Haven, &c., with the privilege to the said Robert and George Gordon of digging clay and sagger clay within the said park or enclosure, for the purpose of the foresaid pottery." The lease was to run for twenty-one years after Martinmas 1811. During the course of the lease, Gordons occasionally made bricks at the pottery, chiefly for the use of the work. In the autumn preceding Martinmas 1833, when the lease was to expire, they manufactured 32,15 bricks. Sir George Grant Suttie of Preston Grange, who had succeeded to the property under lease, presented a petition to the Sheriff of Haddingtonshire, setting forth that Gordons had no right to apply the clay which they dug under their lease, to the purpose of brick-making, at least if the bricks were made for sale, or for being carried off the ground and applied to purposes unconnected with the pottery, in respect the brick-making was no branch of a potter's manufacture, and it was only for the use of the pottery that the privilege of digging clay had been granted; and that there was a large quantity of bricks, thus unwarrantably manufactured, now lying at the works, and which Gordons intended to carry off. He prayed the sheriff "to find that the clay digged or to be digged by them from the foresaid enclosure, in virtue of the lease, may be applied by them for the purpose of the pottery, and for no other purpose, and that they have no right to apply such clay in the making of bricks for sale, or of being carried off the ground, and applied to purposes unconnected with the pottery; and to find them liable in damages and expenses."

Gordons in their answer contended, that they might lawfully manufacture the clay into bricks for sale, especially as the pottery was a brown ware pottery, and that they had always been in the practice of doing so but, separately, that the operations in every pottery occasioned a constant consumption of bricks, which were used in the kilns, and that it was the practice at all potteries where suitable clay could be found, to make such bricks as were required for the pottery, and that they (Gordons) had only acted according to the true powers contained in their lease, in reference to the understanding and practice of the trade, in manufacturing their bricks. In any event, they pleaded that, if Sir George was entitled to retain the bricks on the ground, he must pay their value, or at least the cost of the manufacture, including the duty paid to Government.

During the discussion the bricks were valued, under a judicial remit at £45, 16s. 5d., and Gordons were allowed to remove them on caution for that value. They carried them off and used them in the construction of a rival pottery in the neighbourhood.

The sheriff allowed a proof, from which it appeared that, after applying the clay to the manufacture of potter-ware, there was a

clay left, which could not, without disproportionate expense, be making pottery ware, but which were useful for making into that bricks were constantly needed at a pottery, as there was a or less waste at the kilns, on every occasion of their being fired ; kiln wholly gave way, it might require 40,000 bricks to replace that this accident might occur unexpectedly at any time. Such witnesses as were potters also swore that they would have considered bricks, so far as not used in the pottery at the end of the lease, their own property as much as any other articles manufactured by their trade. It farther appeared from the proof that Gordons a very long period, been in the practice of manufacturing bricks works, but chiefly for the use of the pottery. It did not appear what extent this manufacture had been carried on ; nor that a manufacture of bricks for sale had ever been acquiesced in by Sir

No. 14

Feb. 14, 18

Gordon v.

Suttie.

in this state of the proof, Sir George contended that the manufacture required a quantity of bricks as 32,156, on the eve of leaving the premises must have been done in mala fide ; which Gordons denied.

The sheriff pronounced this interlocutor :—" Finds it sufficiently established that potters are in the custom of making bricks out of the clay of the clay used in their potter-work, and that every pottery requires a large supply of bricks : Finds it not proven that a lease of a field for a pottery entitles the lessee to make bricks for sale : " And " Finds that there is no sufficient evidence of the petitioner having been engaged in the respondents' manufacturing bricks out of the clay-field on for sale, or for any other use than those of the pottery : Finds that the respondents had on hand at the time of raising this action a quantity of bricks, amounting, according to Mr Watson's report, 6 in number ; that these were manufactured out of the clay-field, and that they were not required for the purposes of the pottery, having been since removed from the premises by the respondents : Finds that although the respondents were entitled to make bricks for the purposes of the pottery, they were not justifiable in manufacturing a quantity near the termination of the lease, to be otherwise disposed of : Therefore finds the respondents liable in the value of the bricks subsequently carried away by them, approves of Mr Watson's valuation of these at £45, 16s. 5d., the interdict formerly granted to the respondents removed on caution being found to that amount, and, in the circumstances of the case, finds no damages due ; and finds the respondents entitled to expenses."

James Gordon, senior, and George Gordon, junior, as representing James Gordon, who was now deceased, brought an advocacy of this

The sheriff pronounced this interlocutor :—" Finds that,

147. under the tack libelled on, the advocators were not entitled to manufacture bricks for sale; but finds it proved that, in carrying on a pottery a great quantity of bricks is required for the purpose of the manufacture of pots: Finds it proved that, according to the usage of the trade, the bricks so required are commonly made of the coarse clay, or, as it is called, the crops or pairings of the clay which could not, without an expensive process, be made into pots: Finds that the advocators, at the expiry of their tack, were entitled either to remove the bricks which they had made bona fide for the use of the pottery, but which had not been used, or to demand the price of them from the landlord: Finds that it is not proved that the quantity of bricks which the advocators had on hand at the end of their tack, was greater than they might reasonably suppose were necessary for the ordinary use of the pottery, or that they were manufactured mala fide with the view to their being sold: Therefore alters the interlocutor of the sheriff, assoilzies the advocators from the conclusions of the action, and decerns; and finds the advocators entitled to the expenses of process, both in this and the inferior court, subject to modification.\*

Sir George reclaimed.

LORD GILLIES.—I cannot concur altogether with either the interlocutor of the Lord Ordinary or with that of the sheriff. The Lord Ordinary holds that the bricks had been made bona fide for the use of the pottery, and has assoilzied the advocators absolutely from the action. Now I feel satisfied that the bricks were made in mala fide, and if not for sale, they were at least intended for another work, and not for the pottery of Sir George. On the other hand, the sheriff has found Sir George entitled to the whole value of the bricks, at the market-price, which includes not only the cost of the manufacture, but also the King's duty. That I think was going too far, and it may be difficult to fix the precise amount of reparation due to Sir George, for the bricks which have been removed by the

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\* "NOTE.—It is clear that a field of clay let expressly for the purpose of a pottery, cannot be used for a purpose entirely different, that of making bricks for sale. But it is satisfactorily proved, that a great quantity of bricks is required in every pottery, chiefly for the construction of the kilns, and these bricks are made out of the coarse and bad clay called crops, or timings, or pairings, which cannot be profitably used in making pots. It is impossible to calculate before hand how many bricks may be required, because it depends upon accident, and it cannot be foreseen whether a kiln is to fail or not; and one witness, whose evidence is not contradicted, depones, That, in the event of a kiln failing, 40,000 bricks may be required. The advocators had on hand 32,156 bricks, which do not appear, therefore, to be an unreasonable quantity. The Lord Ordinary is of opinion that the respondent was not entitled to take possession of these bricks at the expiry of the lease, without paying to the advocators either the expenses of the manufacture, or the King's duty, which is levied before the bricks are fired. The advocators have been found entitled to expenses, under modification, because they have all along carried their plea too high, in maintaining that they had a right to make bricks for public sale, and that to an unlimited extent."

advocators from his premises. But the Court should fix on a moderate sum as being justly due to Sir George, and award it in his favour. No. 147

LORD MACKENZIE.—I take a view which is very much the same with that now expressed. The advocators, if they did not make these bricks for sale, at least made them for a rival work which they were about to carry on, and that was a purpose equally unauthorized by their lease, and more invidious, than if the bricks had been made for sale. But although the advocators acted unwarrantably in the manufacture of these bricks, I do not think their landlord Sir George was entitled to confiscate them simply, and appropriate the whole to himself. If the clay was his, and was unwarrantably taken by the advocators, still the cost of the manufacture and the amount of King's duty, entered into the value fixed under the judicial remit, and I cannot think Sir George entitled, in the circumstances, to all that. Both parties have pleaded their rights too high, and the Court should now award what is just, by rejecting what is extravagant in the pleas of either party. Feb. 14, 1832  
Ewing v.  
Glasgow Police  
Commissioners

LORD PRESIDENT.—I concur with your Lordships. Both parties have pleaded their rights too high. We ought now to award in favour of Sir George the value of the clay, as the raw material which the advocators improperly applied to the manufacture of these bricks. Probably the sum of £10 might suffice for that, and it should be made a full value, as the advocators committed a wrong.

LORD GILLIES.—I think a smaller sum might suffice.

THE COURT pronounced this interlocutor:—"Alter the interlocutor reclaimed against, and find that the reclaimer was entitled to the value of the clay, from which the bricks were manufactured; modify the same to £10 sterling; but find no expenses due to either party."

W. ALLAN, S.S.C.—J. and A. SMITH, W.S.—Agents.

WILLIAM LECKIE EWING and OTHERS, Pursuers.—*H. J. Robertson.* No. 148

GLASGOW POLICE COMMISSIONERS, Defenders.—*G. Napier.*

*Law-Agent.*—The clerk of a provincial board of commissioners, who was not a procurator before any court, and had no attorney's license, held entitled to charge for agent's business performed by him in a cause in which the commissioners were parties, the employment of the clerk having saved the employment of another agent.

THE defenders, the Glasgow Police Commissioners, having been found entitled to expenses in this case, mentioned ante, 389, the account was admitted to be taxed. The auditor allowed a charge for business done in the course of the proceedings by the commissioners' clerk, who, although bred in the office of a professional person, was not a procurator before any court, and had no attorney's license. Feb. 14, 1832  
2D DIVISION

THE pursuers objected to the auditor's report in so far as it allowed the



148. expenses of the clerk, who as such was a party to the process, and bound to give the board of commissioners what assistance he could without charging for it, and was besides not a regular law-agent.

1837.

To this it was answered, that the clerk was the only law-agent employed by the board, and was entitled, like any other country agent, to make a charge for business performed by him.<sup>1</sup>

THE COURT, on the ground that the defenders were entitled to employ a country agent, and the employment of their clerk in the business in question saved the employment of another person, repelled the objection to the auditor's report.

MOWERAY and HOWDEN, W.S.—G. and W. NARISS, W.S.—Agents.

49. JAMES PONTON, Claimant.—*Robertson—Maidment.*  
MRS ALISON PONTON OF HARDIE, and MRS JEAN PONTON OF HAMILTON and SPOUSES, Claimants.—*Sol.-Gen. Rutherford—Penney.*  
Competing.

*Provisions to Children.*—Terms of a marriage-contract in regard to provisions to the children of the marriage which held not to exclude a power of distribution by the father, and circumstances in which a preference in favour of certain of the children was sustained.

14, 1837. THE late George Ponton by antenuptial contract of marriage executed in 1781 between him and Jean Currie, daughter of David Currie, tenant in Rosyth, bound and obliged himself, inter alia, "to provide and have in readiness, of his own proper means and money, against the first legal term after the solemnization of the marriage, all and hail the sum of £700 sterling, which, with the sum of £100 sterling contracted by the said David Currie in name of tocher with his said daughter, making in hail the sum of £800 sterling, he the said George Ponton bound and obliged himself and his foresaids to lend forth and employ in responsible men's hands upon good security for annualrents, or upon land, and to take the rights and securities thereof provided and secured to himself and the said Jean Currie his promised spouse, and the longest liver of them two in liferent, during all the days of their lifetime, and to the heirs and bairns of the said intended marriage in fee, whom failing, £700 of which said sum of £800 to belong to the said George Ponton and his own nearest heirs, executors, or assignees, and the remaining £100 to pertain and belong to the said Jean Currie, her own nearest heirs, executors, or assignees."

Division.  
Lord Jeffrey.  
F.

<sup>1</sup> *Darling v. Adamson*, Nov. 26, 1834 (ante, XIII. 93).

the date of the last deceasing of the said promised spouses." He **No. 149.**  
 bound himself to provide and secure whatever property they might **Feb. 14, 1837.**  
 during the marriage, "to himself and his said promised spouse, **Ponton v.**  
 best liver of them two in liferent, during all the days of their life- **Ponton.**  
 l to the heirs and bairns of the said intended marriage in fee."  
 marriage, there was issue, two sons, James and George, and two  
 s, Alison and Jean (the claimants Mrs Hardie and Mrs Hamilton).  
 g his lifetime George Ponton gave to James, his eldest son, an  
 r payment of £500 out of a fund on which he had a claim.  
 dmitted that he had received to the extent of £150 from this  
 nd there was prima facie evidence that he had drawn £400.

he Ponton died in 1828, being survived by his wife and his four  
 leaving a trust-deed of settlement, whereby he conveyed all his  
 to trustees with powers of sale. After directing payment of his  
 d an annuity of £80 to his widow, he set forth that he had paid  
 able sums to his two sons during his life, and therefore appointed  
 es to pay £500 to each of his daughters, and then to divide the  
 of his estate equally among all the four children. On the death  
 uster, James, the eldest son, raised an action of reduction of the  
 d as in contravention of the contract of marriage above-mention-  
 hich action the trustees were assoilzied. Subsequently to this  
 ed a multiplepoinding, during the dependence of which they sold  
 table property of the deceased, and after taking credit for the  
 of their management, including that of defending the action at  
 nce of James Ponton, there remained of free funds only £376.  
 ow's claim for her annuity was admitted to be preferable, and,  
 tra, Mrs Hardie and Mrs Hamilton claimed to be ranked prefer-  
 heir brothers, under the provisions of £500 in their favour respec-  
 ey having received nothing, while their brothers had during their  
 life drawn an amount far beyond what the fund in medio could  
 the sisters. On the other hand, James and George, the sons,  
 that the contract of marriage precluded the deceased from giving  
 ence to any of his children, and as to the alleged payments to  
 es during the truster's life, it was alleged that so far as these  
 nitted, which was not the case to any extent in regard to George,  
 e made on other grounds, but of this no evidence was adduced.  
 ns were also taken by them to the sale by the trustees, and to a  
 r factor's fee.

Lord Ordinary pronounced the following interlocutor:—"Imo,  
 f consent, that the assignee of the late widow of George Ponton  
 the truster), and John Henderson, the law-agent for the said  
 Ponton and spouse, are entitled to be preferred primo loco and  
 n on the fund in medio for whatever may be ascertained as the  
~~sums of~~ their claims as creditors in this process: And in regard to

149. the competition among the other claimants, the sons and daughters of the said George Ponton senior, Finds, 2do, That the claimant James Ponton (the eldest son) has not instructed by any sort of evidence that he is entitled to claim or rank on the said fund in medio as a creditor of his late father, in respect of his right to salary or payment for alleged services done to his said father; and that he has made no relevant offer of proof in support of such claim: Finds, 3tio, That the terms of the trust-deed executed by the said George Ponton senior (the father), are in no respect inconsistent with the provisions of the antenuptial contract entered into by him in contemplation of his subsequent marriage, but are, on the contrary, in entire conformity thereto, and distinctly provide for an equal distribution of his whole free property and estate among the children of that marriage: But finds, 4to, That it was within the power of the said George Ponton, notwithstanding the said antenuptial contract, to have exercised a reasonable discretion in distributing the property thereby settled among the children of the marriage; and that effect should be given to the directions of the trust-deed, although the consequence might be to render the shares of the said children respectively in some measure unequal; and that the burden of proving that such directions import an unreasonable and excessive inequality, should be laid on such of the said children as might make that allegation: Finds, 5to, That it was also within the power of the said George Ponton, notwithstanding the said contract, to direct his trustees to sell and turn into money the small detached heritable properties in which he was vested at his death; and that the legality, fairness, or propriety of the sales of the said properties accordingly made by the said trustees, have not been impeached upon relevant or intelligible grounds: Finds, 6to, That there is prima facie evidence in process that the claimant James Ponton did receive at least £400 as part of his provision in his father's life; and that he has admitted, that at all events he did receive £150; and therefore finds that he can, in no view, be entitled to any place in this competition, till each of his sisters shall have drawn from the fund in medio a like sum of £150; and till his brother George shall also either have drawn a like sum in this process, or been proved to have received such a sum from his father in his life: And in respect that it appears from any thing yet seen, that the whole fund in medio (after satisfying the preferable claims of the widow and law-agent) will be more than exhausted by the daughters severally drawing the said sum of £150, finds it unnecessary, *hoc statu*, to determine to what farther extent the said daughters (or younger brother) might be entitled to rank, before the said claimant James Ponton could claim any thing in this competition: And in regard to the claim of George Ponton, junior (the younger son) Finds, 7mo, That it was not in the power of the father, by the execution of the subsequent trust-deed, or otherwise, entirely to exclude him from any share of the property set-

ted by the marriage-contract; but that the narrative and recital in the said trust-deed, of his having actually received, in the father's lifetime, sums amounting to no less than £500, in satisfaction of his claims under that contract, and his practical acquiescence in, and written recognition of the justice and validity of the said trust-deed, raise such a presumption of his having truly received considerable sums, as there stated, as to impose upon him the obligation of proving the contrary, before he can be admitted to compete with the sisters in this process; and appoints the cause to be enrolled, that he may explain whether he is willing to undertake such a proof, and in what way he proposes that it should be taken: Before farther answer, remits the trustees' state of intromissions, and corrected abstract thereof, to Patrick Cockburn, accountant in Edinburgh, in order that he may report whether the sum for which credit is there taken in discharge, under the title of factor-fee, is a just and proper sum to be charged in that account, and if not, what would be just and proper." \*

No. 149.

Feb. 14, 183

Ponton v.

Ponton.

James Ponton reclaimed, but

THE COURT adhered.

J. J. FRASER, W.S.—SMITH and ROMAINES, W.S.—J. HENDERSON, S.S.C.—Agents,

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\* "NOTE.—The Lord Ordinary is anxious to bring this family contest to a close (if possible) before the expenses of litigation shall have swallowed up the whole sum in dispute. The fund in medio seems to be already reduced to something under £400, and the claims confessedly preferable are said to exceed one half of this. It is idle, therefore, to consider whether the sons have actually received £500 or upwards, since, if they have received but £100, it is plain that they have no right to compete on this fund with their sisters, who have confessedly received nothing. The pretensions of James are not very intelligible. With regard to George, the Lord Ordinary feels that there is some difficulty in holding him to the proof of a negative; and yet the father's recorded averment, in an instrument of this description, and referring to family transactions for a period of 40 preceding years, and his distinct adoption of that deed, by his taking a small payment under it, and signing the remarkable receipt in relation to it, appears sufficient to relieve the sisters from the necessity of now proving that some payments had been made to him. The factor-fee seems quite extravagant, and it would be very desirable to make some addition to the miserable fund in medio."

150.

CHARLES GRANT, Advocate.—*D. F. Hope—A. McNeill.*

1837.

GEORGE SMITH, Respondent.—*Robertson—E. S. Gordon.*

*Reparation—Verbal Slander.*—A dispute, about a frivolous subject, arose between two referees, and one of them, who was a man in a low rank of life, got into a passion, and called the other a partial judge or a partial fellow, and alleged that he had acted in many cases as a partial judge; that referee raised an action of damages labelling that the statements were made "falsely, wickedly, maliciously, and calumniously;" that they had been widely propagated through the country; and that his character and feelings were deeply injured; and concluding for £100 as damages and solatium; no proof of propagation of the statements was adduced, and no injury was proved to have resulted from the use of the words.—Held, in the circumstances, that the defender ought to be assolizied, and neither party found entitled to expenses.

1837.

verdict.  
Harton.

GEORGE SMITH, distiller in Glenlivet, raised an action of damages against Charles Grant, residing at Glenlivet, before the Sheriff of Bauffshire. He libelled, that a verbal reference had been made to Grant and himself, to decide whether certain parties who had been employed to cast peats had duly fulfilled their agreement with their employer; that Grant and he, on 30th June, 1833, met on the ground where the peats had been cast, and proceeded to execute their duty as referees, but soon differed in opinion as to the nature of their duty; that Grant, "actuated by a determination to injure, calumniate, and defame the pursuer, upon the 30th day of June last, or on one or other of the days of said month of June last, or of the month of July following, and while the pursuer was discharging the sacred duties reposed in him, as aforesaid, did falsely, wickedly, maliciously, and calumniously say and assert that the pursuer was not a competent judge, and also that he was a partial judge; and did farther falsely, wickedly, maliciously, and calumniously say and assert that the pursuer had acted as a partial judge on other occasions, and that he could prove that the pursuer had been guilty on these occasions of acting as a partial judge, and has propagated these false, malicious, and calumnious statements widely through the country, to the pursuer's great hurt and prejudice, from all which it is evident the said Charles Grant has said, asserted, and propagated the said false, malicious, and calumnious statements, with the evident intention of traducing and vilifying the pursuer's character as an honest man, and holding him up to the public as partial and corrupt in judging of matters referred to him;" that these "false, calumnious, wicked, and malicious statements" had tended to destroy his character, and "cause him to be held up to ridicule and contempt," and had hurt his feelings, &c. He concluded for £100, as damages and solatium.

The defender denied that he had been actuated by the intention imputed to him, or by any animus injuriandi; he also denied that he had

ever propagated the statements libelled; but admitted that, in No. 150.  
 it of a difference or quarrel between the pursuer and himself, some  
 e language had passed on both sides, but under such circum- Feb. 15, 1837.  
 as to afford no ground of action in any court. Grant v.  
 Smith.

oof was allowed, from which it appeared that the referees had got  
 dispute, chiefly about one particular peat, whether it was twelve  
 long as averred by Grant, or only eleven inches long as averred  
 th; that Smith cautioned Grant to take care what he was about,  
 ight be put upon oath respecting it, and Grant then grew hot  
 d he would swear for no man; that farther altercation ensued,  
 which Grant was in a passion, and used abusive and insolent  
 e to Smith, refusing to act longer with him, calling him "a partial  
 or a "partial fellow," accusing him of having been a partial judge  
 y cases, and, on Smith's asking him to name an instance, naming  
 at Craighead as an occasion where he had acted as a partial judge.  
 eared that one of the parties to the reference then came on the  
 , and Smith told him what had happened, upon which Grant  
 d his words. During all this time Grant was in a violent passion.  
 ot appear that Smith had used abusive words to him, unless the  
 respecting putting him on oath implied an impeachment of his  
 ling.

ese circumstances the sheriff found "it proved that the defender  
 nted the pursuer as a partial fellow, and persisted in that repre-  
 on, and that that imputation was aggravated by being applied to  
 n who was in the practice of acting as an arbiter or referee;  
 re, found the defender liable in £5 sterling of damages to the  
 ; and found him also liable in expenses."

it brought an advocacy, and the Lord Ordinary "found it  
 that, on the occasion libelled, the defender did use the injurious  
 ions complained of, and therefore repelled the reasons of advoca-  
 mitted the case simpliciter to the Sheriff of Banffshire, and decern-  
 d found the advocator liable in expenses."

it reclaimed.

GILLIES.—I feel considerable doubt respecting this interlocutor. In a  
 ere damages are asked for verbal slander, it is proper to look to all the  
 tances, including the habits and rank of life of the parties. There are  
 cusations, such as those of being a thief, or a murderer, which must be  
 us whenever used, and must always infer damages. But the words here are  
 erent sort. The parties here, who are in a low rank of life, fall into a hot  
 about the size of a peat, and Grant, in the violence of passion, accuses  
 f being a partial fellow, or a partial judge. These were improper expres-  
 specially between referees, and I do not justify them; they should never  
 in used, but still, in all the circumstances of the case, the use of them  
 ut have been made the ground of an action of damages such as this. The

rtiality does not necessarily imply a charge of corruption, as it

150. might merely import that an arbiter was too partial to his own views; but, at the rate, an action such as this should not have been raised. The libel states that Grant used the words "falsely, maliciously, and calumniously." Is there any proof to support a charge libelled in this fashion? I see no proof of malice, no attempt to prove the alleged propagation of these statements through the country, and no proof of any injury sustained by Smith in consequence of the words. And as the words were only used during the heat of an altercation, I think the action should be dismissed, and expenses found due to neither party.

LORD PRESIDENT.—I am of the same opinion. I think no injury to Smith has been proved, and that trifling, miserable actions of this sort, ought not to be encouraged.

LORD MACKENZIE.\*—I think the case not altogether free from difficulty, but concur in the opinions now given. This was a serious action of damages, £100, founded on a statement of premeditated deliberate malice, continued for considerable time, and producing repeated and extended calumny, accompanied with great injury to character and business. It was an action bearing of great expenses, in case of any judgment in favour of the pursuer, according to a recent decision of the Court. Then, in this action, there was proved no premeditation, no malice, no repeated or extended calumny, no injury to character or to business. Nothing was proved but this, that on one occasion, at a meeting of the parties, as referees, about the value of some peats, a difference of opinion having occurred, and some words (not well ascertained) having been used by the pursuer about the defender being put on oath, the defender, apparently understanding (right or not) these words as an imputation on his honesty, or veracity, got into a passion, and in that passion called the pursuer a partial fellow, or a partial judge. I think this proof can sustain no verdict or judgment in such an action. For it shows no injury requiring any remedy. To give a judgment for even a small sum of damages, on such a proof, in such an action (which would carry expenses with it), would truly be doing injustice between the parties.

THE COURT accordingly advocated the cause, and assoilzied the defender from the action, but found expenses due to neither party.

J. SOUTER, W.S.—ROY and WOOD, W.S.—Agents.

No. 151. MRS ISABELLA BETHUNE MORRISON and OTHERS, Claimants.—

*D. F. Hope—Monro.*

MRS KNIGHT'S TRUSTEES and OTHERS, Claimants.—*M'Neill—*

*Spiers.*

*Trust—Clause—"Free Rents."*—Construction under the terms of a testamentary trust-deed, of the "necessary charges" to be deducted from the annual proceeds of the trust-estate, before the residue could be held to be "free rents," dissoluble as directed by the deed.



THE late Mrs Knight of Halkerton, at her death, which took place on the 11th November, 1834, left two trust-deeds of settlement, in favour of the same individuals, as trustees, but of different subjects, and for different purposes. By one of these she conveyed to the trustees three heritable properties, called Halkerton, Balmye, and Scotstown, appointing them, 1st, "To divide and pay annually the free rents (deducting all necessary charges connected with, or burdens on the said lands, either by law or in terms of the current leases; and also deducting the liferent annuity of £180 sterling, payable from the lands of Balmye and Scotstown, to Mrs Ann Halliburton, the relict of the late David Maxwell of Balmye), and that equally and proportionally among Mrs Isabella Morrison, the only child in life procreated of the marriage between the late James Morrison," and three other ladies (one of whom predeceased the granter), and "the survivors or survivor of them, during all the days of their or her lifetime :"—2d, After the death of the last of these ladies, to convey the estate of Halkerton to Mrs Stewart of Stenton, in liferent, and certain other persons in fee :—3d, After the death of the last of the annuitants, to sell the estates of Balmye and Scotstown :—4th, After deduction of all proper and necessary expenses attending the sale and conveyance of the lands of Balmye and and Scotstown, to pay out of the price certain specific legacies, amounting to £1500, and to divide the residue into twelve equal parts, to be paid over to the persons therein named. Alongst with the assignation to the writs and title-deeds there was an assignation to the rents. There was no provision as to payment of the expenses of the trust other than that implied in the provisions above mentioned.

No. 151.  
Feb. 14. 1837  
2d Division.  
Ld. Moncreiff  
T.  
Morrison v.  
Knight's  
Trustees.

The trustees made up their titles by infestment, and disputes having arisen as to the free proceeds divisible among the three annuitants, the trustees raised a multiplepinding, with reference to the rents of the crop and year 1834, in which they, alongst with the parties among whom the lands were ultimately to be distributed, claimed that all the expenses of making up titles, including entries to the superior, and of management, as well as all the burdens imposed by law, and expenses connected therewith, as those of a process of locality, the building of a parish church, &c. must first be deducted from the rents, and that the residue only formed the free fund divisible among the annuitants.

On the other hand, Mrs Morrison, &c. contended that the only deductions from these rents meant to be sanctioned by the trust-deed were the ordinary annual burdens affecting them by law, the burdens arising under current leases, and Mrs Halliburton's annuity; particularly, that there was no ground for deducting the expense of making up titles and inventories connected with the personal estate of the testatrix, or the expense of infestments, compositions, entries with the superior, or of any process of locality.

The Lord Ordinary pronounced the following interlocutor, adding the

151. note subjoined : \*—“ Finds, that the fund in medio, consisting of rents of the heritable subjects conveyed to the trustees for crop and year 1834, which were due, though not payable, at the death of testatrix, must be applied by the trustees, in the first place, to the payment of ‘all necessary charges connected with, or burdens on the said lands, either by law, or in terms of the current leases;’ and that, quoad ultra, if any residue remains, it is to be considered as ‘free rents,’ to be divided equally among the three claimants, Mrs Morrison, Miss Lillias Maxwell, and the representatives of Miss Janet Maxwell : Finds, that the expense of making up titles to the property, and, in particular, of entries with the superior or superiors, in so far as such entries are necessary from the nature of the titles, must be considered as a necessary charge connected with the said lands, or a burden thereon by law, and as such must be paid out of the said fund or rents, before it can be held that the said rents are free rents,

\* “ NOTE.—This multiplepointing comprehends nothing but the rents for crop and year 1834, due at the death of the testatrix. The Lord Ordinary cannot, therefore, decide any thing as to any other rents or fund.

“ This is not a case of *liferent* and *fee*. The full fee is in the trustees, under the obligation to divide the *free* rents, after deductions according to the special terms expressed. They are not appointed to give the fee to any one; but, after the lapse of the legacies of those rents, to sell the lands, and *divide the price*; and, as the clause appointing the disposal of such price specifies no deductions therefrom but the *necessary expenses of the sales*, and the special legacies provided, the trust-deed evidently supposes that all the other expenses of the trust, and all charges connected with the lands previously emerging, shall have been previously satisfied. The Lord Ordinary, therefore, conceives, that this is a special case on the meaning and effect of the trust purposes, to which the rules by which the interests of *liferenters* and *fiars* in general are determined, have no application.

“ The rents which became due while the testatrix was alive, on the term-day of Martinmas, 1834, seem to be clearly carried to the trustees by the clause of assignment of rents. But, as no rents whatever are appointed to be reserved for those to whom the price of the land is to be paid over; and, at all events, they can have no claim to any rents emerging before the failure of the annuitants, the Lord Ordinary sees no room for doubt, that, in so far as the rents in question are *free*, in the sense of the trust, they belong to the claimants, Mrs Morrison and others. But then it appears to him, that they cannot be free in that sense as long as there are any charges connected with the trust management, or the lands or titles thereto, unsatisfied. The trustees hold no other fund, and have no power to raise money on the fee to answer such charges.

“ The composition to the superiors is a special matter, and seems to be the chief point of controversy. But if the title was so left by the testatrix, that the lands are in non-entry, and a composition is due, it seems to be an inevitable consequence, that this is a necessary burden on the lands, and, at all events, a necessary charge connected therewith, to be deducted from the first rents coming into their hands.

“ It may be true that the trustees are, in effect, maintaining what is for the benefit of those to be interested in the price at last. But this only arises from the necessity they are under of providing for the charges affecting the lands, and disposing of the particular fund in dispute.

“ The Lord Ordinary has not overlooked the expense of the new church likely to arise. His opinion is, that it will fall under the principle of his judgment. But as it is not yet a charge on the lands, he has not thought it necessary particularly to advert to it.”

to be distributed among the claimants as annuitants: Therefore, approves No. 151. of the condescendence of the fund in medio given in by the trustees, but, <sup>Feb. 16, 1837</sup> <sup>Rowand v. Walker,</sup> *quoad ultra*, sustains the claim of Mrs Morrison and others, and appoints the cause to be enrolled, in order that this interlocutor may be accurately applied: Finds, that the expenses incurred by the trustees in this multiplepointing, rendered necessary by the doubts raised as to the disposal of the fund in medio, must be a burden on that fund: Allows an account thereof to be given in, and remits the same, when lodged, to the auditor to be taxed: But finds no expenses due by any party in any other form."

Mrs Morrison, &c. reclaimed.

The Court stopped the counsel for the trustees, &c.

LORD JUSTICE-CLERK.—On the general question I have no doubt. We are here merely interpreting the meaning of this deed. It is a question of will. Mrs Knight had it in her power to declare that these ladies should be liferenters of her estate; but that is not the nature of the deed here. It is not a case of liferent and fee, but we have a testamentary deed, to which the ordinary rules of construction are to be applied. The question is, what are the "necessary charges" and the "burdens" which law imposes. The expense of making up titles, and of an entry with superiors, certainly falls under that description, and I have no doubt the Lord Ordinary has put a sound interpretation on the deed.

LORD GLENLE.—I agree. The general principle laid down by the Lord Ordinary is, that the rents to be held free in each year are only after all the expenses for that year have been paid.

LORDS MEADOWBANK and MEDWYN concurred.

THE COURT accordingly adhered.

BAXTER and M'DOUGALL, W.S.—JAMES WRIGHT, W.S.—Agents.

ALEXANDER ÆNEAS GRANT, Raiser.

No. 152.

MICHAEL ROWAND and OTHERS (Carrick, Brown, and Company),  
Claimants and Pursuers.—*Keay—More.*

CHALMERS of WALKER and OTHERS, Claimants and Defenders. —  
*D. F. Hope—E. S. Gordon.*

*Issue—Right in Security—Clause.*—1. Three parcels of land, the property of party, which had long been let under separate leases, were sold by public auction in separate lots, to the same purchaser; they were conveyed to the purchaser in one disposition, which described them seriatim by distinctive names and surnames, declaring the whole to be held feu, for payment of 3s. yearly of feu-duty, and doubling the same on the entry of heirs:—Held that, as they were naturally contiguous, and had always been held by one tenure, under one superior, they formed but one feudal tenement, and that infestment of the same might effectually be taken by delivery of earth and

1. 152. stone upon any one of them. 2. Terms of a clause in an instrument of sasine which referred to a disposition, containing, first, three parcels of land held feu, and second, a burgage subject, under which clause it was held, that the infestment in the lands "first above disposed," being given on the ground of the lands "first above described," was infestment in the whole lands held feu; these being the lands first disposed or described, in contradistinction to the subject held burgage which was last disposed; and that the infestment was not restricted to the first of the three parcels of contiguous land, held feu, and forming one feudal tenement.

16, 1837. **DIVISION.** **Courthouse.** **D.** THE estates of William Mackintosh of Millbank were sequestrated under the Bankrupt Act, and Alexander Aeneas Grant, writer and banker in Nairn, was chosen trustee. Grant sold the lands of Janefield and others, belonging to the bankrupt, for £2460. They were affected with two securities for £2000 each, one of which was granted in 1825, in favour of Mrs Chalmers or Walker and others, in liferent and fee respectively; the other was granted in 1830, in favour of Michael Row and of Linthouse and others, for behoof of Carrick, Brown, and Company, bankers in Glasgow. A competition on the price arose between these parties, in which Carrick, Brown, and Company objected that the infestment in favour of Mrs Chalmers and others had been so taken as to limit her real right to one parcel only of the lands. The following were the facts on which the objection turned.

In 1770 the burgh of Nairn granted a lease of a portion of their lands amounting to 17 acres, called Moss-side, for 95 years, to Alexander Ore of Knockandie; in 1778 the burgh granted a lease of a contiguous portion of their lands, called Bremner's Possession, to a different tenant, for 57 years; and in 1805 a third portion of their lands, called Janefield, and amounting to 95 acres, which was also contiguous to the other lands, was let for 57 years to a third tenant. The whole came ultimately to be in the occupation of Mackintosh. They were all parts of one property, which had always been held by the burgh under the same grant and by one tenure, under one superior.

In 1824 the burgh exposed to sale by public roup "All and whole the lands, feu-duties, and others after specified, belonging to the corporation or community of Nairn, viz. Primo, That part of the lands adjoining the Moss of Nairn, held in lease by Mr Mackintosh of Millbank, commonly called Janefield; Secundo, The ground adjoining the said moss, known by the name of Bremner's Possession, and likewise occupied by Mr Mackintosh of Millbank; Tertio, The lands contiguous to the said moss, held in lease by Miss Ore of Knockandie, and occupied by William Mackintosh, her subtenant; Quarto, The pendicle, &c.

"Article First, The said lands, feu-duties, and others, are to be exposed to sale in the different lots above enumerated, and at such up prices as shall be put thereon," &c.

At the roup, William Mackintosh bought the lands of Janefield at the price of £950; Bremner's Possession at the price of £1

ide at the price of £260: in all £1350. The Magistrates and Council of Nairn executed a disposition in his favour, narrating that Mackintosh <sup>No. 152</sup> <sup>Feb. 16, 1825</sup> <sup>Rowand v. Walker.</sup> having offered the sum of £1350 sterling for those parts of the said lands commonly called Janefield, Bremner's Possession, and that part of the lands of Moss-side occupied by William Mackintosh, as sub-tenant under Miss Ore of Knockandie, as particularly after described, and being the last and highest offerer for the said three several lots, he was by the judge of the roup preferred to the purchase." The decd then acknowledged receipt of the price of £1350, and disposed to Mackintosh "All and whole that piece of moss ground, now called Janefield, measuring ninety-eight acres, Scotch measure, or thereby, being part of the Moss of Nairn, with the pieces of moor ground lying on the north and south sides of the ninety-eight acres of moss ground, and bounded, the said moss and moor ground, hereby sold, as follows, viz. on the east," &c., "and on the south partly by the lands of Moss-side:" "As also, all and whole that farm and possession called Bremner's Possession, and adjoining the said lands of Janefield; bounded on the south and west by the said lands of Janefield: As also, all and whole that farm and possession called Moss-side, bounded on the north partly by the said lands of Janefield," &c. Immediately after this description they followed an obligation to infest, in these terms:—"In which lands and others above disposed we bind and oblige ourselves to infest and seise the said William Mackintosh, Esq. and his foresaids, upon their own proper charges and expenses, to be holden of and under the Magistrates and Town-Council of Nairn, their successors in office, in feu-farm, fee, and heritage, for ever, for payment to the town-treasurer of the said burgh of the sum of three shillings sterling yearly, in name of feu-duty, and that at the term of Martinmas yearly, beginning the first year's payment thereof at the term of Martinmas in the year 1825, for the year immediately preceding, and so forth yearly thereafter, at the term of Martinmas, in all time coming, and doubling the said feu-duty at the entry of each heir or singular successor to the said lands and others, as use is in feu-farm, and that for all other burdens or secular service which we and the remanent members of the Town-council, and successors in office, and the community of the said burgh, can ask or require from the said William Mackintosh, Esq. his heirs and successors, furth of the said lands and others before disposed, or furth of any part or portion thereof; which lands and others above disposed, with this present right and disposition thereof, and infestment to follow hereon, we bind and oblige ourselves," &c., "to warrant," &c. There followed an assignation not only of "the whole writs and evidents of and concerning the subjects above disposed," but also of "the rents and duties thereof," &c. The receipt of sasine required the bailies to "pass to the ground of the said lands and others, and there give and deliver to the said William Mackintosh or his foresaids, heritable state and sasine, real, actual, and

152. corporal possession of all and whole the lands and others particularly  
 1837. above specified, with the parts and pertinents thereto belonging, all lying  
 v. contiguous, and described as aforesaid, and that by deliverance to the  
 said William Mackintosh, Esq. or his foresaids, or to his or their attorney, in his or their name, bearers hereof, of earth and stone of the ground of the said lands, and all other symbols usual and necessary." Under this disposition Mackintosh took infeftment, in expediting which the notary did not make delivery of earth and stone upon each of the three parcels of land, but upon one of them only, for the whole.

In 1825 Mackintosh borrowed £2000 from Mrs Chalmers and others, to whom he granted a disposition in security. The disposition contained not only the lands holding feu of the burgh of Nairn, as already described, but also a separate subject holding burgage. The disposition first described the lands holding feu, in terms similar to those already quoted in the disposition by the burgh to Mackintosh, and coupling the three parcels of land by the words "as also;" after which it described the burgage subject, which was connected with the preceding description of lands, by the words, "and likewise." The obligation to infest was in these terms:—"In which lands and others first above disposed in security, I bind and oblige" myself to infest Mrs Chalmers and others, "and that by two several infeftments and manners of holding; the one thereof to be holden of me and my foresaids in free-bleinch, for payment of a penny Scots money, on the ground of any part of the said lands, at the term of Whitsunday yearly, in name of bleinch farm, if asked only; and the other of the said infeftments to be holden from me and my foresaids of our immediate lawful superiors," &c. Then followed the words "And in the subjects, with the pertinents last above disposed in security, I bind and oblige myself and my foresaids, at our own proper charges and expenses, duly and validly to infest and seise the said Mrs Chalmers," &c., "to be holden of his Majesty, and of his royal successors, in free burgage," &c., which referred to the subject held burgage. A precept of sasine was added "to the effect the said Mrs Chalmers and others may be infest and seised in the foresaid lands and others with the pertinents first above disposed, I the said William Mackintosh desire and require you, &c., that ye pass to the ground of the said lands and others, and there give heritable state and sasine, &c., of all and whole the foresaid lands and others with the pertinents first above disposed,"—"by delivery of earth and stone of the said lands."

In January, 1825, infeftment was taken under this disposition. The instrument of sasine bore that the parties appeared before the notary "upon the ground of the lands first herein-after described." It then narrated the conveyance of the lands holding feu, and the lands holding burgage, all as contained in the dispositive clause of the disposition in security, and, after quoting the precept, as stated above, it bore that sasine was given "of all and whole the said lands and others &

infestment in each parcel of the lands under a disposition from Mackintosh conveying these lands to them in security of a loan of

the sequestration of Mackintosh, and the sale of the whole lands as trustee, he raised a multiplepoinding for distributing the price among Mrs Chalmers and others, and Carrick, Brown, and Company, according to the nature of their preferences; and Carrick, Brown, and Company, who had themselves bought the lands at the roup from the trustees, besides claiming in that process, on the price, raised a declarator of the referable nature of their right, and containing various conclusions burdening the lands of all incumbrances. In support of their action, they pleaded, that the three parcels of land called Moss-side, Moss-side, and Bremner's Possession, had been occupied on separate leases for a long term of years; that they had been sold as separate lots by Mackintosh at the roup in 1824, and that the deed in his favour described them each separately, and as mutually sold by each other; that the disposition by Mackintosh to Mrs Chalmers and others described them in the same manner; and that, as borne in their favour narrated infestment to have been given in the lands "first above disposed," which was done by one single delivery of earth and stone, upon the ground of the lands "first described," the effect of such infestment was necessarily limited only to the first of the three parcels of land. One delivery of earth and stone could carry no more than that single parcel of land, of which, delivery was made. But even if it might competently extend to the whole, still it was expressly restricted in its terms to



1837. sold in separate lots, yet as they were contiguous, and were disposed to the purchaser to be held by the same tenure, under the same superior, for payment of one slump sum of feu-duty, doubling it on the entry of heirs, they formed but one feudal tenement, and accordingly were conveyed by the burgh to Mackintosh in one disposition, under which one infestment would suffice to give sasine in the whole, unless there were any restrictive words in the infestment confining its effect to a part. But there were no such words, and therefore he had been duly infest in all the three lots, by a single delivery of earth and stone upon one of them. In like manner the claimants and defenders were duly infest in the whole, under their disposition in security. That disposition first conveyed the lands which were held feu, all of which were seriatim described; and it next conveyed the separate subject held burgage. And in the relative obligations to infest, that part of it which referred to the whole lands held feu, described them as the lands "first above disposed," and that part which referred to the burgage subject, referred to it as "last above disposed." In reference to this natural division and description of the subjects, the instrument of sasine also narrated that infestment was given "of all and whole the lands first above disposed," which necessarily referred to the whole of the lands held feu; and though such sasine was only given once, and therefore upon only one part of the lands, it was effectual to carry the whole, because the whole formed but one feudal tenement.

The Lord Ordinary, "in the multiplepointing, found the claimants Mrs Chalmers and others preferable on the fund in medio for their respective rights of liferent and fee, in terms of their claim, and decreed in the preference accordingly; and in the declarator, sustained the defences of these claimants, assoilized them from the conclusions of the libel, and decreed; and found the claimants and pursuers Michael Row and others, partners of Carrick, Brown, and Company, liable in expenses." \*

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\* "NOTE.—The claimants Carrick, Brown, and Company, have not shown that the three farms, Janefield, Bremner's Possession, and Moss-side, are separate feudal tenements. It is proved that they are all contiguous, and it does not appear, nor is it alleged, that they are, or ever were, holden of different superiors, by different vassals, or under different tenures. An infestment, therefore, taken on any one of the farms or parcels is a competent infestment for the whole tenement. Accordingly there is no warrant in the precept of sasine, contained in the heritable bond of the Walkers, to take infestment on the three farms respectively and successively; and if there had been such a warrant it would have been superfluous.

"Besides this tenement holden in feu, Mackintosh, the common debtor, conveyed to the Walkers, in security, a second tenement, which was holden burgage. In their heritable bond, therefore, there is an obligation on the granter to infest them in the lands first above disposed, by two several infestments and manners of holding, by delivery of earth and stone; and in the subject last disposed, Mr Mackintosh binds himself to infest them in the lands, to be holden of his Majesty and his royal successors in free burgage for service of burgh used, and that by resignation, &c.; and the precept of sasine accordingly con-

ed of a clause of union, or the erection of such lands into a barony, in  
o make one sasine good for the whole. They are naturally contiguous to  
ther, and they do not form distinct feudal tenements. It was therefore  
ent to give delivery of the whole of these lands by tradition of earth and  
upon any part of them ; and, on looking at the terms of the disposition and  
I am satisfied they do not restrict the infeftment to any portion of the lands,  
re infeftment of the whole. I therefore concur in the interlocutor of the  
Ordinary, and am of opinion that it ought to be adhered to.

ED GILLIES.—I entirely concur with the Lord Ordinary and the Lord Pro-  
r.

ED MACKENZIE.—I am of the same opinion.

ED PRESIDENT.—I am of the same opinion also.

THE COURT adhered.

W. and D. ALLESTER, W.S.—J. GARDINER, W.S.—Agents.

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eftment in the lands first above disposed to be holden feu, and by delivery  
th and stone. The instrument of sasine narrates the conveyance of the  
first disposed holding feu, and the subject last disposed holding burgage,  
bears that heritable state and sasine was given to the Walkers in the lands  
bove disposed by delivery of earth and stone. Nothing can be more re-  
than all this procedure. But the notary states in his iustrument that the  
ony was performed, not on the lands first disposed, but on the lands first  
bed ; and as the boundaries of the three parcels composing the feudal tene-  
are mentioned separately, Carrick, Brown, and Company maintain that this  
nent must have been given on Janefield. But that is a matter of no conse-  
e, for, if the three parcels are one tenement, it is indifferent on which of the  
the ceremony is performed. But, secondly, Carrick, Brown, and Company  
ain that the lands first disposed are synonymous with lands first described,

No. 153.

— CALDER, Pursuer.—*Shand.*— ADAM, Defender.—*Hector.*

16, 1837.

1837.

1837.

Hamilton.

*Jury Trial—Reparation—Process.*—Circumstances in which the Court dismissed an action of damages, under A.S. 29th November, 1825, § 47, in respect that it had not been insisted in for above 12 months after the issues were adjusted, and no satisfactory explanation of the delay was given.

16, 1837.

Division.

MOTION by the defender to have an action of damages, for slander dismissed, under Act of Sederunt, 29th November, 1825, § 47, in respect of the pursuer not having insisted for above twelve months after issues had been adjusted. The pursuer explained that he had been engaged in prosecuting the reduction of a decree-arbitral, in which he succeeded in January last; that he was unable to carry on both actions at once, but as the reduction was now at an end, he would be able to insist in the action of damages, and was ready to do so.

LORD MACKENZIE.—I do not think that any sufficient explanation is given, to account for this delay, or to save the pursuer from having his action dismissed under the power contained in the Act of Sederunt. There is no connexion between the two actions. The only statement is that the pursuer had not time to carry on his action of damages at the same time with his reduction. But I should have thought of that before raising his action of damages. The provision in the Act of Sederunt is an important and salutary one, and we should give effect to it wherever no satisfactory explanation is made. But if we listened to this explanation there is no end to the apologies which would be made, and jury practice would be thrown loose.

LORD PRESIDENT.—I am of the same opinion.

LORD GILLIES.—I concur also. The action must be dismissed.

THE COURT dismissed the action.

Agents.

No. 154.

ARTHUR HAMILTON, Petitioner.—*Wilson.*

*Cessio.*—A petition for interim protection was presented by a party within two days after raising a process of cessio under 6 and 7 Will. IV. c. 56; intimation ordered, by the Court, in respect that this did not prejudice the right of any party, and, in particular, did not affect the question whether the prayer of the petition could competently be decided on the merits before the expiry of the indulgence allowed by the statute for bringing the defenders in the cessio into Court.

ARTHUR HAMILTON raised a process of cessio under 6 and 7 Will. No. 15 IV. c. 56, on February 13; and on February 15, he presented a petition for interim protection until 14th May. When the petition was moved, Feb. 16, 1881  
1st Division

Yeatts v.  
His Creditors

LORD GILLIES.—I doubt very much whether the Court should pronounce even an order of intimation until the induciæ are expired, which the statute has allowed for bringing the defenders in the cessio before the Court, if they choose to appear. Till then, I apprehend we can do nothing; and if we order intimation of a petition like this, it affords a colour for supposing that we can competently entertain and dispose of the prayer of it.

LORD MACKENZIE.—The question of the power of the Court has not yet been decided; and as the usual order of intimation is harmless in itself, and will not prejudice any party, I think it safer to grant such an order than to refuse it.

LORD PRESIDENT.—I think an order for intimation may be pronounced.

THE COURT then ordered intimation, and, on the motion of the petitioner, directed special service of the petition upon a party who was stated in the petition to have given him a charge of horning.

J. JOHNSTONE, S.S.C.—Agent.

ROBERT YEATTS, Pursuer.—*Sandford*.  
HIS CREDITORS, Defenders.—*Robertson—Mure*.

No. 15

*Cessio*.—Observed by the Court, that although, in a process of cessio, the length of the pursuer's imprisonment is an important element for consideration, where the creditors merely complain of his past extravagance or misconduct, it is altogether irrelevant where there has been actual concealment of funds, and these are still secreted by the pursuer; that, in such a case, the incarceration must be prolonged until he makes a full discovery of his estate, and sibi imputet, if this be for a protracted period. Feb. 16, 1881  
1st Division

ROY and WOOD, W.S.—A. NAIRNE, S.S.C.—Agents.

1856.

WILLIAM ROBERTSON, Suspender.—*McNeill—Robinson.*

1857.

RICHARD COLLINS and OTHERS, Respondents.—*Sol. Gen. Rutherford—Moir.**Jurisdiction—Prisoner—Act of Grace—Salmon-Fishing Acts—Process.*

1. A party was convicted under 9 Geo. IV. c. 39, of taking salmon in close-time, and the Justices fined him in £3, besides £1, 3s. of expenses; the sentence ordained "execution to pass hereon by poinding in terms of said act, and by imprisonment in the Jail of A. for the period of two months, unless said sums be sooner paid:"—Held that, although the question was attended with extreme difficulty, the party was entitled, after imprisonment, to the benefit of the Act of Grace. 2. Cause discussed on the bill and answers, and mutual cases, without making up a record.

1857.

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By statute 9 Geo. IV. c. 39, entitled, "An act for the preservation of the salmon fisheries in Scotland," it is provided, § 1, that whereas various Scottish statutes against killing salmon in forbidden time, and killing fry, &c. of salmon, had been ratified by 1696, c. 33, and it was expedient "that the penalties enacted by the said acts be augmented, and the period of the forbidden time altered and extended, and that sundry other regulations should be made," therefore, the act 1424, c. 35, fixing the close-time was repealed, and it was enacted that it should be close-time between 14th September and 1st February, during which "no salmon, grilse, &c., shall be taken in or from any river, &c., estuary, &c., by any person; any law, &c. to the contrary notwithstanding:" § 2. That if, during close time, "any person shall wilfully take, &c., any salmon, &c., such person shall forfeit and pay any sum not less than £1, and not exceeding £10, for and in respect of every such offence, over and above forfeiting every such fish so taken, and every boat, net, or engine by which the same may have been taken:" § 3. Penalty for trespassing on any ground, with intent to kill salmon, &c.: § 4. That if any person "shall wilfully take, &c., or sell, &c., the spawn, smolts, or fry of salmon, &c.," or obstruct the passage of salmon fry, &c., or injure any spawning bed, &c., "such person shall forfeit and pay a sum not less than £1, and not exceeding £10, for every such offence:" § 5. Penalty for wilfully taking, &c., or selling, &c., any unclean salmon: § 6, 7, 8. Penalties imposed on using a light in taking salmon; on neglecting or refusing to remove boats, nets, &c., from a fishery, during close time; and an augmented penalty, beyond that of 1477, c. 73, as to improperly constructed salmon-cruives, &c., in fresh water: § 9. "Provided always, and be it enacted, That each and every penalty provided by this act shall go to the informer, and may and shall be recoverable, with expenses, as well before the Sheriff as before the Justices of the Peace of any county, as aforesaid, wherein the same may be incurred, or where the offender shall reside, at the instance of any person or persons."

prosecute for the same ; and in prosecutions for the different penalties imposed by this act, or any other act for the preservation of the fisheries in Scotland, it shall be lawful for the Sheriff or Justices to whom any complaint for the recovery thereof may be brought, to proceed in a summary way, and to grant warrant for bringing the party complained upon immediately before them, and on proof on oath by one or more credible witnesses, or confession of the offence, or other evidence, forthwith to determine and give judgment in such case, without any written pleadings or record of evidence, and to grant judgment for the recovery of all penalties and expenses decreed for, failure of payment within fourteen days after conviction, by poinding and imprisonment, for a period at the discretion of the Sheriff or Justices, not exceeding six months, it being hereby provided that a record shall be made of the charge and of the judgment pronounced ; and any person or persons who shall think himself, herself, or themselves aggrieved by judgment of any Sheriff or Justices, pronounced in any case arising under this act, or by assessment made under this act, in Scotland, may appeal to the Commissioners of Justiciary at their next Circuit Court, or where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions contained in the act passed in the thirtieth year of the reign of King George the Second, for taking away and abolishing the heritable jurisdictions in Scotland ; with this variation, that such person or persons shall, in place of finding caution in the manner prescribed by the said act, be bound to find caution to pay the costs or penalties, and expenses awarded against him, her, or them by sentence or sentences appealed from, in the event of the appeal or appeals being dismissed, together with any additional expenses that may be awarded by the Circuit Court on dismissing the said appeal or appeals ; and it shall not be competent to appeal from or bring the proceedings of any Justices or Sheriff acting under this act under review, or revocation or suspension, or by reduction, or in any other way than herein provided :” § 10. A mode was prescribed by which the proprietors of fisheries in the same river, &c., might assess themselves for the purpose of enforcing this act and the other laws regulating fisheries ;” “ and it shall be lawful for such meetings to appoint and pay clerks, water-bailiffs, and other officers, as they shall see fit.” The assessment, whatever its amount, was declared to be recoverable in the Sheriff’s Small Debt Court “ at the instance of any proprietor or other person ” authorized by the meeting of proprietors : “ And be it further enacted, That it shall be lawful for any person, without any warrant or other authority than this act, brevi manu, to arrest and detain any person who shall be found committing any offence against this act, and to carry such person before any Justice of the Peace or Magistrate, or to deliver such person to a constable, who is here-

No. 156.

Feb. 16, 1837.

Robertson v.  
Collins.

by required to carry such person before a Justice of the Peace or Magistrate, who shall forthwith examine and discharge, or commit such person until caution de judicio sibi be found, as the case may require : " § 18.

" And be it further enacted, that no prosecution or other proceeding whatever, shall be brought or commenced against any person or persons, for any offence or offences against this act, unless the same shall be laid or commenced within six calendar months after any such offence or offences shall have been committed ; and provided, that where any offender shall be punished by virtue of this act, he shall not incur the penalty of any other law or statute for the same offence."

William Robertson, merchant in Banff, designing himself " water-bailiff, appointed (under § 10 of the above statute) by the proprietors of salmon-fisheries in the river Deveron," prosecuted Richard Collins before the Justices of the Peace of Aberdeenshire, for taking salmon in close-time, in contravention of the statute, and obtained a conviction and judgment in these terms :—" At Turriff, in the county of Aberdeen, the 17th day of November, 1835, the which day his Majesty's Justices of the Peace for the said county, fined and amerced, and hereby fine and amerciate Richard Collins, vander of hardware, residing in Huntly, in the sum of £3 sterling, payable to William Robertson, Esquire, merchant in Banff, superintendent of the salmon-fishings on the river Deveron, for certain offences committed by the said Richard Collins, in contravention of the act, 9th Geo. IV., cap. 39, as particularly mentioned in the petition and complaint, raised at the instance of the said William Robertson against the said Richard Collins ; also found and hereby find the said Richard Collins liable to the said William Robertson in the sum of £1, 3s. of expenses, and if said sums are not paid within 14 days from this date, decerned and ordained, and hereby decern and ordain, execution to pass hereon, by poinding in terms of said act, and by imprisonment in the jail of Aberdeen for the period of two months, unless said sums be sooner paid."

Collins failed to pay the sums for which he was found liable, and he was imprisoned in terms of the decree or sentence. He made an application to the magistrates for aliment under the Act of Grace 1696, c. 32, in respect that in terms of that act he was " a prisoner for a civil debt or cause ;" that Robertson was " the creditor at whose instance he was committed ;" that he was not a " prisoner for a criminal cause ;" and, therefore, he was within the benefit of the act. The magistrates, after hearing parties, awarded aliment to Collins, and appointed it to be paid by Robertson as " the creditor-incarcerator," with certification of liberating Collins if he failed to aliment as ordered. Robertson presented a bill of suspension, which was ordered to be intimated to the magistrates of Aberdeen as well as to Collins, and, on answers, the Lord Ordinary on the bills (Balgray) " in respect that the question between the parties has not been sufficiently fixed in practice, passes the bill on caution, re-



entire to the respondents, the primary debtors in the aliment, to payment of the same cum omni causa, if it shall be afterwards at the complainer is legally and properly liable for this burden " and the magistrates reclaimed, and the Court recalled hoc statu, mitted to the Lord Ordinary to hear parties fully on the bill and . Cases were ordered by the Lord Ordinary.

No. 156.  
Feb. 16, 1837.  
Robertson v.  
Collins.

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the preservation of the salmon-fisheries was an object of national , and had been so from the earliest times, both because they af- large supply of food to the people, and because they yielded a venue to those of the lieges on whom the King had conferred the salmon-fishing, which right was inter regalia. The killing of during close-time was just as wantonly destructive to the fisheries, ig poison into them, and thereby killing the fish by wholesale, the fishing season, would be: and both were instances of that and dangerous mischief, which, in regard to a matter of so much concern, amounted to criminal delinquency.

it it was no longer open to argument whether killing salmon in ne was a crime, as it had been declared to be so by a whole series es from 1424, c. 35, downwards,<sup>1</sup> several of which made the of- nishable with the pains of death. These statutes were ratified s 1696, c. 33; and though their barbarous severity was in total le, yet the whole statutes themselves were not so; many import- isions were still in force, and that statute which formerly regula- e-time (1424, c. 35) was only altered as late as 1828, by the sta- ler which the present question had arisen. But the whole of these ed in affixing the character of criminal delinquency to the act of almon in close-time.

ie statute 9 G. IV. c. 39, viewed the offence as criminal. It red any person to seize an offender brevi manu, if caught in the l to carry him straightway to a magistrate. It allowed no appeal : sentence, excepting to the Circuit Court of Justiciary, or, where re no Circuits, to the High Court of Justiciary, which was cog- : criminal causes only. It provided, that if the penalty was not 14 days after "conviction," the offender should be imprisoned for od not exceeding six months. And it provided generally, § 14, here any offender shall be punished by virtue of this act, he shall r the penalty of any other law or statute for the same offence." rds amounted to a declaration that the sentence was a "punish- for an offence, and necessarily implied that the offence was a cri-

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<sup>1</sup> c. 10; 1424, c. 35; 1503, c. 72; 1579, c. 89; 1600, c. 11; 1606, c.

56. minal delinquency; as other deeds might infer reparation, but nothing save what was criminal could infer "punishment."

1837.

4. If the offence was thus to be viewed as of a criminal character, the circumstance that the penalty should go to the informer, and be recoverable at the instance of any person who chose to prosecute, was immaterial to the present question. Collins would still be a prisoner "for a criminal cause," and so be debarred from the benefit of the Act of Grace; and besides, the prosecutor, being constituted, by the statute, public prosecutor quoad hoc, did not cease to be so by having the penalty made over to him, any more than a procurator-fiscal would cease to be so, by being made the crown-donatar of the fine, which was to be recovered under any complaint at his instance. And if the prosecutor under this statute was obliged to aliment a prisoner, it would put an end to all prosecution whatever, as the aliment would cost more than the penalty or fine, and the imprisonment would equally come to an end, in terms of the sentence, whether any part of the fine was paid or not.

5. None of the previous cases afforded any precedent for holding that this offence was not of a criminal nature.<sup>1</sup> And if the distinction was kept in view, that, any sum, whether in the form of a fine or not, which was awarded in name of reparation or damages to an individual for an injury sustained by that individual, was necessarily a mere civil debt, from whatever cause the civil right of reparation had arisen, that distinction would separate all preceding cases from this; because the sum here awarded was not given as reparation to any individual, but merely as a punishment of the offender, and was expressly described in the statute, equally with imprisonment, by the same word "punishment."

*Pleaded by Collins and the Magistrates of Aberdeen —*

1. It was merely *malum prohibitum*, and not *malum in se*, to kill a salmon in close-time. And the prohibition was so essentially arbitrary, that, in the very statute founded on by the suspender, the period of close-time was altered, thereby rendering it a prohibited offence to kill a salmon at a certain period, at which period such killing had been no offence whatever, prior to 1828, when the act passed. The action was not, therefore, criminal in its own nature, and was merely one, out of a class of contraventions of positive laws, such as omitting to make a due return to the collector of assessed taxes, &c., none of which, though inferring penalties, was a crime in itself.<sup>2</sup>

2. If the act was not criminal in its own nature, it could not be made so, by any reference to the barbarous severity of obsolete statutes.

<sup>1</sup> Stewart, Feb. 5, 1783 (11817); Maclesly, Nov. 23, 1728 (11810); Watt, Jan. 5, 1734 (11810); Wright, Feb. 24, 1768 (11813); Robertson, May 21, 1829 (ante, VII. 633.)

<sup>2</sup> 4 Ersk. 4, 39; Couper, June 22, 1781 (7388); Guthrie, Dec. 10, 1807 (Dicty. voce Jurisdiction Appx. No. 17); Buchanan, 1754 (7347); Johnston, May 15, 1810, F. C.; Baird, Jan. 19, 1825 (ante, IV. 448, or 318 new Ed.)

3. There was nothing in the terms of 9 G. IV. c. 39, declaring this offence to be a crime, or treating it as such. The power of summarily interrupting a party caught in the act of committing the offence, and carrying him before a magistrate, did not do so. The appeal to the Circuit Court of Justiciary was not characteristic of the offence as criminal, since at appeal was allowed in civil causes of the amount of the penalty, as well as in criminal causes; and it was merely from allowing such appeal to the Circuit Court, that an appeal had been allowed, where there were no Circuits, to the High Court of Justiciary for the sake of summary procedure. In regard to the word "punishment" used in one section of the statute it was not material, for, if the offence was not in itself criminal, it could not be made so by merely describing the pecuniary penalty, or the imprisonment, incurred by committing it, as a punishment. And as there was no public prosecutor who could, as such, insist in a prosecution under this statute, that alone showed it not to be a prosecution of a criminal nature.<sup>1</sup>

4. But even if the offence were of a criminal nature, yet in so far as regarded the suspender, it had resulted merely in this, that a debt of a certain amount, made up of penalty and expenses of process, was due to him by Collins. And if imprisonment was inflicted by him on Collins for non-payment of this debt, he must, according to various precedents, bear the cost of alimentering Collins during an imprisonment inflicted by him for his own behoof.<sup>2</sup> By the terms of the statute, such imprisonment was regarded, equally with poinding, as a mere diligence "for the recovery of all penalties and expenses decerned for," and not as inflicted *ad indictam publicam*. Though the term of imprisonment was limited, that did not alter the nature of the debt due by Collins; and if this diligence did not produce payment of the debt, the suspender might still poind the effects of Collins if he pleased. There was no reason for apprehending that prosecutions under this statute would be stopped by refusing this bill, as the proprietors having a common interest in the fisheries might assess themselves, and alimenter convicted parties, if necessary, and thereby exempt the individual prosecutor from any such burden. But, at any rate, that circumstance could not affect the construction of the statute.

5. There were various precedents showing, that, in cases which savoured of criminal delinquency more strongly than this, the Court had held a prisoner entitled to the benefit of the Act of Grace. In particular, in one instance, where the procurator-fiscal, under a criminal prosecution for assault, obtained a conviction, and the imposition of a fine, of which one half was awarded to the private party, it was held that such party could not keep imprisonment in force against the offender, without the offender

No. 156.

Feb. 16, 1837.  
Robertson v.  
Collins.

<sup>1</sup> *Duffy*, Feb. 10, 1796, (F. C.); *Syme*, Jan. 19, 1810, (F. C.); *Campbell*, Feb. 10, 1837, (ante, XIII. 535.)

<sup>2</sup> *Clark*, Dec. 7, 1787, (F. C.) 2 Bell, 553.

. 156. being entitled to the benefit of the Act of Grace. And nothing but the clearest proof that the case of Collins was out of the statute could warrant the Court in refusing him the benefit of it.

16, 1837.

1837 v.

18.

The Lord Ordinary "having considered the bill and answers, with the cases for the parties, refused the bill, and found the complainer liable in expenses." \*

\* "NOTE.—The question is, whether a person incarcerated for not paying a fine imposed under the 9th Geo. IV., cap. 39, is to be alimented under the Act of Grace by the private incarcerator, or as a criminal, by the burgh where the jail is?"

"It is needless to attempt to define the precise character or boundaries of public and of private wrongs by any general or abstract principle. This is a problem which has defied the legislators and lawyers and philosophers of all ages. In reference to any actual question, the matter must be looked to practically, and with reference to rules or cases, which, whether theoretically right or not, have been positively decided.

"Nor is there much solid foundation for the practical determination of any case to be got by picking out detached words in the statute, which may seem to indicate that the wrong was meant to be treated by the Legislature as of a criminal character. The words, 'Offence,' 'Fine,' 'Prosecutor,' 'Justiciary,' 'Penalty,' &c., unless they be combined into sentences forming enactments, are of very little use, and are to be found in many statutes, which it has been determined only to introduce and describe civil delicts, not proper crimes.

"This statute treats fishing for salmon in close-time as an offence, which is to be visited by fine, the failure to pay the fine may lead to imprisonment, and there may be an appeal, as in civil cases, to the Court of Justiciary. But the delict is not raised by express words to the rank of a felony, misdemeanor, or any other known public crime, and it is only from those expressions that its being an offence is to be gathered. But there are three circumstances in the statute which are conclusive of this question.

"1. The *malum prohibitum* which it introduces or recognises may be atoned for by a pecuniary payment. 2. This payment must be made to any person who may sue for it, for there is no public prosecutor created. 3. The imprisonment is no part of the punishment, but merely a mode of compelling payment of the money.

"Now, whatever some of the older cases, such as that of *M'Lesly*, founded on by the complainer, may have done, it was solemnly determined in *Clark against Johnstone*, 7th December, 1787, that even in the case of a known heinous public crime, liable to be repressed at the instance of the Lord Advocate, by transportation for life, that part of the punishment which consisted of a fine to a private party was, *quoad hoc*, merely a debt, and that if the delinquent should be imprisoned for not paying it, aliment was due by the incarcerator under the Act of Grace. The Lord Ordinary conceives that this very marked case fixed the law, and he has found no subsequent case which tends to unfix it, on the contrary, the cases of *Guthrie*, 10th December, 1807; *Baird*, 19th January, 1825; and *Campbell*, 24th February, 1835, all confirm it. If (which was *Clark's* case) aliment was due by the incarcerator on imprisonment for an assault, because the incarcerator's interest was a fine payable to himself, how can it not be due here, where, though the public be interested in salmon not being killed in close-time, as it is in the observance of all statutes, and of all private contracts, nobody but the complainer has the smallest interest in the debt, for non-payment of which the delinquent is in jail? It is just a debt, though due *ex delicto*.

"The complainer thinks it expedient that, while he reaps the benefit of the conviction, the burgh should aliment. This is not a judicial consideration. If it were, the Lord Ordinary would doubt the proposition. *Burghs*, in

suspender reclaimed.

No. 156.

THE PRESIDENT.—The question raised in this case is attended with a good difficulty. But I am much moved by the consideration that this debt, of penalty and expenses of process, does not go to any public prosecution solely to the suspender for his private behoof. It is now neither more nor a debt which is due to him. It is true that he acquires it under the authority of the statute, being in a situation somewhat analogous to that of crown-doff a fine. But in the whole circumstances I incline to adhere to the judgment of the Lord Ordinary. The suspender is following out steps to recover his proper debt, for which he might have pointed, if Collins had possessed any property, and being in that situation, I think the Court are not warranted in debar Collins from the benefit of the Act of Grace.

GILLIES.—I feel this to be a question of extreme difficulty. If we re-pass this bill, there will probably be an end to all prosecutions under this Act, for, if the prosecutors have to aliment their prisoners, they will not under-expense. But that consideration *ab inconvenienti* does not decide the question, and I own that I feel it to be a very doubtful one indeed. But I incline to follow the interlocutor, and to find Collins entitled to the benefit of the Act of Grace.

MACKENZIE.—The case is attended with great difficulty, but I rather incline to adhere to the Lord Ordinary. The Act of Grace applies to a poor prisoner "for a civil debt," and not to the class of prisoners "for criminal causes." The question, therefore, is whether Collins was a prisoner for a civil debt or cause, or for a criminal cause. In some of the earlier decisions regarding the application of the act, it was held that wherever a fine (for delinquency, such as assault, &c.) was imposed, whether for behoof of a private party or not, and imprisonment followed for the purpose of levying such fine, the prisoner was excluded from the benefit of the Act of Grace, even in a question with the private party, because he was a prisoner for a criminal cause. It was felt to be difficult to hold that such a question was one of debt, and not truly for a criminal cause. And yet it was afterwards held to be, as between these individuals, a question of debt, and it rather seems reasonable to be, as between them, nothing more than this. Suppose that in this case, in place of a Judge fining and amerciating an offender in £10, he did something, in other words, by ordaining him to grant a bond or bill for that sum to the private party, and that such party used legal diligence for recovery of it, could it be said that it was not a mere civil obligation which he was discharging, and that the offender was liable to him in any thing else than a civil debt? Or suppose that a private party got decree for a sum of damages in name

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privileges, are bound to maintain criminals imprisoned at the instance of the public, acting through its official accuser, and for whom no party but the public is to provide; and a heavy burden enough it is. But in what condition may they be, if they were further bound by implication to aliment all those imprisoned for not paying fines to private parties, on account of violations of regulations of Parliament, considering that almost all the countless statutory delicts are punishable by fines, and that wherever the delinquent cannot pay by his purse, he is detained at the pleasure, and for the behoof of a private party, may contain his

156. of assygment, and that in order to recover the amount, he used poinding or arrestment; I rather think that, even in that case, though the origin or ground of the liability was of a criminal nature, yet the liability contracted was but a civil debt, and nothing more. And so also in the present case, I apprehend that, whatever was the nature of the grounds which gave rise to this liability, which Collins incurred to the suspender, still the liability itself results in nothing but a civil debt. The case is of a very peculiar nature. I may notice, in regard to a supposed difference between the words "crime" and "delinquency," that I hold they equally designate what would exclude a party from the Act of Grace if he was imprisoned for a cause belonging either to the class of crime or delinquency. I hold the words the same in this question. A fine was, no doubt, imposed on Collins; but the fine was payable to the informer for his private behoof. Thus Collins was brought under an obligation to pay the small sum in question to the informer. Imprisonment is not a part of the sentence. If it were so, it neither could be brought to an end by payment of the fine, nor even by the consent of the prosecutor himself. When a sentence of imprisonment is passed, the King may indeed remit so much of it as seems good to him, but no subject has the power of doing so. In regard to the imprisonment under this act, it is provided "for the recovery of all penalties and expenses decerned for;" and though the period of imprisonment is limited, from motives of humanity, that does not affect this peculiar character of the imprisonment, that the prosecutor may inflict it or not as he chooses. He may use the diligence of poinding or not at his own discretion, and he may enforce the imprisonment or not at his own discretion; which imprisonment, by the express terms of the sentence, is terminable at any time by the prisoner's payment of the fine to his incarcerator. In these circumstances, I do not think that such imprisonment is so essentially distinct and different from imprisonment for debt, that the prisoner is to be denied the benefit of the Act of Grace, and that the burgh must be at the expense of alimentering the prisoner, in order to enable the suspender to recover his debt. I do not think this was one of those cases which was within the view of the Act of Grace, as one which should remain a burden upon the burghs.

THE COURT adhered on the merits; but, on account of the extreme difficulty of the case, altered as to expenses, and found them due to neither party.

J. SOUTER, W.S.—GORDON and BARRON, W.S.—Agents.

AMES OCHTERLONY LOCKHART MURE and MANDATARY, Pursuers.— No. 157.

*D. F. Hope—Sol.- Gen. Rutherford—Dundas.*

AMES OCHTERLONY LOCKHART MURE, Jun., and CURATOR AD LITEM, Mure v. Mure  
Defenders.—*Keay—Anderson.*

Feb. 16, 183

**Entail—Settlement—Succession.**—An entailer settled his estate on his son, and the heirs of his son's body in a certain order; whom failing, on his daughter and the heirs of her body; whom failing, on his own nearest heirs and assignees whomsoever; the son died without issue, and a grandson of the daughter succeeded, who had a son and daughter—Held, that, although the entail was liable to be defeated so soon as the succession should open to heirs-portioners, it was a good entail until that contingency should actually happen, and was not in the mean time defeasible at the will of the heir in possession.

In 1754, Robert Mure of Livingston and Glenquicken, executed an entail of these two estates. He had one son, Adam, and two daughters, the eldest, Jane, and the youngest, Margaret. Robert Mure, in the deed of entail, granted a procuratory of resignation for infestment in favour of "Adam Mure, and the heirs-male lawfully to be procreate of his body, respectively and successively; whom failing, to the heirs-female to be lawfully procreate of the body of the said Adam Mure, and the heirs-male to be lawfully procreate of their bodies, respectively and successively, the eldest heir-female always succeeding without division through the whole course of succession, and excluding all heirs-portioners; whom failing, as to the lands and barony of Livingston, &c., to and in favours of Jean Mure, my daughter, now spouse to Samuel Lockhart at Barma-gachan, and the heirs lawfully procreate, or to be procreate of her body, in this or any other marriage; whom all failing, to my nearest heirs and assignees whatsoever: And, as to the foresaid nine-merk land of Kirk-mabreck, &c. failing of the said Adam Mure and the heirs-male and female descending of his body, in manner above-mentioned, to and in favour of Margaret Mure, also my daughter, spouse to David Thomson of Ingleston, ay, and until Adam Thomson, her second son, attain to the age of twenty-one years complete; and then to the said Adam Thomson, and the heirs to be lawfully procreate of his body; whom failing, to the heirs procreate or to be procreate of the said Margaret Mure of this or any other marriage; whom all failing, to my own nearest heirs and assignees whatsoever."

Feb. 16, 183

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Robert Mure died in 1757, and Adam Mure made up titles under the entail. He died, without issue, in 1802. A separation of the two estates took place, in terms of the destination. In regard to the lands of Kirkmabreck, Adam Thomson, the entailer's grandson, by his younger daughter Margaret, being past twenty-one years of age, made up titles to them, and enjoyed them until 1822, when he died without issue. The succession then opened, in terms of the destination, to the heirs of his mother, Margaret Mure or Thomson, and these were six



No. 157. daughters, or their representatives. A competition of briefs arose between the younger daughters, or their representatives, claiming as heirs-portioners, and the representative of the eldest daughter, claiming the estate, and alleging that the clause of exclusion of heirs-portioners was applicable to the destination of each of the two estates, after they had separated, as well as to both of them while enjoyed by Adam Mure and his descendants. The Court found, that, by the true construction of the deed, the destination, heirs-portioners were not excluded from the destination of the two estates had separated, and found the six daughters or their representatives "entitled to be served heirs-portioners of provision and settlement of the said Robert Mure of Glenquicken."<sup>1</sup>

In regard to the estate of Livingston, Mrs Jean Mure or Lockhart made up titles to it, as heir of entail, in 1803. She died in 1810 leaving her eldest son having predeceased her, leaving a son, James Ochterlony Lockhart Mure, he was served heir of entail on his grandmother's estate. He had two children, a son and a daughter, and in 1835, he was served summons of declarator against them, and the other heirs of entail, but the Court found and declared that he possessed all the powers of a fee-proprietor, in respect that the destination, under which he was called, did not exclude heirs-portioners, and was, therefore, in its own nature, feasible, and unsusceptible of the fetters of a strict entail. He also pleaded a plea, upon the special construction of the deed, as not imposing the fetters of the entail at all upon the heirs called after the separation of the estates. This plea was held unfounded, and being of a special nature, does not require to be farther noticed.

Defences were lodged by James Ochterlony Lockhart Mure, junior son of the pursuer, and his curator ad litem.

Cases were ordered, and the pursuer pleaded, that whenever the estate in an entail was so far exhausted, that, on the death of the last possessor, the next parties called were the heirs and assignees who were of the entail, it was an acknowledged rule that the estate, in the person of such heir, became a fee-simple. The legal principle, which operated this result, was merely, that, in the ulterior destination to the heirs and assignees whomsoever, there was no exclusion of heirs-portioners by their succession, which might happen quodocunque, the estate would divide, and subdivide ad infinitum, and it was neither according to the intention, nor in the power of the entailor to fetter these fragments of the estate, descending contemporaneously through so many ramifications of succession. But in such a case it was not necessary to wait until the contingency of the estate devolving on heirs-portioners had actually occurred; it was enough that the estate had reached that point in the succession where they were not excluded, and where their occurrence

<sup>1</sup> Feb. 6, 1823 (ante, II. 186; or new ed. 166.)

happen at any time ; and so soon as that point was reached, the law regarded it as a defeasible tailzie. But as the Livingston entail, so soon as Adam Mure died without issue, devolved on Jean Mure, " and the heirs of her body," it became a destination which was not tailzied in any respect, amongst her descendants, but left to the course of legal succession ; heirs-portioners would accordingly take, just as in the legal descent of any other heritable estate, and it had been so found in regard to the other estate of Kirkmabreck which was destined in similar terms. As the entail was thus defeasible quandocunque by the existence of heirs-portioners, the estate had reached that point in the destination, at which, as in the class of cases already mentioned, the pursuer was entitled to hold it in fee-simple. This was more especially true, as there was no ulterior substitution, after the descendants of Jean Mure, except to the entailer's heirs and assignees whomsoever, who were the same with the heirs whomsoever of Jean Mure ; so that the destination was substantially to Jean Mure and her heirs whomsoever, which was not a destination susceptible of the fetters of an entail. And this circumstance distinguished the present from other entails where a similar defect occurred in the middle of a series of substitutions, because, in these other cases, if that individual branch of the substitution which admitted heirs-portioners, was got over without their occurrence, there were ulterior substitutions, effectually excluding heirs-portioners, which would be called into existence ; but in this instance there was no such ulterior substitution, and, through the whole existing destination, heirs-portioners might happen to supervene quandocunque ; the entail was therefore defeasible by the pursuer.<sup>1</sup>

The defender answered, that the entail contained all the requisite fetters, aptly imposed on a destination " to Jean Mure and the heirs of her body," unless there was something in the nature of such a destination, which rendered it unsusceptible of fetters. And if so, the effect would be to break a very large proportion of entails, as it was a clause of very common occurrence in destinations, sometimes in the first member of them, and sometimes in the ulterior substitutions ; but in all cases equally fatal, if the pursuer's argument were well-founded. But it was altogether unwarranted. So long as the succession did not actually open to heirs-portioners, but was open only to either a male heir, or a single female heir, the fetters of the entail must apply, and they could not be thrown off at the will of an heir in possession merely because a contingency might, at some indefinite distance of time, occur, and then defeat the entail. The clause of destination " to Jean Mure and the heirs of her body," whom failing, to the heirs and assignees of the entailer, was essentially different from the general clause at the termination of every tailzied succession calling the heirs

<sup>1</sup> *Earl of March*, Feb. 27, 1760 (15412) ; 3 *Ersk.* 8, 32 ; *Leslie*, Dec. 15, 1710 ; *Henry*, June 13, 1832 (ante, X. 644) ; *Sprot's Trustees*, May 22, 1833).

1837. and assignees whomsoever. That was merely a clause of style, originally meant to exclude the crown or superior;<sup>1</sup> and which now did not serve to prolong an entail in favour of the heirs and assignees whatsoever, because the fetters were not imposed in their favour, and none of them had a *jus crediti* entitling them to challenge any act of contravention of the entail which might be executed by the last substitute, nor would they have *jus crediti*, even though heirs-portioners were excluded. But in this case the defender was a substitute-heir, having a vested *jus crediti*, entitling him to reduce every act in contravention of the entail.

The Lord Ordinary "assolized the defender from the conclusions of the libel and decerned; and found no expenses due."\*

<sup>1</sup> 2 St. 3. 43; 3 Ersk. 8, 32.

\* NOTE.—"Anciently it was the law of Scotland, as it was of most of the other states in Europe which adopted the feudal system, that when all the heirs, expressly called to the succession of lands in the grant or charter to the vassal, had failed the fee returned to the superior, or failing him and his heirs, to the Crown. To prevent that rule from taking effect, a clause was early introduced in this country as matter of style, by which all grants were made to terminate by a limitation to the heirs and assignees whatsoever, either of the grantee or of some other person suggested by him. After strict entails were authorized by statute, an attempt was made to convert this clause to a different purpose from that for which it was intended, the remoter heirs whatsoever of the entailer maintaining, that it imposed the fetters of the entail on the nearer heirs whatsoever. But the attempt was successfully resisted, as the clause was plainly intended not to be a nomination of heirs of entail under the restrictions of the deed, but merely to let in heirs-general to the exclusion of the feik. Among other arguments to prove this, it was observed, that if the clause in question had been intended to prolong the entail, heirs-portioners would have been excluded, for it is inconsistent with the nature and object of an entail, that the estate should be exposed to unlimited division, by which the representation of the family by an individual is destroyed.

"But the present case is of a totally different nature. The clause which gives rise to this question is a distinct substitution, expressly confined to the heirs of the body, and followed by the clause of style to heirs whatsoever, which indicates, that then, and not till then, it was the intention of the entailer that his entail should come to an end. The fetters, therefore, must be effectual, unless, 1st, They are not imposed in apt and legal terms; or, 2dly, Unless they are applied to persons incapable of being so fettered. No objection is made to the terms in which the prohibitory, irritant and resolutive clauses are expressed. They are framed in the usual and appropriate style. But there are two classes of substitutes called in the clause; heirs-male of the body, on whom the fetters may be imposed, and heirs-portioners of the body, on whom they cannot be imposed; for, as has just been observed, it is inconsistent with the nature of a strictly entailed fee, that it should be vested in heirs-portioners. The conclusion therefore is, that as long as the first class of substitutes, that is, heirs-male of the body, remains unexhausted, the entail is good, and as soon as the succession opens to heirs-female of the body, heirs-portioners not being excluded, the estate becomes a fee-simple.

"The ingenious argument of the pursuer rests upon the obvious fallacy of confounding the last limitation or clause of style, to which a special rule applies, with a preceding substitution, to which effect must be given according to the ordinary principles of entail law. In the clause of style, heirs, whether male or female, are not fettered, because it was not intended to fetter either the one or the other. In the prior substitution, heirs-female are not fettered, whatever the intention may have been, because in the character of heirs-portioners they cannot be

The pursuer reclaimed, and, *inter alia*, objected that by the note of the Lord Ordinary, it was implied that all heirs-male of the body were called before any heir-female, whereas a granddaughter or granddaughters by the oldest son, were preferable to the said oldest son's younger brother. No. 157.  
Feb. 16, 1882  
Mure v. Mure

LORD MACKENZIE.—I think the interlocutor is quite right, and that the note of the Lord Ordinary, merely means that where there are sons and daughters of an heir of entail the destination is first in favour of the sons successively, before it calls the daughters; pointing out the manner in which a class of substitute heirs are called, on whom the fetters are effectually laid, before the succession opens to the daughters.

LORD PRESIDENT.—I think the interlocutor quite right; and if it were otherwise, any tailzie whatever might soon be brought to an end. The last clause, in every destination, is in favour of the heirs and assignees whatsoever, and, according to the pursuer's argument, an heir in possession is not bound to wait until the contingency arrives of the succession opening to the parties called under this clause of style; it is enough for him that it may one day open to them; and as it is liable on the occurrence of that future contingency, to be defeated, it may equally be defeated now. That is just his argument when he maintains, that, because, under the existing destination the succession may one day open to heirs-portioners, and be thereby defeated, it may therefore be defeated now, although he himself has a son in existence, defending against this action. But whatever is to become of this entail hereafter, it is enough for the Court that it is a good entail as it now stands, both in regard to the pursuer and his son, and it may continue a good entail for an unknown length of time. Had the succession opened to a single heir-female, that might perhaps have been a case less free from doubt; but, as it stands, I see no room for doubt whatever.

LORD GILLIES.—I think the interlocutor right.

THE COURT adhered.

G. McCALLUM, W.S.—M. N. MACDONALD, W.S.—Agents.

precedents on which the pursuer relies do not touch the question. In the cases of *Cassels* and *Leslie*, the action was brought to enforce the entail against the last substitute by parties called merely under the clause of style. Thus also in the case of *Watt*; by the failure of Robert Watt, and the heirs-male of his body, the substitution to his heirs and assignees whatsoever, that is, to those called by the common clause of style, opened; and it was in the character of heirs under that clause exclusively, that the defenders in that case attempted to enforce the tailzie against *Barry*. In the present case, the defender, James Ochterlony Mure, younger, is called by an express substitution, and not by the clause inserted to exclude the *tail*. He is capable of being fettered, and may be succeeded by a series of heirs-male with the same capability.

It is thought unnecessary to take notice of the pursuer's argument, that the tailer did not mean to continue the fetters after the succession divided. The words are too express to admit of that construction, and more particularly the clause with regard to bearing the name of the entailer.

No expenses have been found due, because this appears to be the first case in which the question at issue has been tried, and it is a family suit rendered up in the inaccurate style in which the settlement has been framed."

No. 158. DUNCAN M'CUAIG and REV. WILLIAM M'RAE, Pursuers.—*D. F. & Maitland.*

Feb. 16, 1837.

*M'Cuaig v.*

*M'Raey.*

DONALD M'AULAY, Defender.—*Penney.*

*Settlement v. Marjoribanks.* *Compensation—Retention.*—Plea of compensation, depending on special circumstances, repelled.

Feb. 16, 1837.

*1st Division.*

*Ed. Fullerton.*

*D.*

SEQUEL of the case which is fully reported on January 22, 1836,<sup>1</sup> will see. The plea of compensation or retention, in respect of the bill £75, there mentioned, depended on special circumstances and was repelled with expenses by the Lord Ordinary, and the Court.

*Macintosh and Macfarlane, W.S.—Rox and Wesson, W.S.—Agnew.*

No. 159. CHARLES HOPE WATSON and DAVID ROBERTSON, (Alison, Lady Marjoribanks' Trustees,) Raisers.

DAVID ROBERTSON and OTHERS, Claimants.—*Sol.-Gen. Rutherford A. Wood.*

MARY LADY MARJORIBANKS and CAMPBELL MARJORIBANKS (Sir William Marjoribanks' Trustees,) Claimants.—*Keay—Anderson.*

*Settlement—Faculty—Provision to Children.*—1. A testatrix made a provision in her settlement "for payment to my daughter, in liferent, for her liferent alienably, and to her children, in such proportions as she may appoint, and for the residue thereof, equally among such of them as shall survive me, share and share alike, in the sum of £3333, 6s. 8d.:" nine children survived their grandmother the testatrix, but two of these predeceased their mother, without issue; their mother, in exercise of the faculty, executed a deed of distribution, allotting the sum of £440, in various proportions, among six of the surviving children, and the whole residue to the seventh:—Held, 1st, That, immediately on the death of the testatrix, a jus quiritium vested in each of the nine children then alive, to some share of the sum which their mother could not deprive them; 2d, That the omission to allot a share on account of the two children who predeceased their mother, and which would have fallen to their representatives, rendered the deed of appointment conform to the will of the testatrix; and 3d, That the deed of appointment being thus disconform, must be altogether set aside.—Observed that it was competent for any one of all the children to object that the deed of appointment was invalid, although the challenge was rested, not on the failure to allot a share to the objecting, but to any of the other children.—Question whether the allotment of a share to any of the children would have been equally fatal to the deed of appointment, with the total failure to allot any share at all.

Feb. 17, 1837. THE late Mrs Ramsay of Barnton, mother of Alison, Lady Marjoribanks, left a settlement containing a provision in these terms, "for payment to the said Dame Alison Marjoribanks in liferent, for her liferent alienably, and to her children in such proportions as she may appoint,"

*1st Division.*

*Ed. Corshouse.*

*R.*

<sup>1</sup> Ante, XIV. 318.

proof, equally among such of them as shall survive me, share and No. 159.  
e, in fee, of the sum of £3333, 6s. 8d. sterling."

date of Mrs Ramsay's death, Lady Marjoribanks had nine chil-  
sons and five daughters. Two of the sons, Edward and Charles,  
siderable time before Lady Marjoribanks. Edward was insol-  
lied intestate; Charles left a settlement appointing his brother  
rjoribanks, (afterwards Robertson,) to be his executor. The  
who became Sir William Marjoribanks, died one week before  
rjoribanks, and left issue. Lady Marjoribanks died on 29th  
r, 1834. On 1st September she had executed a settlement in  
sh form, containing this clause: "And whereas under the set-  
f Mrs Ramsay, bearing date the 31st day of August, 1815, I  
ower of appointing the sum of £3333, 6s. 8d. amongst my chil-  
e, in such proportions as I might think proper, now and in vir-  
said settlement, I do hereby direct and appoint the said sum of  
. 8d. to be divided as follows: that is to say, to each of my  
, Janet, Rachel, and Agnes, £100; to each of my daughters  
Susan, £20; to my son Sir William Marjoribanks £100; to  
avid £100; and the residue and remainder thereof to my said  
William Marjoribanks, his heirs, executors, administrators, and

Feb. 17, 1837.  
Watson v.  
Marjoribanks.

A question arose among the members of the family whether  
valid exercise of the power, or faculty, conferred on Lady Mar-  
by Mrs Ramsay's will. On the one hand, David Robertson, and  
members of the family, or their representatives, excepting the  
ider Sir William's settlement, contended that the whole appoint-  
t be set aside, and that each of the nine children who were alive  
th of Mrs Ramsay, or the representatives of such as had since  
were now entitled to a ninth share of the sum of L.3333, 6s. 8d.,  
ase of no appointment having been made by Lady Marjoribanks.  
her hand, Sir William's trustees contended that Lady Marjori-  
duly executed the power. In these circumstances, the trustees  
Marjoribanks raised a multiplepinding, and minutes of debate  
red.

*for David Robertson and others—*

ess the power conferred by Mrs Ramsay's will was duly executed,  
appointment by Lady Marjoribanks must fall to the ground,  
m must be divided in equal shares as provided by Mrs Ramsay  
e of no appointment at all being made by Lady Marjoribanks.  
r such power or faculty was stricti juris, and could not be exer-  
l, unless in exact conformity with the will of the granter.  
the terms of Mrs Ramsay's will the liferent allenarly of the sum,  
ged on Lady Marjoribanks, and the fee vested in each of the  
m soon as Mrs Ramsay died.<sup>1</sup> Lady Marjoribanks had no power

1837. of totally depriving any child of its share, though she was entitled to exercise a fair discretion in apportioning the fee amongst the children.<sup>1</sup>

3. By the settlement of Lady Marjoribanks no part of the sum was allotted to the representatives of Edward, or of Charles. But as a share in the fee had vested in each of them at the moment of Mrs Ramsay's death, this omission was as fatal to the appointment, as if both had not survived, and been omitted. The allotment of a special share of £100, to Sir William, and the farther allotment to him of the residue, after paying the other special shares mentioned, did not remove the incompetency of the deed as *ultra vires*, or afford the means of doing so, by paying the sums out of such residue to the representatives of Edward and Charles. For there still was no share allotted by Lady Marjoribanks to the representatives of Edward and Charles, and unless such allotment was made by her, the whole appointment was void.

4. Any one of the children had an interest in founding on the defective nature of the appointment; so that, even if the representatives of Charles and Edward had acquiesced, it would not have sustained the appointment against the challenge of the other children. Because the appointment must be invalid, unless executed by Lady Marjoribanks herself, in conformity to the power conferred by Mrs Ramsay's will; and if she had not done so, no third party could now cure the defect. And therefore, even if a full ninth share was now offered to be set apart for Edward's creditors from the residue allotted to Sir William, in satisfaction of the share which should have been allotted by Lady Marjoribanks to Edward's creditors or representatives; and another ninth share for Charles' representative; that could not validate the deed of appointment by Lady Marjoribanks, as it would not render her proper deed more conform to the will of Mrs Ramsay than before. It must therefore fall altogether.

*Pleaded by Sir William's trustees—*

1. The power of Lady Marjoribanks was absolute and unqualified in distributing the legacy among her children, and it was validly and effectually exercised.

2. Even if necessary to allot a share to each child and the representatives of each, it must be presumed, that, as David was the representative of Charles under the settlement of Charles, the £100 was allotted to him by Lady Marjoribanks, both in respect of his right as a child, and as the representative of a deceased child. And in like manner, as all the other children were next of kin, and, in that sense, representatives of Edward, it must be presumed that his share was allotted among them, and that the share given to each were given, *pro tanto*, in respect of their representing him.

3. But assuming that Lady Marjoribanks was bound to allot a share to the representatives of Edward, and to the representatives of Charles, and

<sup>1</sup> Kemp, 5, Vesey, 849.



iled to do so, the only result would be that of now finding each of parties entitled to one ninth share, just as in the case of no appoint-  
 having been made. So far they might have an interest to challenge pointment, but no farther. And the claimants were willing if neces-  
 to pay these sums out of the residue allotted to Sir William, and the of appointment quoad ultra should be sustained.

No. 159.  
 Feb. 17, 1837.  
 Watson v.  
 Marjoribanks.

No one, except the creditors of Edward, or the executor of Charles right to challenge the deed of appointment. The shares of the other en might have been diminished, but certainly would not have been sed by Lady Marjoribanks, had she known that it was necessary to wo more shares than she did. And if Sir William's trustees were it to abide by the deed of appointment, even after paying two ninth to the representatives of Edward and Charles, there was no other who possessed a title or interest to challenge the appointment. e Lord Ordinary reported the cause.\*

ED GILLIES.—The question here is of a very peculiar kind ; but I agree in a with the Lord Ordinary. In determining the case, it is necessary to put a

OTE.—“ The Lord Ordinary is induced to report this case, because it occurs amiliam, and the question is attended with some difficulty. He is inclined pt the view taken by David Robertson and others, in opposition to the claim trustees of the late Sir William Marjoribanks.

is settled law, even in the case of provisions granted in a marriage-contract, issue of the marriage, when no right of credit vests in the children till the of the father, and where the father, from paternity alone, has the implied and nt power of distribution, that he cannot exercise that power to the entire ex- of any one child ; a fortiori therefore, where a power of distribution is con- by a third party, none of the express objects of the grant can be entirely dis- ted, because all faculties of that nature are stricti juris, and cannot be exer- at all, except in exact conformity with the will of the person conferring them. lamsay bequeathed the fee of the sum in question to the children of Lady ribanks, in such proportions as their mother might appoint. Every child, ore, who survived the testatrix, had a jus quæsitum to some share, of which nother could not deprive them. If she attempted to do so, the whole appoint- was bad ; and it is thought, that not only the child excluded and his repre- ives could found on it, but that every child of the family had an interest to to make way for the other alternative in the settlement, namely, a distribu- all, share and share alike, in default of appointment, that is, of a due appoint-

The trustees have pleaded, that the sum allotted to each child by Lady ribanks must be held to include what each was entitled to, as the representa- t legatee of the children who predeceased their mother. It is plain, from the in which the appointment is expressed, that this was not the intention of Marjoribanks ; and if it had been her intention, the matter would have been leable, because no distinction is made between the sum given to each in his own right, and the sum given in right of the deceasing child. If, for exam- e creditors of Edward Marjoribanks were now to appear, which it is compe- is them to do, it would be impossible to ascertain their share according to nstruction of the deed. An offer on the part of Sir William Marjoribanks' s to settle with the representatives of Edward and Charles, would not, as has e observed, cut off the claim of the other children ; but that offer was e had has been now withdrawn.”

189. just construction upon the will of Lady Marjoribanks, but it is also necessary to put a just construction on the will of Mrs Ramsay: And Mrs Ramsay's will requires our first attention, as it is the governing instrument, and the will of Lady Marjoribanks, so far as regards this sum of £3333, 6s. 8d., can only be valid if it is conformity with it. Now it is clear to me that the one is not in conformity with the other. It was the *enixa voluntas* of Mrs Ramsay that all the children of Lady Marjoribanks, surviving Mrs Ramsay, should get the sum, and that each one of them should have a share. That has not been done. Two of those who survived Mrs Ramsay have been left out of the deed of distribution, two more have received shares which are nominal and elusory, and which are given merely as a colourable compliance with Mrs Ramsay's will. I consider that the allotment of a share, so small as to be merely elusory, is in substance the same thing as if no share at all had been given; it is in fact an evasion of the will of Mrs Ramsay, under the pretence of being a compliance with it. However I am not forced to decide on the effect of an elusory allotment in this instance, as there was absolutely no share whatever allotted to two of the children, who, by Mrs Ramsay's will, were entitled each to a share. From the moment of Mrs Ramsay's death, the fee of that sum was in the children who survived her; two of them have been denied all share and interest in the sum, by the deed of appointment of Lady Marjoribanks; and as I think that deed is therefore not conform to the plain import and intention of Mrs Ramsay's will, it is invalid and must be wholly set aside.

LORD PRESIDENT.—I think the whole appointment must be set aside, and that the distribution must take place, as provided by Mrs Ramsay's will, in the event of no appointment at all having been made. I rest my opinion on the circumstance that no share whatever has been allotted to two of the nine children, surviving Mrs Ramsay, each of whom was entitled to some share. In regard to the other point noticed by Lord Gillies that two of the legacies are elusory, that is a point which depends so much on circumstances, and is always so much a question of degree, that I wish to refrain from giving an opinion whether or not these were elusory legacies, intended to give a mere evasive compliance with the will of Lady Magribanks; or, supposing them to be so, whether or not that circumstance would entitle the Court to set aside the appointment. It is not necessary to decide these questions, and I rest my opinion entirely on the fact that two of the children received no share at all.

LORD MACKENZIE.—I concur with your Lordship in thinking that the deed of appointment by Lady Marjoribanks must be set altogether aside. And in doing so, I shall not enter at all into the question which has been adverted to by Lord Gillies respecting the effect of an allotment of elusory shares to two of the family. Perhaps I might entirely agree in principle with his Lordship if it was necessary to go into that question; but we do not require to decide it in this case. The first matter requiring attention in construing the settlement of Mrs Ramsay is whether Lady Marjoribanks was bound to allot a share of the sum to each of the children who survived the testatrix, or only to each who survived herself. But as the sum was left to her "for her liferent use alienably, and to her children in such proportions as she may appoint," I think the fee, which was thereby left expressly to the children, vested in them immediately on Mrs Ramsay's death, subject to the exercise of a power of distribution by Lady Marjoribanks. I consider, therefore, that she was bound absolutely to allot a proportion of the fee to each of including those who predeceased herself, so as to go to their representatives.

those who survived her. But she did not do this; she did not duly use the power with which alone she was intrusted. The appointment made by her is therefore invalid, and the provision for equal distribution which Mrs Ramsay was to be made in the case of no appointment by Lady Marjoribanks, must take place. Two children have been entirely omitted. Had a share been allotted to each, as Lady Marjoribanks was bound to have done, it is probable that it might merely have been to diminish the residue allotted to the late Sir Marjoribanks. But it might have been otherwise; it might have had the effect of altering each and all of the allotments which have been made; and as the allotment was bestowed on Lady Marjoribanks alone, there is no possible remedy now left of making a new allotment. The whole deed of appointment must be set aside.

No. 159.

Feb. 17, 1837.

Sibbald v.

Fraser.

for Sir William's Trustees, enquired whether it was the decision of the Court that the deed must totally fall, or whether the allotment of the sum of £3, 6s. 8d. to each of the two omitted members of the family, should be made, as that would be placing them on the same footing as if no allotment had been made, while the others were left as fixed by Lady Marjoribanks.

MACKENZIE.—The whole deed falls. Unless the power was validly exercised, no part of the deed can stand. It is impossible to say, if Lady Marjoribanks had been aware of the necessity of allotting a share to each of these members of the family, or their representatives, what share she would have allotted to them, and such allotment would have affected the other shares left by her.

PRESIDENT and GILLIES concurred; and the Court found that the deed of appointment must be wholly set aside; that an equal distribution of the sum of £3, 6s. 8d. must take place as in the case of no appointment having been made; and that one share must go to each of the children of Lady Marjoribanks who survived Mrs Ramsay, and to the representatives of such of the children as were now deceased.

TOUN, ANDERSON, and TROTTER, W.S.—CUNNINGHAMS and BELL, W.S.—Agents.

JOHN ROBERTSON SIBBALD, Pursuer.—*Deas.*

No. 160.

FREDERICK SAUMAREZ FRASER, Defender.—*Maidment.*

*Compensation—Judicial Admission.*—Circumstances in which a set-off, in name of compensation, was disallowed, excepting to a small extent, as being uninstructed admission of the party, and no other evidence being produced.

JOHN ROBERTSON SIBBALD, M.D., raised an action against Lieutenant FRASER for payment of £35, of money lent. Fraser admitted the debt, but pleaded in compensation that Sibbald had boarded with him for 18 months at £3, 13s. 6d. per week, which amounted to £33, 16s., and a balance of £1, 18s. 6d. due. The only evidence in support of the defence was an admission by Sibbald that he had once paid a

Feb. 17, 1837.

1st Division.

Ld. Fullerton.

S.

160. visit to Fraser, as a friend, and on Fraser's invitation, for a period not exceeding three weeks; and that, when Fraser afterwards made a claim for board, Sibbald had written that he was willing "to allow you the same board which you receive from Miss Russell," which was at the rate of £1 per week. Fraser refused to accept of this offer. In the action, the Lord Ordinary, decerned for payment of £35, without abatement, and found the defender liable in expenses. He reclaimed, and

THE COURT, in reference to the pursuer's letter, directed an abatement of £3, to be made from the debt decerned for; but quoad ultra adhered; and, in respect that the pursuer had offered to make this abatement, on having the rest of his debt paid, and the claim for board discharged, their Lordships awarded additional expenses against Fraser.

W. MACDONALD, S.S.C.—J. J. FRASER, W.S.—Agents.

161. ARTHUR GIFFORD and MANDATARY, Pursuers.—*Sol.-Gen. Rutherford—G. G. Bell.*  
ARTHUR GIFFORD of Busta, Defender.—*D. F. Hope—Maitland—G. Napier.*

*Service—Reduction.*—1. In a reduction of the verdict of a Jury, obtained in a competition of briefs, as erroneous and contrary to the evidence, the Court, reviewing the whole evidence led before the inquest, reduced the verdict; 2. In such reduction no particular effect is to be given to the verdict of the inquest, but the Court have the power of reviewing the case on the merits of the evidence on both sides, and deciding accordingly.

- ab. 17, 1837. THE late Thomas Gifford of Busta, in Zetland, and his wife Elizabeth Mitchell, commonly called Lady Busta, lived during the beginning and middle of last century, and had a family of four sons and three daughters, besides other children, who died in infancy. A female relative, of the name of Barbara Pitcairn, resided in family with them in the house of Busta. On the 14th May, 1748, Gifford's four sons and their tutor, John Fiskien, were all drowned by the upsetting of a boat. Some months thereafter, Barbara Pitcairn gave birth to a child, the father being John Gifford, the eldest of these four sons. The other three sons left no issue. This child was named Gideon Gifford, and educated in the house of Busta; the mother subsequently removing to the town of Lerwick, where she remained, retaining the name of Pitcairn till her death in 1766. In 1752, and the following years, Thomas Gifford executed various deeds of entail and other deeds, conveying his whole property in favour of Gideon Gifford, and his heirs-male. He died in 1760, and was succeeded by Gideon, who took up and possessed the estate of Busta under these deeds till his death in 1811. Gideon

2d Division.  
d. Cockburn.  
R.

ed to take up the character of heir-of-line of his grandfather by No. 161.  
 or otherwise. He never inherited property from any of his rela- Feb. 17, 1837.  
 right of blood; and in various legal documents and pleadings Gifford v.  
 30 downwards, in matters relating to the family affairs, his illegi- Gifford.  
 appeared to be taken for granted. After Gideon's death, his son  
 32, the defender, Arthur Gifford, entered into possession of  
 e of Busta, as under his great grandfather's deeds.

as Gifford's youngest daughter Andrina, was married to her cou-  
 ck Gifford. Her eldest son was the late Andrew Gifford of Ol-  
 who died in 1810, and whose eldest son is the pursuer, Arthur  
 at present residing in America. Her sisters died without issue.  
 32, Arthur Gifford of Ollaberry having taken out a brieve for  
 rved "nearest and lawful heir-in-general to the deceased Thomas  
 of Busta," Arthur Gifford of Busta took out a competing brieve  
 g served in the same character, and the brieves were thereafter  
 d to the Court of Session. Arthur Gifford of Busta, the defen-  
 med to be so served, as the eldest lawful son of Gideon Gifford,  
 "as only lawful son of the deceased John Gifford," eldest lawful  
 Thomas Gifford. Arthur Gifford of Ollaberry claimed in right of  
 dmother, the only daughter of Thomas Gifford leaving issue.  
 stion, therefore, depended on the legitimacy of Gideon Gifford,  
 establishment of a marriage between John Gifford and Barbara  
 which was alleged by the defender. The inquest was proceeded  
 ore Lord Moncrieff, as junior Lord Ordinary, and a Jury of  
 nal men. Evidence, both documentary and parole, and the de-  
 of a considerable number of witnesses which had been taken  
 mission, were laid beore the Jury by the parties respectively.  
 variety of procedure, and nine several adjournments, states of the  
 ring by order of the Court been printed and submitted to the  
 e inquest, by a plurality of voices, served and cognosced Arthur  
 the son of Gideon, "nearest and lawful heir of the deceased  
 Gifford of Busta," and negatived the competing brieve.

after, Gifford of Ollaberry brought a reduction of the service with  
 ry conclusions as to his being the nearest lawful heir of Thomas  
 on grounds which are stated as follows in his pleas upon the record :  
 e verdict and service now challenged are erroneous, and ought  
 luced, in respect there was not sufficient evidence before the Jury  
 ct the claim of the defender, or prove that he was the nearest  
 air in general of the late Thomas Gifford; but the defender's  
 s disproved, while there was sufficient evidence before the Jury  
 by the claim of the pursuer, and proving that he was the nearest  
 general of the said Thomas Gifford.

least the said verdict and service are erroneous, and ought to be  
 at the defender is not the nearest heir in general of the  
 d, whereas the pursuer is the nearest heir in general

161. of the said Thomas Gifford; and the pursuer's claim is sufficiently instructed by the evidence which was led in the competition of briefs, or will be sufficiently instructed by that evidence, and the additional evidence now tendered on the part of the pursuer.

3. The said service being reduced, and the pursuer's claim instructed, it ought to be found and declared that he is the only nearest lawful heir in general of the said Thomas Gifford.

The defender, on the other hand, pleaded, that the pursuer was not the nearest lawful heir in general to the deceased Thomas Gifford of Busta, mentioned in the summons, and that the defender alone was entitled to and had been rightly served and retoured in that character.

The pursuer having moved, after the record was made up, to be allowed to adduce new evidence at once, and independently of the import of the proof already taken, the Court, on the matter being reported by the Lord Ordinary, remitted to refuse the application in hoc statu.<sup>1</sup>

Thereafter his Lordship pronounced the following interlocutor, adding the subjoined note, which contains a general view of the nature of the evidence and its character : "—The Lord Ordinary having considered

<sup>1</sup> Ante, XIII. 1042.

" NOTE.—Considering the peculiarity of this case—the extent of discussion it has received—the trial having required about ten diets, and the pleadings before me occupied nine days,—and the impossibility I have found of agreeing with the jury, I think it my duty, avoiding all needless details, and not attempting even to notice minute statements or arguments, to put the parties fully in possession of the general views on which I have proceeded in disposing of it.

" It is an action instituted by the pursuer for having a verdict, finding that the defender is nearest and lawful heir in general to Thomas Gifford, set aside.

" This Thomas Gifford, formerly of Busta, in Shetland, died in the year 1768. He had once four sons, the whole of whom were drowned together in May, 1748. It is certain that the three youngest died bachelors; but the basis on which the verdict under reduction rests, and must rest, is, that the eldest son, John, had been married to Barbara Pitcairn, who produced a son, called Gideon, the issue of the wedlock, though not born till after its father's death. If this child was legitimate, the defender, who is his son, is heir-of-line of Thomas, his father's grandfather. But the reality of this marriage is denied; and if the denial be well founded, the character of heir-of-line belongs to the pursuer, who is the eldest son of Thomas's youngest daughter, there being no issue of his other two daughters alive.

" After some manœuvring in the country about services, in the course of which advantages, but not more than the ordinary ones, were attempted to be taken, the parties brought forward their claims fairly and openly in a competition of briefs, which was tried by a jury before Lord Moncrieff.

" The substance of the case for the defender is, that Barbara Pitcairn was by birth and manners an equal match for John Gifford; that he had paid his address to her; that this ended in a private marriage on the 8th of December, 1747, in the procreation of Gideon, the defender's father; that this union was contracted during the few months it lasted, from fear of the husband's mother, Mrs Gifford, called Lady Busta in the proof, an able and imperious woman, who, it was known would be averse to the marriage, and could easily have made her husband desert any son who had displeased her; that the marriage was dissolved in May, 1748, by the death of the husband, who was drowned by the upsetting of a boat; that this accident also proved fatal to John Ficken, the clergyman who officiated

the closed record, with the proof, productions and whole process, and No. 161  
proceedings, and heard parties thereon at great length; Finds that the

Feb. 17, 1834  
Gifford v.  
Gifford.

the marriage ceremony, and to the three other sons of Thomas, two of whom and the clergyman had been the witnesses; that a regular certificate was found on the person of John Gifford when his body was recovered two days after the accident; that the marriage being thus disclosed came to be publicly acknowledged; that Barbara Pitcairn, though obliged to manage herself, so as to humour her mother-in-law, was reputed and treated as the widow; that the posthumous son, Gideon, was universally, or nearly universally, considered as the heir; and that, accordingly, he succeeded to the estate in the year 1760, when his grandfather died, and held undisputed possession of it from that time to the year 1811, when he died, and was succeeded by the defender, who has been in possession ever since.

"The substance of the pursuer's case is, that John Gifford's marrying Barbara Pitcairn was highly improbable, she being in a much lower rank of life, and it being known that Lady Buxton, though she had tolerated her as an humble companion, would never endure her as a daughter-in-law; that, accordingly, there was no cohabitation, and no marriage; that the certificate of marriage is a forgery; that the reputation of Gideon Gifford was that of a bastard; that he himself frequently acknowledged this, directly or virtually, and on occasions when it was his interest to vindicate his legal status if he had believed that he possessed it; that, in particular, he never took up the character of heir-of-line by a service or otherwise; that he possessed, and whatever be the result of the present proceedings, must retain, that estate merely under a special deed, which the grandfather, who executed it, might have made in favour of any person he chose; that though this possession has never been, and never could have been, legally disturbed, the objections to his and to the defender being considered as the heir-of-line, have been long stated in ways sufficiently plain, and sufficiently offensive, to have compelled any person, conscious of having a right to that character, to take legal measures for establishing it.

"These views were submitted to a jury, which decided by a plurality of voices in favour of the defender. Hence the present action for having that verdict set aside.

"The pursuer of such a process has always a strong presumption against him from the fact of the verdict, and no Court ought ever to be anxious to diminish its force. But, in estimating it on the present occasion, three circumstances, appearing on the face of the proceedings, must be considered. 1st, Of the 15 jurors, 13 were legal practitioners. 2d, The Court was adjourned, and often for long intervals, about 10 times, its first sitting being on the 9th of November, 1832, and its last on the 7th of February, 1833. 3d, A printed copy of the whole parole testimony (except one deposition), and of such part of the documentary evidence as the party thought material, extending in all to about 214 close printed quarto pages, was put into the hands of each jurymen, two days before the senior counsel were heard, and about 10 days before the Judge summed up and the verdict was pronounced. I am far from presuming to blame these proceedings, some of which, by necessity, as the law stands, of taking down the evidence in writing, may have appeared convenient and perhaps unavoidable; but they form a bad preparation for a sound verdict; in so much that they are never practised, and could not be suffered, in any ordinary trial.

"The whole matter has again been sifted and discussed in the course of this action, and it is impossible not to feel that the case requires great consideration; minute attention to its material details, and the steady application of general principles of evidence.

"The *onus probandi* is on the defender. He is the claimant. And the pursuer has nothing to prove; because his case is conceded, or at least it is clear, provided it be not interfered with by the defender making out a case which excludes his. The defender does undertake to prove that John Gifford and Barbara Pitcairn had been married.



161. verdict brought under reduction cannot be maintained on the evidence  
 1837. hitherto adduced, and that upon this evidence the claim of the defender

"In the Record, he makes the general averment, that they were married persons, but he does not state any particular way in which the marriage had been constituted. But his evidence contains no serious attempt to establish any marriage, except one by *actual celebration*. Questions are, no doubt, repeatedly put, with an apparent desire to indicate some marriage of a different description, such as whether witnesses did not understand that Gideon '*had been begotten on the head of marriage*,' or '*on the head of a promise of marriage*.' But promise must be left entirely out of view; partly because it cannot be proved solely by parole testimony, and there is no other evidence for it here; partly because even this testimony does not establish the fact. There is not one of the witnesses who has any reason for believing such a promise to have been given beyond mere report. They had *heard* it. There is no indication of any attempt to prove a marriage by cohabitation as husband and wife, or by mutual interchanged declarations, or by conjugal behaviour. Every thing of the kind is excluded, by the admitted facts, that the alleged union only subsisted about five months, and that it was studiously concealed. Marriage, by *actual celebration*, therefore, is the one on which the defender does, and must rely.

"Now it is admitted, that the only three persons named or known as having been present, being the clergyman and two of John Gifford's younger brothers, were all drowned along with John himself, and there is no proof of their having previously violated the secrecy imposed upon them by their being engaged in this private transaction. Margaret Gifford, (an unsafe witness, however), makes an old butler say that he was particularly drunk '*on the occasion*' of the marriage; but even she does not report him as having stated that he was actually present at the ceremony. (Def. 49, F.) In these circumstances, *the paper produced as a certificate of marriage, which is said to be subscribed by these three persons, forms the only direct proof of the fact.* The defender's case accordingly rests so much upon this certificate, that if it be withdrawn his defence must fail. This makes it indispensable, before advancing to any other facts or views of the case, to ascertain how far this document is to be received as genuine, and what effect is to be given to it.

"The paper is in the following terms:—

" '*At Busta, 8th December, 1747.*—These certify, that this day, John Gifford of Busta, younger, and Barbara Pitcairn, there, were duly married in presence of William Gifford and Hay Gifford, his brothers, by JOHN FISKEN, Minister.

" '*WILLM. GIFFORD, witness.*

" '*HAY GIFFORD, witness.*

"It is most material to trace the history of this document.

"It is said to be subscribed by John Fiskén, as minister of the parish. The extracts produced from the presbytery records show that this person was ordained assistant to his father, the proper minister there. The ordination was vitiated by such obvious and flagrant irregularities, appearing on the face of the extracts, that if the proceedings had been reviewed in the Supreme Ecclesiastical Court, they must have been set aside. But as this was not done, the ordination must be taken in this question to be valid. Now, this marriage, if it took place, was *without proclamation of banns*. No proclamation is proved; none is even asserted; and all suspicion of it is excluded by the admitted desire and necessity of concealment. The idea of a regular marriage would be inconsistent with every page of the defender's evidence. But celebration of marriage, without proclamation, was then as it is still, a grave criminal offence, punishable in the Court of Justiciary by banishment for life, and ruinous, ecclesiastically, to any clergyman. It is extremely improbable that a minister should not only commit this offence, but that he should put a signed confession of his having done so into the hands of another; especially a minister who knew what sort of an informer he exposed himself to. If this guilt, if detected, he incurred the displeasure of Lady Busta.

is rejected, and that of the pursuer sustained, and, quoad ultra, No. 161.  
is the cause to be enrolled, reserving all questions of expenses."

Feb. 17, 1881  
Gifford v.  
Gifford.

This paper is said to have been found upon the person of John Gifford, when it was recovered, two days after the fatal accident. But it is very remarkable that although every thing that occurred on that occasion must have been attended to with attention, and although Barbara Pitcairn, who had an interest in making innocence instantly clear, is said to have been on the beach, *no human eye has seen it* by whom the writing was then seen. The two witnesses who are most immediately into connexion with it are Laurence Johnston and William Williamson, both of whose fathers assisted and were present at the finding of the body, and whose sons tell what their fathers used to say. Both of them are very exact as to many particulars. Johnston mentions the precise day of the accident, and of the finding of the bodies; the hour of the night, as marked by the striking of the watches in the water, when the upset had taken place; that it was his father who lifted John's body, 'the dredge taking hold of the thumb,' and when it was brought ashore, '*there was plenty people, besides Miss Pitcairn, who saw it.*' But neither of them give any distinct account of what the paper was; it is not to be wondered at, for they both state that their fathers *did not see it*. Johnston says 'that he has heard that a paper was found on Mr John Gifford's body.' That his father told him that he had never seen the paper that was found on John Gifford's body.' Williamson says, 'That his father *did not see* the above-mentioned as having been found on Mr John Gifford's body, but he saw it. Depones that his father *could not tell him the contents of said paper, and he did not, and could not read it.*' This witness also specifies a person of the name of Anne Laurenceson, a servant in the house of Basta at the time, who told the same story about a paper being found, but adds, '*that she never said she saw the said paper, and deponent knows that she could not write.*' Another witness for the defender, James Williamson, who had often conversed with another person who was in the dredging boat, after saying 'he supposes the paper found on John Gifford's body was marriage-lines,' adds, 'that he cannot say that *any one ever told him they had seen said paper.*' Margaret Gifford, to be sure, makes up for this, by stating, on the authority of her deceased mother, that the paper was not only known, but that, after being found on John's person, it and a corresponding one, which was in the custody of Barbara Pitcairn, '*were both laid down on the table in presence of the servants, and sworn to before the Sheriff; and that the deponent's mother said, that she had sworn to them before the Sheriff, Mr Malcolmson.*' But this statement, which, if true, must have been capable of being corroborated by many others, rests on the evidence of this solitary witness; who, or whose informant, is contradicted by the decisive fact, that, at this time, Malcolmson was a boy, and not Sheriff of the county. The fact of the writing, if found, not having been exhibited at the moment, is established indirectly by this circumstance, that, although there came in to be an impression on the minds of certain persons, that some writing or paper had been found, very few of them agree in their account of it. It is described as '*marriage lines*' (21, C.); as '*a letter*' (23, A.); as '*a paper concerning marriage*'; as '*a promise of marriage, or something acknowledging the child*,' (34, A.); as '*marriage-lines from the Session-Clerk*'; as '*something consistent with marriage*'; as '*a paper from her to him*'; as a letter '*showing that the parties were married, or that they are to be married.*' The variety of description may increase the probability that some paper or

P. 11, letter I  
P. 12, C.

P. 14, F.

P. 21, C.  
P. 21, D.

Def. 48, B

Def. 14, F  
— 11, F.  
— 28, B.

101. The defender reclaimed, and in regard to the legal effect to  
 1837. in the reduction to the verdict of the inquest, he pleaded—

other had been found. But it is also a circumstance which generally a mere rumour of such a discovery; and, considering the decisiveness and of the document in question, it greatly diminishes the probability of it. The parties were in a situation in which the possession of writings from or even of regularly interchanged declarations, far short of marriage, is and therefore, the actual celebration of a marriage can never be held blished by any document of which the authenticity and the precise words known. The defender, therefore, is bound to maintain *this specific writing*. I do not feel that he makes an advance towards doing so, by proving though prevalent impression, that *some paper or other* had been found. Barbara's assertion of her marriage, at the moment of the catastrophe which it (assuming such an assertion to have been made), and thereby incurring of harshness and abuse if she could not prove it, goes very little to blish *this particular document*. She might have other writings which she to be sufficient; and, even the consciousness that she had no such evidence over would, with some temperaments, only increase the intensity of as on which alone her fate depended.

"If this writing had really been found, it is very difficult to resist the notion, that the family would have soon put it to its proper use. A short time they had recovered their surprise, and checked imposture, might not be unnatural. But continued silence on the subject of such an attestation more, any course of conduct inconsistent with it, cannot be explained by the suspicion that they never heard of the existence of the paper, or that they trusted it. It is impossible that the writing could have existed, and been to others, without being known to old Busta. His whole sons had been at that moment, and one of his earliest consolations would have been in proving that he had still a lawful grandson. It is true that Lady Busta, have been hostile to the marriage, was hostile to the recognition of Barbara as her son's widow; and it is possible, that this feeling might make in anger, even go the length of endangering the status of her grandson. But it is out of nature to suppose that it could operate to the effect of concealing the certificate, or refrain from publishing it *permanently*. She knew the importance of giving Barbara the status of a woman once married, she was still alive. But she never did so, though strongly tempted. He died in 1760, having previously executed an entail of his estate in favour of his grandson, whose legitimacy was thus made a point of family honour. But the certificate was not brought forward then. Barbara died in 1766, and the cause was thus removed. But it was allowed to remain unseen and unheard of by Busta herself died in 1769, when the last restraint was withdrawn, and was in the hands of the family. Still nothing transpired about this which lay unknown by any mortal from the time it is said to have been discovered in 1748, till about the year 1798 or 1799; when, after the silence of half a century, it is said to have made its second appearance.

"The account of its revival then is contained in the important testimony of Mrs Hutchison (p. 37.) and Mrs Bruce (p. 42.) two witnesses for the pursuer. The pursuer has endeavoured to discredit these witnesses by other evidence in appreciating them, I take their story as they themselves give it.

"Mrs Hutchison's statement is, that when Mrs Bruce of Symbister John Gifford, and called Lady Symbister in the proof, was one day examining a chest of drawers which had belonged to her mother Lady Busta, for some time expected to have been stolen, a grey paper parcel was found, containing a sealed paper; that the seal of the parcel being broken, there was found a letter, addressed to Lady Symbister; that the witness read the first part of the letter; that Lady Symbister read the first part also, and that as she was turning the leaf 'a note fell out of the letter on the ground before them;' that

The sole ground on which the Lord Ordinary has rested this interlocutor, the insufficiency of the evidence, for which, in the case of a verdict in

No. 16

Feb. 17, 11  
Gifford v.  
Gifford.

ant lifted the note; that Lady Symbister looked over it, and said 'it is my other's marriage lines with Barbara Pitcairn; that she read that paper to the deponent, and gave it to the deponent in her own hands:' That Lady Symbister as so much agitated that she was obliged to lie down in bed, but rose again in an hour or two, and made the servants be called in; before whom she formally announced the discovery of the marriage lines; after which she did not put the two documents into the grey paper again; but 'laid them in another and a better drawer,' which was in her own room.

Def. 38,

— 40,

"An attempt is made to confirm this witness by her sister, Mrs Sutherland, who says that she had repeated the same story to her. No corroboration can be more futile, and if it had been objected to, it would probably have been found inadmissible. Mrs Bruce, however, was present, and to a *certain extent* concurs in the same general story. But there are some discrepancies very material to be attended to in appreciating the evidence of both.

"1. Mrs Hutchison says that this took place *early in the morning*. (Def. 38, D.) Lady Symbister having risen 'about 6 o'clock in the morning,' (40, E.) Mrs Bruce says 'that it was about twelve o'clock mid-day when this took place,' (44, C.) 2. According to Mrs Hutchison, the drawers stood 'in a sort of lumber room,' (38, C.) According to Mrs Bruce, 'they stood in the corner of Lady Symbister's sleeping room (44, C.), and there was no furniture in that room, so far as she knows, that had come from Busta: 'That the deponent has been many times in the lumber room and there was no chest of drawers there,' (46, A.) 3. Mrs Hutchison swears that it was *she* who found the parcel, (38, E.) Mrs Bruce, that the deponent saw Lady Symbister find the marriage lines, and that she took them out of the chest of drawers in her own room,' (44, C.) 4. Mrs Hutchison states, 'that this took place in the month of July, immediately preceding Lady Symbister's death, and she died near to the Martinmas of the same year,' (39, D.) Mrs Bruce 'being interrogated how long it might be after this, that Lady Symbister died, depones, *That it was about two years*, and depones, *That she is sure it was two years*, and the deponent continued in the service till about a fortnight before Lady Symbister died.' She died in November, 1799, (37, C.)

— 44,

"Unimportant discrepancies strengthen credit. But these inconsistencies are material, and though they may not evince skilful concert, they imply a degree of inaccuracy, which, in a story depending on these two witnesses alone, nearly destroys its evidence. But there are statements in each deposition, taken separately, which provoke a stronger repugnance to the testimony, than what is produced even by these contradictions.

"Mrs Hutchison says, that she read the *first part of the letter*, and that the certificate was put into her hands, and 'that she saw that it was marked with damp rust in the middle,' (39, B.), and that 'it was neither written in a very old hand, nor in a very new hand,' (39, A.) But her perusal of it was very slight, she 'just read it as she could make it out, and cannot say how often she read it,' (41, D.)—Her powers of reading are not great. She was a menial servant, and as she herself states, 'not a scholar,' (39, B.) 'Depones, That she cannot write, and never was taught to write, but she can read legible writing; that her brother was at the school when she was learning to write, and she happened to learn some letters with him. And being given a paper, marked No. 108 of process, and desired to read the backing thereon, she reads the words, 'Report, Act and Commission,' and the words 'at the place of,' and the word of 'Gifford,' but depones that *she cannot read the other words*; 'and being particularly directed to a word which the Lord Ordinary now has down on the record, as the word 'witnesses,' depones, *that she cannot read the word*,' (41, E.) The words by which she was thus tried, though not eminent for distinctness, are at least as distinct as the certificate. Now, she swears expressly that the two papers were redeposited in another and a better drawer, 'she

161. a contested service, there is no precedent. This is a proper question for a jury,<sup>1</sup> and their finding ought not to be interfered with unless it

never saw them again,' (40, B.; 41, A.) Yet when examined in the case an interval of at least thirty-two years, she recited almost the exact terms of the certificate, including the names of the witnesses, and the precise date, without the paper, and swears that she had so described it before it had been lately shown to her, (39, F.), and that 'she so described the paper when she was first asked a question concerning it' (39, A.) She accounts for this by stating, that, reading it herself, Lady Symbister read it to her and the other servants, and she has a great memory, particularly for old Shetland ballads, of which 'repeat some hundreds in wholesale,' (39, E.) This last statement may be true; but the recitation of the minute terms of a prose certificate, after a long interval, from pure recollection, is very improbable.

"Her memory breaks out suspiciously again, in the remembrance of the words of the following formal address, which she says Lady Symbister delivered to the assembled servants. Something being said about the lace: 'Depose Lady Symbister said, *No, it is a better thing we have found this day; and I have called you together for: That Lady Symbister then said, 'The news that I have to declare to you are, that I have found my dear brother's marriage lines this day, and I desire you all to declare it to any person in the house as far as your influence will go.'* An address not very likely to have been delivered or remembered; especially as the simple and continued exhibit of the certificate, would have been more natural and far more efficacious. She is successful in narrating the contents of the letter: Depones, 'That Lady Symbister said in the letter, that it was the last letter which Lady Symbister would write from her; that she was sorry that she had carried her resentment so far as to her son's marriage, for she knew it; but that she did not like that a lady should be in the house of Busta, who would dispute the authority with her; and that she was dying blessing to her daughter, and enjoined her to publish her brother's marriage, and hoped that she would obey the dying injunction of her mother in her most important letter has never re-appeared, either to confirm or contravert. Lastly, Though the witness had been thus solemnly desired to promulgate the coverly, she can only specify two individuals, an old man called Theodore John Hutchison, to whom she can remember telling it, 'though she may have told it to several persons.' (40, C.)

"Mrs Bruce, though sworn by the last witness to have been present when the servants were addressed, says, 'that the lady neither told the deponent to tell that the lines were found, nor forbid her to do so; that she merely mentioned she had found them.' (45, E.) She does not say, that the lady made any or gave any injunctions, or read the certificate, (43, F.); and that she (deponess), 'heard no more about the marriage lines, and that Lady Symbister mentioned the subject again to the deponent, or in her hearing,' (44, E.),—she 'never saw the said paper, since she saw it in Lady Symbister's hands deposed to,' (43, G.) Yet the certificate being shown to her in Court, after two years, she 'depones, that that is the very paper.' But the judge thought it his duty to record this fact. 'The Lord Ordinary certifies, that the witness answered instantly upon the paper being handed to her, and without having or examined it.' (43, G.) She herself admits, indeed, that, 'she never saw the inside of it, and knew it only by the spots which appear upon it,' (43, C) though certainly spotted, it does not appear to me to have any such very prominent spots as to warrant this confident and hasty identification; and I cannot expect, that if any old-looking paper had been shown to her she would have been equally clear.

<sup>1</sup> Watson, ante, XIV. 734 (in which case the Lord Chancellor directed the issue as to propinquity to be tried by jury).

it and gross error in the probation," and the verdict be shown No. 161.  
tly in the face of the evidence.<sup>1</sup> In a reduction of an ex parte

Feb. 17, 1837.

Gifford v.

Gifford.

any other witness who is examined as to all this, is Mrs Hughson, who is the pursuer to prove that no such scene occurred. I think that this is the case she admits that she was absent twice, and though only for a few days it is possible that it may have happened just when she was away. But it is very important indirectly; for the sensation made by such a discovery, in a secluded place, could not soon die away, and she must have heard of it. Hutchison says, 'That there was *much conversation about the letter in the family*, and in the island, and the deponent and the servants accordingly, as they had been desired; that it was in consequence *generally known* on the island of Whalsay, that the letter and certificate had been found.'

2.) But Mrs Hughson, who, being the housekeeper, may be supposed to be an intelligent person, swears that she never heard of it; and '*that she heard any of the servants in the house of Symbister speaking of a certificate having been found, and depones that if such a thing had been found she must have heard of it.*'

3.) The only thing that could have got the better of all this would have been, that the letter had been followed by the immediate, general, and continued, disclosure of the documents; which, moreover, was the natural course. It was the reverse. But it is not pretended that they were given or exhibited to the deponent. The mother left her dying injunction to her daughter to keep the gratifying fact, that her dead brother had been married, and that his son was now the owner of the family estate, was legitimate, and gave her two documents which this could be proved; but, instead of publishing them to the world by depositing them with her nephew, Lady Symbister merely bids her secret them, and then quietly locks them up. The letter, though said to have been put into the same drawer with the certificate, has never since been seen; the certificate, after this single display, only reappeared in the year 1805, when the unfortunate circumstances attended its third and ultimate disclosure.

4.) The other of the pursuer was Mr Andrew Gifford of Ollaberry, who is reprehensible in his son in his rights, but certainly not in his iniquities. It is proved 3.) that Ollaberry had purchased a chest of drawers in the year 1802, which belonged to Lady Symbister. On the 10th of September, 1805, he showed the letter to the agent of Gideon, (Def. 36, E.) repeating what he had stated before, viz., that in these drawers he had found a certificate of the marriage of Gideon's father and mother, a copy of which he enclosed. *This is the first time the document is ever brought openly to light.* The paper so transmitted was the certificate produced and founded on by the defender. For several years after a great deal of correspondence took place between Ollaberry on the one part, and his son on the other part, in reference to this important paper; Ollaberry always making offensive charges, or dark insinuations, about its authenticity, trying to extort hush-money; and Gideon and his son meeting this, not with perfect prudence, because they ought instantly to have tried to quash the charge if they believed it to be so, judicially, but with no want of honest defiance and refusing to bribe him. At last, Ollaberry died in 1810, But, in February of that year, he made what he called a solemn written declaration (p. 143.), not only that the certificate *which he himself had transmitted was forged*, but that it had been forged *by him, and this at the instigation of Gideon.*

5.) The strength of this declaration mainly, the pursuer maintains that the certificate must now be treated as thus forged. But some things must be considered in this result be adopted. The idea of a person alleged to be usurping

<sup>1</sup> Stair, III., 5, 43.

181. service the onus probandi is laid on the pursuer, and there is a presumption in favour of the party in possession of the verdict; 19, 1887.

the *status* of legitimacy, applying to the true heir to fabricate evidence for in itself not very credible. But besides, no such conclusion can be rested on evidence. Ollaberry is utterly incredible on this point, or in this cause. 'he was false at first or at last, he was certainly most false in one of his acts and probably in both. Forgers professing penitence are never good witnesses when disinterested and corroborated. But this one is not corroborated, interested. The scroll of the declaration is in the handwriting of William derson of Bardister, one of the subscribing witnesses, (Def. Proof, 67, E.), and is superabundant evidence of virulent hostility on the part of this person to Gifford, and of a general character, qualifying him almost for any thing as to hurt an enemy. The illegitimacy of Gideon, would have brought the property very near Ollaberry's own family, and accordingly he avows that 'make this solemn declaration for the benefit of my own family, and all other concerned,' (143.) It was under the impression of this interest, that 'from *de motu*, he practised what he calls the 'innocent deception.' An attempt to confirm him, by showing that the certificate is in his handwriting. But unsuccessful. None of the witnesses can discover any resemblance, except Barclay, whose opinion, however, is extremely faint, (Pursuer's Proof, 43, I he is so had a judge of the matter, as to think that other two papers shown are in the handwriting of Ollaberry, as to both of which he is unquestionably wrong, (Pursuer's Proof, 43, G. 44, A.)

"If the statement made by this person originally, had been without fiction, it might have been maintained that the defender ought not to suffer subsequent delinquency. But, unfortunately, his first assertion was tainted with the same falsehood and selfishness that mark his last. His first communication was by a letter dated 10th January, 1803, (Def. Proof, 36, G.), mentioning the discovery of the certificate, and sends a copy of it, but makes a *valuable* *condition* necessary for the delivery of the original; and he expressly states, that out of that consideration the original shall never appear. 'The consequence of you and your family you cannot but put the proper value on; but I declare *original shall never appear till you possess me of the renunciation you promised* This bribe was not given, and in his next letter of the 24th of March, 1804 (36, D.) he intimates that the certificate *had been lost*. 'I am sorry to have you that the certificate which I promised you was put up with other papers sent home, when I left the country, and *must have been lost*, for they never reached home; nor any letters at that time, of which I have never as yet been able to procure any account.' And so the matter stood for another year and a half, until, on the 10th September, 1805, he writes a third letter, avowing that his statement was a *wilful falsehood*, and that he now enclosed the certificate *had never been lost*, (Def. 36.) His subsequent letters from about this time, show that in all his varying and inconsistent statements, he had no other object than extortion. There is one of them, dated the 14th December, 1808, in which he has even the audacity to avow that he had long been preparing for this by possessing himself of the Busta family papers, (Def. Proof, p. 67.)

"No reliance whatever can be placed on such a witness; and as he stands alone and utterly uncorroborated, as to the fact of his having found the paper in a box belonging to Lady Symbister, that most material circumstance must be left unproved. No doubt he did produce a paper, which I think is not established to have been forged by him; but whether it was manufactured by any body else, whether it was found in a situation which identifies it with the document, Lady Symbister is said to have placed in her repositories, are very different questions. An attempt is made to prove that the paper of the certificate must have been manufactured before 1748. But Mr Macdonald, on whom the point depends, (Def. 54.) says *that it either might or might not*; and at any rate it was



Will this hold in a reduction of a verdict obtained in a competition.<sup>1</sup> No. 161.  
 es, the filiation in the present case not being disputed, legitimacy is Feb. 17, 1837.  
 Gifford v.  
 Gifford.

or any intending forger to possess himself of a piece of paper of the requisite  
 : his purpose.

certain genuine signatures by the three persons who sign the certificate have  
 en produced, to which both parties refer, the one to confirm, the other to  
 ve the authenticity of the subscriptions by comparison of handwriting. This  
 issible evidence by the law of Scotland; though I am not aware of any case,  
 ch, where modern forgery is alleged, it has been acted upon as sufficient of  
 o sustain the impeached writing. I cannot say that I am so satisfied by the  
 ere, *that if it stood alone*, I could feel confident in inferring fabrication. But  
 dly, after a careful examination of the writings, I must say that I think the  
 ate *extremely suspicious* in many particulars. There is a considerable diffi-  
 n applying the challenged to the genuine signatures, because the latter are  
 ways written by each of the subscribers in one uniform way—a circumstance  
 detracts greatly from the defender's evidence; for it implies that he has not  
 ed a clear standard of genuine signature for the Court to compare with. But  
 nature of William Gifford, the first witness, differs in three marked particu-  
 he *W*, the contracted *m*, and the *d*) from any genuine signature of his that  
 t been exhibited. However, without being able, and indeed without think-  
 necessary, to detect fabrication, and still less to convict any individual fabri-  
 the conclusion which I feel safe in adopting is, that *the authenticity of this*  
*ate is not proved*.

it be so, the defender has no maintainable case. The certificate pervades,  
 necessary for every other part of his evidence. If this document be held to  
 tinguished, the testimony of his own witnesses becomes inconclusive and  
 t unmeaning.

till, however, it is proper to consider how the matter stands, *even taking the*  
*cate into view*. The weight due to it in connexion with the whole circum-  
 s, must still be examined. For even in the case of the most regular marriage,  
 doubted certificate by the clergyman is not of itself conclusive evidence of the

It must always be important, and in particular it may determine, or shift the  
 n of proving. But in a disputed question it is never in law conclusive. It  
 y a part of the evidence.

Now, in appreciating this writing on the present occasion, it is to be observed  
 : is not subscribed by the wedding parties, but only by the minister and two  
 ses. Of the latter, the eldest was only seventeen years of age, the younger  
 fourteen. (Def. 59, B.) The clergyman was not only guilty of a crime in  
 engaged in such an affair, but he was guilty of a moral offence, greatly dimi-  
 g the credit which might otherwise be due to a person of his sacred function.  
 ust have known that proclamation of banns was avoided, not for any of the  
 objects, such as aversion to delay, ignorance, or the notoriety of the intended  
 age, for which this ceremony is sometimes dispensed with, but merely to  
 ve the relations of the pair, one of whose families was the principal one in the  
 . The minister lent himself to this, and he made two boys, *his pupils*, his  
 ments in the proceeding.

The document which certifies these facts may be genuine, but it cannot be  
 used as a *proper official attestation*. It must be confirmed. The ordinary  
 nation would be by the examination of those who subscribe it. But this being  
 able, we must look elsewhere for corroborative evidence.

Now, its statements are not confirmed by any relative *writing*. The defender's

<sup>1</sup> *Hamilton v. Douglas*, 1767; *Bell v. Bell*, April 14, 1819, 2, Murray,  
 June 20, 1826, ante, IV., 734 (new ed. 741); *Corbet's Trustees*  
 1824, 2, Shaw, Ap. 147.

2. 1837.

"Nor does the copy produced receive any support from the *pari* which, as it now exists, contains no entry on the subject. An entry o riage, indeed, could not be expected. But it is stated by some of the witnesses (15, C.; 23, C.) that they heard that Barbara Pitcairn had be before the kirk-session, when she gave up John Gifford as the father o and as the session record for this period has been lost, and is said to be the hands of Gideon Gifford, the imputation is put upon him of having it. There is nothing whatever in this. The evidence, though not clear, i of the records having, at the suggestion of the Presbytery, been sent who was the principal heritor in the parish, upon the death of the clergy year 1781. The son of the clergyman states expressly that he himself him (Pursuer's Proof, 37, B.); and the minutes of the kirk session, to defender refers (p. 69.), in order to show that they were committed to t of that body, does not establish the fact. They show that other things to the session, but not the record. But, besides, there is not a vestige of Gideon Gifford mutilated the record; nor is there any thing in his cl general conduct to make this probable. The imperfections of the volu accounted for without any such supposition. What remains of it, shows very irregularly kept; the minister's son cannot tell how many volumes Gideon; and John Anderson, a subsequent session-clerk, swears that i the tearing out of leaves from the record, was one of the pastimes of h the minister's children (Defender's Proof, 30, 31.) The want of an entr subject, therefore, may be a misfortune, but it is an innocent one, in Gideon was concerned, and it is impossible to take the hearsay of two o nesses in place of the book. So the certificate stands without any di corroboration whatever.

III., 8, 66; Stair III., 5, 35; Corbet's Trustees, *sup*

pursuer answered—

No. 161.

service of an heir is to be considered as the judgment of the jury Feb. 17, 1837.  
capacity of judges, and subject to be reviewed in the same man- Gifford v.  
Gifford.

There are no facts in reference to what occurred *before the marriage*, that are either way. Every thing of the kind is excluded by the admitted anxiety and concealment, under which the whole affair was arranged. The defender, no doubt, says, that in spite of this the addresses of the parties had been sufficiently liberal, to raise an expectation that they would be married. (Def. 22, F.) If it is a fact, I should doubt its being favourable for the defender's case; but if there was no resolution to conceal, or none strong enough to repress appearances, there ought to have been more of them, if the intention to marry was intended. But the fact is not established. It is only mentioned at second hand, in report of certain dead witnesses, and resolves into inferences said to have been drawn by these deceased observers from circumstances not explained, and on which as to which mistake is common. Accordingly, Mrs Ross, one of the pursuer's witnesses, says that her mother and grandmother told her that it was intended, 'the minister, who was courting Miss Barbara Pitcairn.' (Def. 7, D.) The only fact sworn to is by Margaret Gifford (Def. 47, G.), who (but only on the alleged authority of her deceased mother), describes one scene between the parties, which, though it indicates affection, by no means necessarily evinces conjugal affection.

The pursuer, on the other hand, attempts in his record to make the marriage probable from Pitcairn's inferiority of station. There would be nothing in this, if the fact were established. But no inferiority either of birth or manner is proved, but the reverse.

The result is, that there is little in the evidence *as applicable to the period before the marriage*, which makes its taking place either probable or improbable. Three individuals say, that deceased people told them, that when the matter was to be discussed after the death of John Gifford, they then remembered to have seen or heard something, not specified, from which they supposed that a marriage might take place; while others who had equal opportunities of observation say that they never heard or saw any thing of the kind; but all the evidence on either side makes it plain, that deducting these faint or fancied recollections and suspicions, the union, though perfectly natural, was divested of all external indications of marriage.

There is not a vestige of evidence as to any thing that occurred *at the alleged marriage itself*. The certificate is dated 'Busta,' but this only refers to the place where that paper was made out. Because the whole facts, and particularly the absence of Lady Busta, whose possible appearance would rather have marred the probability, make it certain that no marriage ceremony was performed in her house before John Gifford and Barbara Pitcairn. The only other place spoken of by the pursuer is the house of Symbister, in the island of Whalsay, which is expressly stated by Margaret Gifford to have been the scene of the marriage. If so, it is not probable why the certificate was not made out there. The travelling distance between the two spots is not proved. It might be useful to know the probability of the pursuer marrying at Symbister, and writing an attestation of that fact *on the day in December* at Busta. Margaret Gifford states also, that there was so much concealment in the transaction, that she was told that it was signalized by domestic dissipation. But her inaccuracy appears in this other statement, that the marriage took place within a few weeks of John Gifford's death. 'The marriage came within a fortnight or four weeks after it.' (Def. 49, F.)

The situation of matters while the alleged marriage subsisted, continued free as before of all facts evincing or constituting conjugal status. This period is an entire blank.

—It occurs after the marriage was dissolved, a correct estimate is indispensable towards any sound disposal of the case. They

161. ner as the sentence of any other inferior Court.) The rules in 1837. to motions for new trial, introduced along with the recent use

relate chiefly to the *repute* in which Barbara Pitcairn and Gideon Gifford held, as the widow, and the lawful son of John Gifford, and to the closeness of the near connexions of the family, as evinced by their conduct in the matter.

"On the former of these subjects (which occupies a very large portion of the testimony), there is little room for doubt as to the *state of the fact*. The evidence establishes clearly, that the *repute* was neither entirely in favour of the marriage nor entirely against it, but that it was divided. This is so plainly the result, that it is quite unnecessary to analyze the depositions. Notwithstanding much just criticism by both parties, there is a strong body of evidence on one side, not only in favour of the marriage and the legitimacy, but to the effect that no opposite opinion was ever heard of, and an equally strong body on the other side of exactly a contrary tendency. If it were necessary to decide on the relative credit due to either class of witnesses, I should give the preference to the pursuer. Many of them are of a higher description, and more free from the contagion of local prejudice; and I am not aware that any of them can be detected in deviations from fact too important and too gross to be counted for from ignorance or forgetfulness. Some of the most necessary to the defender provoke distrust.

"And, to a certain extent, the opinions of each set of witnesses can be traced to causes which impair or destroy their weight. On the one hand, the people have a pleasure in suspecting flaws in pedigrees; and those of the defender had considerable encouragement here, from the undoubted fact of the want of registration of the marriage and the want of registration. On the other hand, there was a positive disposition among the connexions and dependants of a resident in the priory, to maintain the purity of the family blood; in which, in this case, were supported by the rumours about the certificate. The extent to which the reputation of legitimacy rests on this supposed document assists us greatly in appreciating that reputation. One witness, who is confident that there was no marriage, says, '*That she never heard of any other evidence of it than the lines.*' (Def. 9, C.) Another, who was alive in 1747, and is equally confident, says, '*heard that the evidence of the marriage was some papers found on John Gifford's body.*' (Def. 12, F.) A third, whose father, like the father of the witness just referred to, saw the body found, deposes, '*That her father heard evidence that the paper above-mentioned, and that the subject became a speculation among the people.*' (Def. 14, G.) The same exclusive reliance on this document is expressed by many others. For example, by the Rev. Mr. Clay, the son of a minister of the parish, who, being 'interrogated whether he had heard of any other alleged evidence of John Gifford's evidence than this certificate,' deposes, '*That he never did.*' (Pursuer's Proof, p. 36, A.) Mr. Hume, witness for the defender, being asked, 'Whether it was the prevailing opinion in the country that Gideon Gifford was a natural child?' Deposes, '*That was. That he first heard something to the contrary of that report when the lines were produced.*' (Def. 35, A.) And the sheriff-substitute of the county being 'interrogated what was the general report of the country as to the legitimacy of Gideon Gifford as being legitimate or illegitimate?' Deposes, '*That he generally spoken of as a natural child down to the year 1808 or 1810, a certain certificate came to be talked of. That it was then he first heard of it as to his being illegitimate.*' Another witness, called for the pursuer, in the defender's cross-examination, that she heard 'that there had been no marriage between Barbara Pitcairn and John Gifford; and that she

<sup>1</sup> Erskine, III., 8, 59 and 60.

civil causes, are not applicable to reductions of services; in re- No. 161.  
which, whether the verdict have been *ex parte* or in a competi-

Feb. 17, 1837.  
Gifford v.  
Gifford.

Barbara had not had these to have shown, Gideon Gifford would not have admitted to have been John Gifford's child.' (Pur. 10, C.) So that the reputation a great measure rested on a fact which is not proved.

As an example makes it necessary to observe, in general, that *repute*, even if it is clearly established, is a fact which, if its application be not well considered, is extremely apt to mislead. There are situations in which the mere existence of a generally prevalent opinion is itself an ultimate fact in questions of *status*. For example, in cases of alleged marriage said to have been contracted or not by circumstances, and particularly by conjugal behaviour; because in a case resolving into the mere consent of the parties, when such a report exists, or what it rests upon, every moment during which they know it, and do not deny it, is a virtual recognition by them of its truth. Or when the events to which the general belief applies, are so very remote, that they are lost in antiquity, leaving but the impression which they originally produced survives. In such cases the hereditary conviction may or must be adopted in evidence, partly because it is all that can be obtained, and partly because it may fairly enough be presumed, that at first it rested on solid grounds, though these cannot now be examined.

But the *repute* founded upon, in the present question, never arose till the marriage was dissolved. It is made to bear upon John Gifford, to the effect of showing him to have been married, after his death. And the original circumstances, though certainly not recent, are still within the grasp of ordinary memory in so much, that they have all been explained by the testimony of living persons, either telling what they themselves knew, or repeating the statements made by themselves, by those of the immediately preceding generation.

Accordingly, there is scarcely any valuable witness, who declares his conviction in favour of the legitimacy of Gideon Gifford, *who does not explain the grounds on which this conviction rests*; and these resolve into circumstances of which the Court can now judge as well as they. There is one witness, James Greig (9, B.), who, after mentioning some circumstances as the foundation of his opinion, adds, 'that he really believes that there were other evidences if he could find them.' But this reference to forgotten matter is almost peculiar to this individual.

It is difficult to open a page of the proof, without observing that every part is founded on the circumstances with which evidence has now made the matter familiar. The paper supposed to have been found on John Gifford—the discovery of a corresponding paper with Barbara Pitcairn—Lady Busta's real or imagined dream—the discovery of the certificate, first by Lady Symbister, and afterwards by Ollaberry—the habit of hearing it talked of—the recognition of the certificate by the family—these are the facts which the witnesses themselves give as the foundation of their own and of the public persuasion. Whether these be sufficient grounds for the prevailing opinion, is a different question. But being the grounds on which it is now explained that people thought and acted, and the facts being ascertained, very little weight is due to the *mere repute*. It is the duty of the Court to disregard the verdict of the local public, and to examine its foundation—to sift the evidence itself, and not to repose upon the traditional opinion of former ages.

The doubt of legitimacy will always produce opposite interests, and feelings, and passions in different branches and connexions of families, each of which is habituated to its own view, and hears nothing else within its own circle. Legitimate and the illegitimate factions in this case derived their faith from partial considerations, or such detached occurrences, as moved each of them separately. Ollaberry was a known enemy of Busta; and a very respectable witness, a merchant in Liverpool, on being asked his opinion, candidly deposes, 'That I am at Ollaberry, and was likely to adopt the impression of the family there.'

161. tion, the Court have the power of reviewing on its merits the proof led before the inquest, and even of allowing new proof if necessary, and deciding upon the whole case, either reducing or confirming the verdict<sup>1</sup>

(Pursuer's Proof, 33, E.) The natural operation of such circumstances makes an undivided repute on such a subject a very rare occurrence.

" But the understanding of *the parties themselves, and of their immediate connections*, stands in a different situation from that of strangers. Such persons may be supposed to have been cognizant of the truth, and their conduct is the only safe exponent of their real feelings.

" If they had been satisfied from the first, or became satisfied afterwards, that there had truly been a marriage, *I hold it to be certain, that they would therefore have acted on that conviction.* There ought, in this view, to be no discoverable difference between this and any ordinary family. Some of them had the strongest temptations to get the legitimacy fixed, and to confer *status* without delay; in so much that the feeling is said to have extended even to Lady Symbister, whose family was brought nearer the estate by the death of her brothers without lawful issue, but whose affection for them, or for any offspring they might have left, is said to have prevailed over all selfish views. The defender proves, that, when she discovered the certificate, *'she was very joyful, and said it was the best news she had heard for twenty years.'* (Def. p. 48, F.) Nevertheless, the proof not only fails to establish any line of action consistent with these feelings, but establishes the reverse. It shows that the relations either disbelieved the marriage, or were doubtful of it. They vacillated, and in a way which is unaccountable, except on the idea that they had misgivings; and while they avoided taking any course likely to bring matters to a crisis, manœuvred to make Gideon's legitimacy be received by the world without discussion.

*The conduct of those who best knew the feeling of the family is explained by a few of the most respectable witnesses.* The Reverend Principal Jack's father *'was tutor in the family of Gifford of Busta, and had charge of Gideon Gifford, but of no other pupil.'* (Pur. 31, D.) The Principal's belief is against the legitimacy, and he depones, *'That he has no information derived from his father relative to the family of Busta; because his father always discouraged any conversation on the subject; and his information was entirely derived from other sources. That the deponent means that his father discouraged any conversation relative to the birth of the said Gideon Gifford.'* (Pur. 31, D.) If this silence had been absolute, it might possibly have been ascribed to an aversion to speak of the *private marriage*. But the witness says, *'that he was always instructed by his parents to believe that Gideon was either the real or the adopted representative of the family.'* (31, G.). The entail in his favour was made by this time, and his representing the family, no matter how, was the only fact cared for.

" This is confirmed and carried to a greater extent by the Reverend Mr Barclay, another nephew of Bruce of Symbister, whose father was the minister of the parish, from 1751 to 1781. *'Interrogated, whether he ever heard his father speak or express any opinion whether Gideon was legitimate or illegitimate? Depones, Never.* He has already said, *his father never spoke to him on the subject.* Depones, *That he never heard his mother speak on the subject.* She died when deponent was very young, so that he hardly recollects having seen her. Interrogated, *if he ever heard any of the family of Symbister talk of the late Gideon*

<sup>1</sup> Erskine v. Blackadder, Jan. 8, 1736, Elchies v. Service of Heirs, and Note p. 423; Hunter v. Hunter of Polwood, June 9, 1823, 1 Sh. Ap. 459; Gifford, Feb. 11, 1834 (Lord Ordinary's Note) ante, XII., 424; Sinclair of Ratho, 1769; Heriot of Ramornie, 1799, not reported.



JUSTICE CLERK.—In discharging the duty incumbent on us of reviewing No. 161.  
 Ordinary's judgment, it is necessary to ascertain what is the true nature

Feb. 17, 1837.  
 Gifford v.  
 Gifford.

birth? Depones, *Never, nor did he ever hear Sir John Mitchell or his*  
*ask of it.* (Def. 37, F.) This aversion to speak of it was most prudent  
 families were afraid—unnatural if they were confident.

Gifford, indeed, swears, that so far from there being any aversion,  
 was christened, and with great family rejoicing, *in the house of Busta ;*  
*Thomas Gifford of Busta held up the child to baptism :* That the  
 were called in and ' desired to drink the health of Gideon Gifford, either  
 e," or " heir of Busta," and all this in Lady Busta's presence. It is im-  
 to reconcile this with any of the leading and undisputed facts. It is re-  
 to the main parts, even of the defender's own case, particularly to the  
 of old Busta and his lady; and it would be difficult to save the witness  
 painful imputation, were she not protected by only professing to repeat  
 as told her by others.

*And did the members of the family act, on occasions when the facts of their*  
*are clearly ascertained ?*

*Barbara Pitcairn* had the double motive of interest and of honour, both for  
 and her child, to insist on being acknowledged as John Gifford's widow.  
 desecration, therefore, in any denial of her rights, especially considering her  
 character, is a strong symptom that she was conscious of their invalidity,  
 that she was in the nearly equally unfortunate predicament of having no  
 their soundness. Yet, she followed no steady single course.

On the one hand, certain things are sworn to (at second hand) powerfully in  
 her. Such as her stating at the time of the accident, and when she first  
 her position, that she had been married to John Gifford—a dangerous  
 for her to make to Lady Busta (Def. 4, C. ; 6, B.); and her resisting  
 temptation, held out to her by Lady Busta at a subsequent period, to  
 look some evidence of the marriage which it was supposed that she was in  
 need of. Mrs Admiral Fraser (Def. 46, F.) and Mrs Winchester (54, C.)  
 deponed that the mother of the one, and the father of the other, told them that  
*she had been present* when these temptations were held out, and that Miss Pit-  
 cairn resisted them, saying, ' that *her honour was more than all she could*  
 ;' and that she ' persisted in this till her dying day, though she lived in  
 poverty.'

On the other hand, these feelings are contradicted by long and important pas-  
 sages in her life. It is quite certain that she did not assert her right to the situa-  
 tion of Gifford's widow uniformly, or conduct herself in all respects as undoubted  
 widow. She wore no mournings. (Pursuer's Proof, B, 9.) She was buried  
 as *Barbara Pitcairn*. (Pursuer's Proof, 73.) No doubt, Lady Busta, who, it  
 probably managed the funeral, was alive when she died; but the estate  
 was previously settled upon Gideon, as Lady Busta's grandson; and after  
 it is difficult to understand any feeling that could induce that woman to en-  
 courage doubts, which she knew existed, by permanently degrading the mother  
 and child on the face of the parish record. But the fact is, that she was not  
 married, but lived as Barbara Pitcairn. She was never known as any thing  
 other than *Barbara Pitcairn*. It was it merely the name of widow that she sunk. Mr Barclay, *the*  
*attendant of the family*, and in great intimacy with them, ' depones, That  
 he has heard that Gideon Gifford's mother was Barbara Pitcairn. Depones,  
 never heard her spoken of by any other name. Depones, That she was  
 never called to be the widow of John Gifford, so far as the deponent ever heard.'  
 (Pursuer's Proof, 42, C.)

It is other evidence to the same effect. But her submission to this treat-  
 ment, that it is endeavoured to be accounted for by ascribing it to the  
 influence of Lady Busta. This might have operated a certain length,  
 but it could scarcely make her continue such an unworthy



181. of the province of this Court in reference to such a reduction as that now  
us. This is an action for reducing and setting aside the verdict of a jury  
1837

sacrifice, after her son's interests were fully secured, and after she must have that his legitimacy was questioned. The Rev. Mr Barclay and others as she always maintained that there had been a promise of marriage. The solution which explains both parts of her conduct is, that she thought that the tion to marry saved her honour, and entitled her morally to say that she widow, but that she was aware that legally this was not enough.

"Lady Busta's behaviour was less equivocal. The whole proof test evidence of her aversion to recognise Barbara as her daughter-in-law. *Busta could never bear to look upon the woman.*' Yet she uniformly of the boy. 'The first time Gideon was brought to see her, she laid her on his brow and said, that brow should make a man of him yet, having immediately recognised the likeness of her son.' (Par. 36, G.) Being thus partial to I cannot account for her fixed and undisguised hostility to the mother, upon the principle that she was satisfied that there had been no marriage need not have liked her; but if she really believed that Barbara was the mother of that child, why should she publicly degrade her? And her even towards her grandson is incomprehensible on the idea of her belief of his legitimacy, and consequently that his status did not depend on skill. It is the defender's statement, that she had early got possession of a certificate of marriage; that certificate which is now held to be nearly correct. But instead of putting down all surmises by exhibiting it, she locked it up, it could never be discussed, and never even re-appeared by any act of hers when, after about 50 years, it was discovered by her daughter, it is another of the defender's case, that it was found, accompanied by a letter from her that daughter described, as saying, 'that it was her mother's last letter enjoining her to declare her brother's marriage with Barbara Pitcairn, and I was very glad to do so, for she had long known it, and her mother's injunction her had kept her back from declaring it.' (Def. 38, F.) If Lady Busta had been satisfied that all was right, why her first injunction to conceal? and then, posthumous direction to a respectable daughter to proclaim that her brother was not a bastard?

"This last statement, however, depends upon the testimony of Mrs Hunt whom I very much distrust. But there is safer evidence. Lady Busta's husband died in 1760, and Gideon was not of age till 1769; and, during this period of ladyship and her brother, Sir Andrew Mitchell, acted as his tutors, under the direction by the deceased grandfather; but she was the principal manager, was in every thing she meddled with. Now she was aware of the proceeding which Gideon's illegitimacy was expressly stated. It is set forth in the SWERS for Thomas Mount of Garth to the PETITION of Gideon Gifford of (Par. Proof, 84.) It is possible—but considering the character, very improbable that she did not observe these statements in a pleading. But similar observations made directly to herself. Mr Anderson, the family agent, told her, in a memorial on these affairs, in 1760, 'In the present case there can be no tutor-at-law, 76.), plainly because of Gideon's bastardy, and consequent want of relation 1761, she sends a very sensible memorial to Mr Anderson; to which the same year, sends an answer (Par. 77.), in which he distinctly tells her, though Gideon be entitled to the estate of Busta, because it was expressly conveyed to him, the rest of the real property 'will belong to your daughters, and the heirs-at-law.' She sends observations on these answers, on the 4th of Jan. 1762, in which she says, 'Lady Busta observes what is noticed by Mr Anderson in the deed of tailzie, of not bearing an assignation to the heritable debt Anderson sends her another memorial in 1765, in which he tells her that proceeding to act upon the fact that the real property, not expressly conveyed belonged to the daughters as heirs-at-law. 'The adjudication is now devolved upon Lady Busta's only daughter, Christian Gifford, Lady Gifford

heirs, and the retour following on it as erroneous, and not supported by, contrary to, the evidence adduced, and also as having proceeded on evidence

No. 161.

Feb. 17, 1837.

Gifford v.

Gifford.

Andrew Gifford, eldest son of Lady Busta's youngest daughter, *who are heirs of conquest in general* to the late Patrick Gifford, the adjudger, and Anderson has sent to Mr Malcolmson a *brieve to expedite a general service in retour*, which will be a good title to the adjudication, and of course to a heritable bond; and how soon the service is returned, a summons will be at their instance against Mowat of Garth, (Pur. 89). This service, which excluded Gideon from the character of heir-at-law, was accordingly obtained in 1777 (Pur. 95.); and the Gifford of Wethersta, to which the heirs were thus declared heirs-at-law, was a brother of old Busta, and he had probably been cognisant of the circumstances respecting the conveyance.

Lady Busta's belief in the legitimacy of her grandson and pupil cannot be reconciled with these proceedings. But her conduct can easily be reconciled to that of a managing grandmother, conscious of a fatal defect, and therefore desirous of submitting to almost any thing rather than provoke discussion.

Old Busta has recorded his opinion under his own hand. In the year 1752, at which time he must have recovered from the shock of the accident, and been in possession of the certificate, if it existed, which indeed is said to have been in the possession of his own wife, he set about arranging his affairs. For this purpose he has written a *short narrative of the present situation of my family* (Pur. p. 63.) In this narrative he explicitly sets forth the bastardy. 'It hath pleased God to call all my sons by death *unmarried*, and leaving no children after them, save my eldest son, *who left a girl with child*, whether he designed to marry her, I know not; but the child promises to be a very promising boy,' &c. mentioning his daughters and his estate, he says, 'As I have no son to succeed to, *these daughters has the best natural right*; but thereby *my name and family becomes extinct*, in case it is not otherwise provided by me in my lifetime, we have possessed the same upwards of 200 years.' To remedy this, he has devised 'to entail the whole, or the greater part thereof, upon my nearest heir-at-law, and although *the child above-mentioned labours under a legal inability to inherit me and my estate, yet as that defect may be supplied*, I think that he has the best natural right to stand first in the entail; and the necessary steps to be taken to clothe him with a legal title, I want to be informed anent.'

The information he got does not appear. But before the end of the year he had made an entail, conveying the estate of Busta to Gideon Gifford, '*my eldest son, procreate of the body of John Gifford, my eldest lawful son*,' and conferring a destination in which a very impressive difference is made between this son and the lawful daughters. The estate is made to descend to Gideon, or to each of the daughters, and the heirs-male of the body of each successively. It is his provisions for the adopted grandson stops; for failing these heirs-male he brings in, *not the heirs-female of his body*, as is natural in the case of a son, but the heirs-female of the bodies of *his daughters*, and the heirs-male of their bodies. So that Gideon, with the best right if he was proved to be lawful, is thrown out of the succession sooner than his aunts, whose legitimacy was certain. It is under this entail that the estate has ever since been

has been urged by the defender, that nothing can demonstrate the belief, of old Busta and his wife, in the legitimacy of Gideon, so unanswerably as the plain fact that they recognised him as their grandson. If, it is said, they knew him to be a bastard, and his mother, in asserting marriage, to have been guilty of perjury, shocking their affections, and insulting the memory of their son, is it possible that they could permit her to remain, and the child to be born and brought up in their house, and then settle the family estate upon him, to the exclusion of their daughters, one of whom, married to a Gifford, had at this

31. incompetent, inadmissible, and insufficient to instruct the defender's claim, and moreover, that the claim was disproved by the evidence led on the part of the pursuer.

"It is impossible not to feel the force of this view. Had the grand-parents not contradicted it, it would have been very strong. But looking at their *whole* conduct, it is difficult to comprehend their true feeling *any* how. It is certainly odd that they should disinherit their daughters for a bastard infant. But is it not as odd, that if they did not think him a bastard, they should transact serious business on the footing that he was one, and expressly call him so in solemn deeds? Their two lines of conduct cannot be perfectly reconciled, except on the supposition, which all the facts recommend as the probable solution, that they were perfectly aware of the illegitimacy, but cherished a genuine affection, which strengthened into a second nature for the adopted boy. The sudden loss of their own sons must have made them cling to the hope of any remnant being saved, and this hope was excited by the claim preferred at the moment by Barbara Pitcairn. The child was allowed to be born in the house, and it grew up under their eye. The grandmother recognised in him the features of her son, and the grandfather, at the very moment that he is stating him to be illegitimate, pleases himself by describing him as a promising boy. Is it quite out of nature that, in a remote part of feudal Scotland, in the year 1748, the passion for direct male descent, when united, in a landed family, with such an interest in the undoubted issue of an eldest son, should weaken the aversion to illegitimacy, and lead, especially if one-half the public disbelieved the law, to the preference of such issue over daughters and their children?

"If this solution cannot be received, and, if instead of reconciling both sides of their conduct, all that can be done is to adopt that one which is least incomprehensible, it has then to be observed that, in detecting the real feeling, more weight is due, in the case of parents, to behaviour indicating bastardy, than to that which indicates legitimacy. A parent may have many reasons for representing a natural son as legitimate. There are very few that can induce him to describe a legitimate child as a bastard.

"*Lady Symbister's* conduct, chiefly in relation to the certificate, has been already mentioned. I recur to it again, merely to notice that there is a letter by her to Gideon in 1778, in which she concludes thus:—'I am with esteem, dear sir, your affectionate aunt and humble servt' (Def. 61, D.) She was his aunt in *one sense*; in the same sense in which her father, in the same page in which he describes him as a natural child, calls him 'my grandson.' Whether this was the sense in which she used the word, may be judged of from what is stated by Principal Jack, *one of her ladyship's lawful nephews*. He swears (Pur. 32, E.), 'That though he believes his aunt acknowledged Gideon Gifford as the *adopted heir of the family, she adopted the idea of her mother, and did not acknowledge him as her lawful nephew*.' He adds, 'that she was a lady of such kindness and courtesy, that if she had believed him to be so, she would have acknowledged him in that character with the greatest warmth, *which she did not*' (Pur. 32, D.)

"*The opinion of Gideon*, in favour of the purity of his own birth, would perhaps be of little importance, were it not that his son, the defender, founds strongly on the long period during which he and his predecessors have been allowed to remain in unchallenged possession of the estate, and with a character of legitimacy never disputed. This plea makes it necessary to observe the facts.

"I disregard the drunken rudeness of Dr Gifford, who is said, when intoxicated, to have called Gideon a bastard to his face (Pur. 5, C.; 17, F.; 27, C.; 53, B.), and all such casual impertinencies. But it is impossible to overlook, that though there were always two known and inconsistent opinions about his birth, and that though the quashing of the injurious one by some decisive proceedings, while the evidence was fresh, would have been the natural course with a person confident of his legitimacy, he never attempted to establish his status as heir of line—*he was contented to hold the estate merely under the entail*. He was deseri

and it is farther stated, that the defender is not the nearest lawful heir in No. 161.  
of the deceased Thomas Gifford of Busta; whereas the pursuer truly pos-

Feb. 17, 1837.  
Gifford v.  
Gifford.

, in at least one judicial pleading (Pur. 98), which, as it relates to a bond 000, and he was then thirty-three years old, it is more than probable that nally saw, yet the answers lodged in his own name alone, contain no upon this imputation. Another pleading (Pur. 116), in which the same said, is treated on this point with the same silence. The relevancy of atements to the cause is not apparent, but their being obtruded unne-, would have only been an additional reason, with a lawful son, to check

was it silence alone that has occasioned a doubt of his consciousness. ved his illegitimacy, or statements and proceedings implying it, to form of practical transactions. He got the estate of Busta under the deed, said, took some other subjects which that deed did not carry. These, or, words, the whole succession of Old Busta, came into his possession; and as he has been in the enjoyment of any thing not covered by the deed, nder argues that he must have been possessing under an admission of his e heir. I attach no weight to this negative recognition, especially as the says that it *was supposed* that these subjects fell under the deed, and e this has been found to be an error, the title to them is now under judi- ussion. But whatever doubt there may have been to the direct succes- Old Busta, there is none as to *all the collateral successions*. These were l and disposed of, on at least three occasions; and on every one of them rranged upon the footing that *he was not the heir of parties, in relation he unquestionably held that character, if he was legitimate*. He allow- s to come in before him, on the open, formal, statement, set forth in proceedings, that they were the heirs, and not he. The evidence of this found in the details of the successions to Lady Symbister, to the Weth- d to the Girlsta bonds. The slenderness or utter fruitlessness of any successions is of no consequence. The *character* to him was every

erson may doubt his own legitimacy erroneously, or firmly believing it, oundlessly despair of proving it; or believing that he might prove it, he er the comparative safety of silence to the absolute security of a doubtful and under the operation of either mistake, a cautious or a timid man may o a great deal, rather than incur the expense and anxiety of getting the tled. This shrinking from discussion, and from taking offence therefor, s been mere prudence, and no admission of spuriousness. But it is a answer to the credit which the defender claims on account of his long n, and the general recognition of his title. The inference from these facts strictness, be carried much farther.

pursuer founded strongly on the correspondence which passed between r, and Gideon and his son, from 1808 to 1810, as evincing conscious Gideon, in the fabrication of the certificate. I think this imputation s. There are a few passages which are mysterious, because they cannot explained. But the allusions are all made intelligible enough, by suppos- they referred to Gideon's very natural desire to keep so false and danger- racter as Ollaberry from making charges, which, however groundless, troublesome. The letters, on the whole, are favourable to the predeces- e defender, who, I am confident, could have prevented the solemn decla- he had chosen to bribe its author. Nor do I think, that any force is the charge of accession to the forgery, by the scene described by Mr John (Pur. 42.), who says, that on hearing of the declaration, Gideon sent him larry how he could reconcile it with his letters—that Ollaberry's answer been written at Gideon's instigation, and that when this mes- id, Mrs Gideon Gifford burst into tears, and said they were d that if they had done any wrong, she hoped they would ask

181. asessed that character, and had instructed his claim thereto, and ought to have been served by the jury accordingly. Now, in deciding with regard to such reduction,

1837.

pardon of Almighty God.' (Par. 42, G.) Gideon sending such a message to such a man, is scarcely reconcilable with conscious guilt. The double crime, of causing both the certificate and the letters to be forged, rests on Ollaberry, an undoubted culprit, alone, and is inconsistent even with his declaration, where he states himself to have been induced to write only a single false letter, whereas his answer to the message makes the charge include them all. The exclamation of Mrs Gifford evinces alarm by her at a communication about a matter she was ignorant of, but no admission or consciousness of criminality by her husband, or by any body.

"The long apparent acquiescence by Ollaberry in what his son now describes as the usurpation of status by his adversary, might be as strong a fact for the defender as the silence of Gideon is for the pursuer, if it were possible to make any thing sincere or consistent out of Ollaberry's conduct. But he plainly had a principle or object but extortion; for which he professed and varied according to circumstances, so as to make it absurd to refer his proceedings to any honest conviction either of legitimacy or of bastardy. The only clear truth seems to have been that he and Gideon were *mutually afraid*.

"On the whole, a review of what the immediate connexions of the family actually did, impresses me with the conviction that, in so far as they profess to believe in the marriage, their professions were inconsistent with their conduct; and wherever this repugnance occurs, a court can be at no loss which to prefer.

"In judging of the whole case, we are apt to be misled by the mere antiquity of the events. Their remoteness, though by no means so great as to lie beyond the reach of ordinary evidence, tempts us to overlook its rules, and has a tendency to give a story, in itself simple, an air of mystery, and to substitute a cloud of rumour, fancy, hearsay, and tradition, for original and proved facts. The proper mode of dealing with such a question is to divest it of all this confusing matter and to consider it as an ordinary recent case, depending on the evidence now before us. Depriving it of its antiquity gives, in my opinion, great advantage to the defender, because it excludes that long course of divided reputation, and of unfavourable proceedings which afterwards followed. What would there have been to have maintained an action of declarator of legitimacy of marriage in the year 1750 *on the present evidence*? There had been no previous enunciation, or warranted belief, that such an union was to take place. Concealment was a part of the scheme. After the union was formed, and during the five months it subsisted, this necessity kept down all external indications of what had passed. There was no congratulations by friends, no introductions to new relations, no acknowledgments by society, no open conjugal recognitions by the parties themselves. While matters are in this state, the averred marriage is suddenly dissolved by an accident, which carries off the husband and all the known witnesses of the ceremony. The certificate (assuming its genuineness) alone remains, but uncorroborated by any other writing or by any testimony. If evidence of a marriage cannot be extracted out of these elements, it could still less be extracted out of the events of the subsequent seventy years. Had the union been gone about in the usual way, the calamity which dissolved it would not have extinguished its proof. But the rules, or the application of the rules, of evidence, cannot be altered to suit the convenience of those who, by irregular and concealed proceedings, unfortunately deprive themselves of their protection.

"Certain legal maxims have been referred to, which it is scarcely necessary to notice. Such as that, *in dubio pro statu presumendum*, and that filiation being proved, legitimacy is to be presumed. These principles have no application to a case where the parents never were in possession of the status of married persons during the subsistence of the alleged marriage, and where the *repute of the child* was always very equivocal.

it appears to me there can be no doubt that whatever were the powers and duties of this Court before the statute of 1st and 2d George IV. c. 38, abolishing the court of macers, and authorizing advocations of brieves of service to be discussed before the junior Lord Ordinary, no alteration in regard to these was introduced; the review of the proceedings of juries on brieves of mort-ancestry having in no respect been provided for of new, but left upon the footing on which it formerly stood. In regard to what those powers and duties are, I do not consider it material to advert particularly to the early state of our law as to the falsing of dooms, or prosecution for wilful error of assize. The frequency of iniquitous verdicts on brieves of service had led to the various statutory regulations contained in the acts 1471, c. 47, and 1494, c. 57; but their object was not only the setting aside of iniquitous verdicts, but the punishment of the assizers themselves. It is in explaining the law upon this matter that Lord Stair (III. 5, 43) thus expresses himself:—"It must be an evident and gross error in the positive probation, specially concerning the death of the defunct, and his being once infest; the special relation and degree of blood of the heir, his age, and the extent of the fee, which, though the point of least moment, yet will annul the retour. But if there be a probable cause for the inquest, as by production of writs containing wrong extents, *they will be declared free of wilful error*. The manner of reducing of retours is by a summons of error against the assizers before the King's Council, which is now the Lords of Council and Session." In the next paragraph it is added,—"*Though it be the ordinary way to annul retours by a great inquest, yet the Lords do sometimes sustain reductions thereof as erroneous by witnesses before themselves without a great inquest.*" It is quite clear, therefore, that while Lord Stair is here explaining the older law, he adverts to the practice which had recently been introduced of the Court of Session having come to proceed by reduction before themselves, without any grand inquest, or of course any process for punishing on the ground of wilful error. Though the exercise of such a power of review and reduction may appear at first sight somewhat anomalous, yet the invariable custom of taking down in writing every part of the proceedings, and the whole of the evidence which is laid before the inquest, who in so far act also as judges, renders the duty more conformable to what is exercised by the Court in reviewing the proceedings of all in-

No. 16

Feb. 17, 18

Gifford v.

Gifford.

"Even if this had been a motion, therefore, for a new trial, on the ground that the verdict was contradicted or unsupported by the evidence, I should have felt compelled to grant it. But this is not the principle on which the validity of a verdict of service is to be determined. The law *as it is*, does not trust the decision of such questions of status solely, or even principally, to juries; and where the conclusion come to by them is challenged, it not only gives a review to the Court, but requires the Court to confirm the verdict, only when the judges *are themselves satisfied* that the evidence can warrant no other result. Hence the proof is directed to be taken down in writing, merely in order to enable them to have the means of correcting the jury by their own independent opinion; and the processes, both of trial and of revision, are, in other material respects, conducted on quite different principles from those of an ordinary case. Still there must always be a disposition to respect what any previous tribunal has done, especially what has been done by a jury with facts. But, with all this, I cannot uphold a verdict which, I think, most clearly repugnant to the evidence and to the facts of the case. The effect of additional evidence, if tendered, remains to be

31. ferior judicatories; while it must have been contemplated that many difficult legal  
 1357. points were likely to arise in intricate questions of propinquity. But whatever  
 may have led to it, the fact is undoubted that, since the period referred to by Lord  
 Stair, this Court has discharged the duty of deciding in reductions of services and  
 retours, not only in cases where they have been obtained *ex parte*, or where there  
 have only been contradictors, but also in competitions where the rights of parties  
 have been fully contested. These cases have been judged of and determined some-  
 times only on a review of the same evidence which was before the inquest, at other  
 times after allowing one or both of the parties to adduce additional evidence, and  
 again in other cases by allowing or ordering additional witnesses to be examined at  
 the latest stages of the cause in presence of the Court itself for the furtherance of  
 justice. It may be said that this shows that in this department of the law we are  
 called to exercise unusual functions by, in fact, mixing up judicial acts with what  
 had previously been the peculiar duties of a jury; and all this I admit to be true.  
 But still we must take the state of the law as we find it, and when we keep in  
 view what has been our own practice, as well as that of our predecessors under it,  
 in the various cases which are familiar to all of us, and need not be particularly  
 adverted to, I cannot for one moment listen to the idea that we are now to apply  
 to cases of this description the principles or rules applicable to ordinary jury trials  
 as to civil rights, and which have lately been introduced by statute. It is quite  
 impossible, therefore, seeing that the legislature has in no respect interfered with  
 the review of verdicts in services of heirs that we can resort in this case to the  
 rules as to the applications for new trials or objections to the verdict in ordinary  
 civil cases. And I can by no means assent to the argument, that because in the  
 late special case of *Watson* the House of Lords did think fit to direct issues as to  
 propinquity to be tried by a jury, that decision either did or was intended to  
 alter the law as to our duty in regard to the reduction of services in general. In  
 that case, each party in a competition for the succession of a Mr *Watson* had ob-  
 tained a service *ex parte*, and mutual reductions were brought; and while one of  
 them was sisted, additional proof was allowed by the Lord Ordinary to support  
 the pedigree in the other. That evidence was held sufficient by the First Division,  
 and the reasons of reduction repelled, which would have given the succession to  
 the party supposed to be related to the deceased in the nearest degree. This judg-  
 ment having been appealed, the House of Lords ordered mutual issues as to the  
 alleged propinquities to be tried by jury. In the present case we must steer our  
 course according to the lights of former times, and cannot resort to the new views  
 which have reference to the system of jury trial recently introduced. I consider,  
 therefore, that we must dispose of this case as other similar cases have been dealt  
 with; and that we, as the Lord Ordinary in the first instance had to do, have now  
 to decide, whether the evidence, upon which the verdict serving the defender was  
 returned, was such as to sustain that verdict, or whether the pursuer of this reduc-  
 tion did not adduce evidence which warranted him to be served as the nearest law-  
 ful heir in general of *Thomas Gifford*. A good deal of discussion has taken place  
 as to the party on whom the onus probandi properly lies; but which appears to  
 be of very little importance to the right determination of the case. For unques-  
 tionably in this as in every reduction, the pursuer must necessarily show by suffi-  
 cient evidence that the conclusions of his action are well-founded, and, accordingly,  
 we have now to decide whether the pursuer of this reduction of the service obtain-



defender has established by sufficient evidence that that service was not by the evidence led before the jury, but, on the contrary, that the jury it to have served the pursuer nearest lawful heir of line of the common  
 No. 161.  
 Feb. 18, 1837.  
 Philp v.  
 Pitcairn.

or Judges concurred on this point with the Lord Justice Clerk.

merits of the case, their Lordships delivered their judgments at  
 th, being of opinion, on the whole matter, that the interlocutor  
 rd Ordinary was well-founded.\*

Court accordingly adhered, superseding the question of ex-  
 nses.

THOMAS RANKEN, S.S.C.—G. and W. NAPIER, W.S.—Agents.

WILLIAM PHILP and ELISABETH PHILP, Pursuers.—

No. 162.

*Sol.-Gen. Rutherford—Whigham.*

JOHN PITCAIRN and OTHERS, Defenders.—*Keay—Deas.*

—*Reduction.*—In an action against certain trustees to reduce, inter-  
 veyance of the trust-property in favour of one of the trustees who  
 l it to a third party, a plea, inter alia, was stated in defence, to the  
 the action was barred by the disposition to the third party, which was  
 it under reduction, and that the disponee ought to have been called  
 der; another plea being, that the pursuers were not entitled to reduce  
 called for except to the effect of entering into an accounting with the  
 —Held, after a discussion on these defences, that it was unnecessary  
 o dispose of the first defence in question, and that, in reference to the  
 defenders were not bound to lodge a state of their accounts before  
 ling.

was an action at the instance of certain parties interested in a Feb. 18, 1837.  
 erty, concluding against the trustees for reduction of certain  
 d, inter alia, of a disposition and assignation conveying the prin- 2<sup>d</sup> DIVISION.  
 of the property to the defender Pitcairn, one of their number. Ld. Cockburn.  
 had re-sold the property, against which there were claims to a T.  
 unt, to one Carstairs, who was not called as a defender, nor was  
 o him brought under reduction.

reduction having been satisfied, defences were given in stating  
 less. The sixth plea was, that the action was barred by the sale  
 nition to Carstairs and his infestment thereon, which were not

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Court appeared to concur generally with the views of the Lord Ordinary  
 it, but to be inclined to give greater weight to the documentary evi-  
 —~~defender's~~ illegitimacy than his Lordship had done in his Note.

162. brought under reduction, and, at all events, that the action ought to have been directed against Carstairs as a defender, and not being so, fall to be dismissed. The ninth was, that the pursuers were not to reduce the deeds called for, except to the effect of entering in accounting with the defenders.

A debate having taken place on these defences, and the pursuers having moved that, before condescending, the defenders should be pointed to lodge a state of the accounts referred to in the ninth defence, the Lord Ordinary found it unnecessary *hoc statu* to dispose of the defence, refused *hoc statu* the motion of the pursuers, and appointed condescendence and answers.

The defenders reclaimed, praying the Court to recall the interdict in so far, *inter alia*, as it found it unnecessary *hoc statu* to dispose of the sixth defence, and to sustain that defence, and dismiss the action.

The pursuers also reclaimed, and prayed the Court to repel the defence, and to ordain the defenders to lodge a state of the accounts referred to in the ninth defence.

THE COURT refused both notes.

DAVIDSON and SYME, W.S.—ROB. MACKENZIE, W.S.—Agents.

No. 163.

ROBERT SPEID, Pursuer.—*D. F. Hope—Anderson.*

JAMES SPEID, Defender.—*Sol.-Gen. Rutherford—A. Wood.*

*Entail—Clause*—1. A deed of entail contained procuratory to resign in fee to the heirs of tailzie; “under the conditions, provisions, declarations and reservations following,” viz. a provision excluding heirs-portioners; an injunction on the heirs to bear the family name and arms (which injunction was with a resolute clause applicable to it alone); a prohibition against alter the entail; a declaration that the whole heirs should possess under no title but the entail; and a clause containing prohibitions against effecting sales, or contracting debts, or doing any other deed, civil or criminal, whereby the lands might be evicted; this clause was immediately followed by an irritant clause, declaring if any heir “shall act and do in the contrary of the provision above set forth, he shall do any deed, directly or indirectly, whereby the order of succession specified may be anyways altered, innovated, or changed, then, and in any such cases,” every such act and deed should be null and void: a resolute clause followed, which was directed against “the person so contravening in any particulars above specified.”—Held that, as there was a series of distinct provisions preceding the irritant clause, and as entails ought to be strictly construed, the term “provision,” in the irritant clause, could apply to only one of the preceding provisions, that it was uncertain to which one of them it did apply; that the several prohibitions against sales, and against debts, not being fenced, the entail was ineffectual. 2. Although all the prohibitions were complied with—Decree pronounced, declaring that the heir in possession might sell the lands or borrow on them, or gratuitously alienate them, without thereby incurring any species of liability to the substitute heirs.

IN 1791, Robert Speid of Ardovie, executed an entail of that estate, No. 163 in the form of a bond of tailzie and procuratory of resignation. The lands were to be resigned for new infeftment to himself and the heirs of Speid v. Speid, "but with and under the conditions, provisions, declarations, and reservations following, viz. Providing always and Declaring," that heirs-portioners should be excluded; "As Also, Providing and Declaring, that" the heirs should be bound to bear the name and arms of Speid of Ardovie; and to this injunction there was subjoined a clause, resolving the right of any heir contravening; immediately after which the entail proceeded in these terms:—"As also Providing and Declaring that it shall not be lawful to the said heirs of tailzie or any of them to alter innovate or change the foresaid tailzie or order of succession above specified And Declaring also that the whole heirs of tailzie succeeding to my said lands and estate above mentioned shall be obliged to possess and enjoy the same by virtue of these presents and the infeftments rights and conveyances to follow hereupon and by no other right or title whatever And farther Providing and Declaring that it shall not be lawful to nor in the power of any of the heirs of tailzie above named or of the heirs succeeding to them in virtue of the substitution above specified to sell dispone wadsett impignorate or burden the lands and others above mentioned or any part or portion thereof nor to contract debts thereupon nor grant infeftments of annualrents furth of the same or any other right of security redeemable or irredeemable or do any other deed civil or criminal whereby the said lands and estate and pertinents thereof or any part of the same may be apprised evicted or adjudged in any sort Declaring hereby that if the persons above named or the persons succeeding to them in the said lands and estate in virtue of these presents shall act and do in the contrary of the provision above set furth or shall do any deed directly or indirectly whereby the order of succession above specified may be anyways altered innovated or changed then and in any of the said cases, all and every one of such acts and deeds with all that shall happen to follow or may follow thereon shall ipso facto be void and null and of no force strength or effect in the same manner as if the said acts and deeds had not been acted done or committed And further that the person so contravening in any of the particulars above specified shall for him or herself alone immediately upon the contravention amitt and lose all right and title he or she has or can pretend to the said lands and estate."

A provision and declaration was inserted at a subsequent part of the bond, that if any heir-substitute had contracted debt prior to taking up the entailed estate, such debt should not affect the estate; also a reservation

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\* Lord Corehouse this day took his seat in the Inner-House in the room of  
deceased.

Feb. 21, 183  
Speid v. Speid  
1st Division  
Ld. Corehouse  
R.

163. of power to provide £50 per annum to wives and husbands of heirs, declaring it not to affect the lands, but only the rents; and a provision and declaration prohibiting tacks for longer than nineteen years, or of diminished rentals. There were no irritant or resolute fetters applicable to any of these provisions.

1837.  
Speid.

In 1835, Robert Speid of Ardovie, who had made up titles as a substitute heir under the entail, raised a declarator to have it found that the prohibitions "are not fenced with irritant or resolute clauses, and that the said irritant and resolute clauses, in the said deed of entail, are not directed against selling, disposing, impignoring, or burdening with debt the lands and others above-mentioned, or against contracting debts thereupon, and granting annual rents and other rights of security, redeemable or irredeemable, furth of the same: And that the pursuer therefor has full power to sell, analzie, and dispoone," &c. He concluded for declarator, 1st, That he had full power to sell and onerously dispose the lands, and that the price thereby realized should be his own absolute property, the heirs of entail having no right to control him in the use or application of it; 2d, That he had full power to borrow on the security of the lands, and that he alone had the exclusive use and control of money so borrowed, the heirs of entail having no claim against him or his representatives in respect of the money so borrowed; and, 3d, That he might gratuitously alienate the lands at pleasure, the substitute heirs having no claim or demand of any sort against him or his representatives, in respect of such alienation.

James Speid, younger of Ardovie, the son of the pursuer, and next heir of entail, lodged defences, pleading that the prohibitions were duly fenced with irritant and resolute clauses, so that the entail was effectual against both heirs and creditors; and farther, that as the prohibitions at least were complete, they were effectual inter hæredes to prevent gratuitous alienation, and to render the pursuer accountable to the heirs-substitute for any price he might obtain for an onerous alienation, or for any loan with which he might burden the lands.

Cases were ordered.

*Pleaded by the Pursuer—*

On examining the structure of the entail it would be found that the irritant clause was so expressed that it could not apply to all the three essential prohibitions, respecting sales, debts, and the order of succession; and it was doubtful whether it applied to any one of them. The deed contained, 1st, A distinct provision excluding heirs-portioners; 2d, A distinct provision enjoining all the heirs to bear the family name and arms, which was coupled with a resolute clause; 3d, A distinct provision against altering the order of succession; 4th, A distinct provision, in the shape of a declaration, that the whole heirs should possess the estate by virtue of the entail, and no other title; and, 5th, A clause, containing one provision against sales, another provision against debts, and

provision still, against doing any other deed, civil or criminal, No. 163. by the estate might be evicted. Immediately after this series of provisions followed the irritant clause, declaring that if any heir "shall do in the contrary of the provision above set forth, or shall do so, directly or indirectly, whereby the order of succession above set forth may be anyways altered, innovated, or changed, then, and in the said cases," such acts were declared void. But these words were limited to some one provision only, by the use of the word "provision" in the singular number; and this limitation became more emphatic, as immediately followed by the specification of one individual provision against altering the order of succession, so that the irritant clause was limited to only two of the previous provisions, viz. the single prohibition against altering the succession, and one other of the previous provisions without specifying which. It could not apply, therefore, to both important provisions respecting sales, and respecting debts, and it could not apply to neither, but only to some of the earlier provisions as to the family name and arms, or making up all titles under the &c. It was impossible, therefore, to hold that all the essential provisions were duly fenced; but even if there was only room for one provision and ambiguity, still, in construing an entail, which was always strictissimi juris, it was necessary to interpret every doubt or ambiguity, so as to remove all fetters, and admit freedom; and therefore the Court were bound in this case to find the entail invalid, and decern in terms of the libel.<sup>1</sup>

*ded by the Defender—*

Though entails were rigorously construed, yet they must get fair play, and the effect of receiving a sound and rational interpretation.<sup>2</sup> And there was no set style of any clause, nor any set arrangement of words or clauses, it was enough if the deed contained within its four corners the essential prohibitions, together with resolute and irritant clauses applicable to them. It was admitted that the prohibitions of this entail were complete: and on examining the deed it would appear, that, up to the point where the irritant clause began, there were no previous prohibitions to which it could fairly be applied excepting, 1st, Those against sales and &c. both of which were contained in one clause, commencing with the words "And farther, Providing and Declaring;" which clause immediately preceded the irritant clause; and, 2d, The prohibition against altering the succession, which occurred very shortly before the clause relating to sales and debts. In these circumstances, the irritant clause declaring that if any heir "shall act and do in the contrary of the provision above set forth, or shall do any deed, directly or indirectly,

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<sup>1</sup> Jan. 15, 1799 (15539); Barclay, May 18, 1821 (1 Shaw's Appeal Cases, 141).  
<sup>2</sup> Menzies, Nov. 17, 1807 (F.C. and 2 Dow's Appeal Cases, 141).

168. whereby the order of succession above specified may be anyways altered,  
 1837. &c. such acts shall be void," &c. was directly applicable, 1st, To the whole  
 1844. immediately preceding clause providing as to the prohibition of sales and  
 of debts; and, 2d, To the anterior clause providing as to the prohibition  
 against altering the succession. And if so, all the essential prohibitions  
 were duly fenced. And it became evident that this was the true and  
 necessary import of the clause, on observing what were the other clauses  
 of the deed preceding the irritant. There was, first, the rule of succe-  
 sion established excluding heirs-portioners, which was merely a qualifica-  
 tion of the destination; then an injunction to bear the name and arms, to  
 which an irritant clause was inapplicable, and which had a separate resolu-  
 tive clause immediately attached to it; and next a provision against alter-  
 ing the succession, followed by a declaratory qualification (which last did  
 not form a distinct provision by itself), that the estate was to be possessed  
 under no title but the entail. In these circumstances, the word "provi-  
 sion" in the irritant clause was not only naturally applicable to the clause  
 providing as to prohibitions against sales, and against debts, as being im-  
 mediately precedent to it, but such was the inevitable application of the  
 irritant clause if fairly or soundly construed. But separately, if it was  
 held that "provision" did not especially apply to the provision last above-  
 mentioned, but had a more detached meaning, then it ought to be con-  
 strued as applicable generally to the whole preceding conditions, as  
 forming the "provision," or subject-matter of provision, "above set  
 forth."

The Lord Ordinary reported the cases."

\* "NOTE.—In construing entails, two maxims are usually referred to, unfor-  
 tunately not well defined or very consistent, and according as the one or the other  
 is allowed to prevail, the result is different. One maxim is that entails are stric-  
 tissimi jura, and must receive a rigorous interpretation in favour of liberty, and  
 against restriction, and therefore, that the intention of the entailor to fetter is not  
 to be regarded, unless it be expressed in apt and accurate terms. Under the autho-  
 rity of this maxim, an obvious and undoubted clerical omission, and even an error  
 merely of syntax in the structure of a sentence, has been held sufficient to cut  
 down the deed. The opposite maxim is that entails are entitled, as it is commonly  
 expressed, to fair play: relying on which they have been supported even in the  
 case of a real ambiguity: for example, the colloquial has been preferred to the  
 technical sense of a term; or, of two technical senses, that which is rare and  
 unfrequent to that which is in general use; or a phrase has been limited, or ex-  
 tended, to give effect to apparent intention. The current of our decisions, for the  
 last sixty years, affords instances of both modes of construction too frequent and  
 familiar to require citation here. The consequence has been that, notwithstanding  
 the immense number of cases which have been decided, little, if any, progress has  
 been made in settling the law on this point, and actions like the present are still of  
 daily occurrence.

"It would have saved much time and trouble, and have been of great service  
 to entailed proprietors, and those who contract with them, if the statute 1665,  
 while it left the conditions of entails, that is, the prohibitions and injunctions, to  
 the will of the maker, had prescribed an exact formula for the machinery, that is,  
 for the irritant and resolute clauses, which give the restrictions effect. And it

LORD GILLIES.—I entirely concur in the observations made by the Lord Ordinary in his note, but his Lordship has not stated what was his own opinion of  
 No. 16:  
 Feb. 21, 18  
 Speld v. Sp

is to be regretted, when the evil became apparent, that a rule of that nature had not been introduced either by the legislature or in practice, by which these clauses might have been rendered as fixed and definite as an instrument of sasine, or the execution of a messenger. As it is, entailers, in nowise deterred by the consequences of inaccuracy, and the uncertainty of the law, go on, each following his own style, or the style suggested at the moment, and there is no end of litigation with regard to lands under this tenure.

"In this case there is a striking specimen of one of these blundered deeds. First, There are clauses by which heirs-portioners are excluded, and the name and arms of the family are required to be used. These are followed by a misplaced resolute, but by no irritant clause. But however clumsy and informal the deed may be, so far, perhaps, there is no material defect. Next, there is a prohibition to alter the order of succession, and then an injunction to possess under the tailzie exclusively; and this is followed by a complex clause, prohibiting, 1st, Alienation; 2dly, Contraction of debt; and, 3dly, The doing any other deed, civil or criminal, by which the estate may be evicted or adjudged. After these conditions, an irritant and resolute clause are introduced to enforce them. The resolute clause is very broad, for it extends to the person contravening "in any of the particulars above specified," which may therefore include any one previous condition in the entail, though taken in that sense it is in so far superfluous, since a preceding resolute clause had protected the exclusion of heirs-portioners, and the use of the name and arms.

"The whole question, therefore, turns on the irritant clause in which there is an undoubted ambiguity; for, after the complex clause of prohibition against sale, contraction of debt, and other acts, civil and criminal, by which the estate may be evicted, it is declared, 'that if the persons above named, or the persons succeeding to them in the said lands and estates in virtue of these presents, shall act and do in the contrary of the provision above set forth, or shall do any deed, directly or indirectly, whereby the order of succession above specified may be anyways altered, innovated, or changed, then, and in any of the said cases, all and every one of such acts and deeds, with all that shall happen to follow or may follow thereon, shall ipso facto be void and null.' Here an alteration of the order of succession, prohibited in a clause preceding the complex clause, is well and aptly annulled; but with regard to the prohibitions in the complex clause itself, it is doubtful whether all, or which of the three is contemplated. All of them are in ordinary and proper style, distinct and substantive provisions, and therefore, an irritancy directed against a provision in the singular number, may apply to one only. If, therefore, the maxim of rigorous construction in favour of freedom is adopted, this ambiguity would sustain the pursuer's plea. If, on the contrary, the term 'provision' is to be construed according to what may be fairly assumed to have been the entailor's meaning, it will comprehend all the three prohibitions in the complex clause. In support of the first view, it is farther argued, that in this case all reference to intention is particularly inadmissible, the deed being blundered in every part; for a series of provisions follow the irritant and resolute clause, with no fence or protection whatever. It is plain, therefore, that the person who framed it, was entirely ignorant of what he was about. On the contrary, the defender pleads that the separation of the conditions into distinct clauses, each beginning with the words 'declaring,' or 'providing and declaring,' necessarily implies that each clause, however complex, is to be held but as one declaration, or as one provision.

"The Lord Ordinary has reported the cause, that the Court may determine which of the two maxims ought to prevail in this case, and, if possible, to substitute some more definite and certain rule for the interpretation of



163. the cause, and I have seldom or never found it more difficult to form one, upon grounds satisfactory to myself. There are two principles of construction, very different from each other, which, at various times, have been applied to entails, in a manner which has had a great effect in throwing loose the law of entail. One of these is, that entails are *strictissimi juris*, and must be construed with all rigour; the other is, that they are to be construed so that their provisions shall have fair play. It is certainly difficult to reconcile these principles, and although in the House of Lords it has been held that they are reconcilable, I am not able so to deal with them. Either principle may be adopted which the Court on full consideration may esteem the true principle of construction, provided always that the other principle be rejected; but both together cannot be simultaneously applied to the construction of any given deed, according to any rules which I am capable of understanding. If I am taught by the decisions of this Court and the House of Lords, that entails are *strictissimi juris*, then I cannot construe them so as to give fair play, as it is termed, to the intentions of the entailer, however apparent, if not effectually and aptly expressed: and, although, with some hesitation, owing to the conflict of judgments on this point, I still think that such is the true rule of construction according to the old established law of Scotland respecting entails, and that any precedents of an opposite sort in the decisions of the House of Lords have been of a limited or special nature, at least in so far as not to have the effect of abolishing that rule of construction, and substituting the opposite in its stead. I shall therefore adopt it, in trying the validity of the present entail, and it is decisive of the question. The words of the entail as to this point are very short. The irritant clause declares, that if any heir "shall act and do in the contrary of the provision above set forth, or shall do any deed directly or indirectly, whereby the order of succession above specified may be anyways altered, &c.," all such acts and deeds shall be null and void.

The question, therefore, is as to the true legal effect and import of the word "provision." Does it include, and necessarily include, more than one of the previous conditions of the entail? Does it include each and all of the previous prohibitions, at least all of those which are directed against selling the estate, and against burdening it, and against doing any other deed whereby the estate might be evicted? That it was the intention of the entailer so to apply the irritancy I have no doubt, and, if fair play was to be allowed to an entail, to the effect of construing it according to the intention of the entailer, then perhaps the term "provision," in the irritant clause, might be taken in a collective sense. That would be a liberal and enlarged interpretation of it, according to what was intended by the entailer. But upon the sound principle, that entails are *strictissimi juris*, I cannot so construe it. I must hold the word "provision" to be limited to some one of the previous prohibitions exclusively, but which of them I cannot tell. In the defender's case, I see he quotes various decisions in which the House of Lords gave a liberal construction to entails, by way of giving them fair play; but in one of the most recent cases, that of Hoddam, that House recurred to the principle of strict and rigorous construction. I hold it to be the true doctrine of the law of Scotland, and that there are numerous decisions of our Courts, and of the House of Lords also, in which that principle of construction has been recognised, to the effect of defeating the plainest intentions of the entailer, wherever the fettering clauses were not aptly expressed and applied. That then is the principle of construction which I conceive ought to be applied to this deed, because, al

not unsettled by some of the decisions of the House of Lords, it has never returned, and that house has lately recurred to it. And, applying it to all, I am of opinion, on the whole, that it is invalid.

No. 16  
Feb. 21, 18  
Spald v. Sp

**PRESIDENT.**—I feel that this is a case of much difficulty, and that I am unable to form an opinion respecting it, in such a manner as to be satisfactory to myself. But I am not prepared to hold that the awkward structure of this such as to render it ineffectual. I perceive that, in the resolute clause, as are, “that the person so contravening in any of the particulars above” shall lose all right to the estate. These words appear to be broad in themselves to render the resolute clause applicable to each and all of the prohibitions. But I think that as these words, “so contravening,” refer to the contraventions specified in the irritant clause, and can refer to else, the effect of the words “so contravening in any of the particulars specified” is nearly tantamount to a declaration of the sense in which the provision” is used in the irritant clause which immediately precedes. And to be extremely difficult to read that word “provision” excepting in that sense, which seems to be unequivocally affixed to it by the relative words “contravening,” &c. in the resolute clause. If the word “provision” be so the entail is good, and I am of opinion that it is so; but I am far from saying that my opinion is a decided one.

**MACKENZIE.**—I think the question turns on the terms of the irritant alone; and, although I have found some difficulty in making up my opinion, I consider that the irritant clause is defective, and the entail therefore invalid. The irritant clause declares the nullity of the deeds of any person “who shall do in the contrary of the provision above set forth, or shall do any directly or indirectly, whereby the order of succession may be altered,” &c. of these two cases, viz. the contravention of “the provision above set forth” and the prohibition against altering the succession, the irritancy is to strike. The question is, to what extent is the irritancy thereby applied? The defender contends, 1st, that the word “provision” is to be taken abstractly, as tantamount to “matter of provision,” which is generally above set forth. But I can regard that interpretation as consistent with strict construction, or with a liberal construction whatever. I think it cannot be the true meaning of the entail. Had it been so, he would not have followed it up by a specific irritancy, but by the prohibition against altering the succession; for, that prohibition was the general matter of provision in the preceding part of the deed, and if the member of the irritant clause had fenced the whole matter of provision, including the prohibition against altering the succession, the entailer would have specially fenced that prohibition in the very next line of the deed. Besides, I do not regard it as consistent with the technical language of our law to interpret the word “provision” in this extensive sense. But the defender contends, 2dly, that without extending the word “provision” back through all the conditions, it must be specially applicable to the whole clause which immediately precedes the irritant clause. That preceding clause contains a prohibition against selling the lands; against burdening them with debt; and against doing any other deed, civil or criminal, whereby the lands might be aliened. And the defender maintains that all this is duly fenced, because the irritant clause, “the provision above set forth,” must apply to that which is last above set forth, and moreover apply to all the

63. members of it. I can assent to neither the one nor the other of these propositions. 1837. The immediately preceding clause contains several distinct provisions, especially those two, respecting sales, and respecting debts, which are of vital importance. *Spald.* In the irritant clause, therefore, I cannot read "contrary to the provision above set forth," as extending to these several important provisions. Even if the word had been "contrary to the provision last above set forth," I could not have done so, but must have held it to be restricted to the last only of the prohibitions in the preceding clause; and the word "last" is one which is not in the deed, and which I have no right to insert in it. As the irritant clause stands, I can only read the first member of it as importing that it strikes at some one or other of the provisions above set forth, but which of them I cannot tell. I consider this to be the necessary result of adopting a strict construction of this entail in place of a liberal one. For I concur with Lord Gillies that the great question lies there. I adopt the strict construction, and I reject the liberal one. That is the old doctrine of the law of Scotland, as laid down by all our lawyers. And although there are some decisions of this Court and of the House of Lords which are at variance with it, these have not had the effect of abrogating our old law; they merely constitute exceptions to the general rule, and do not go the length of reversing that rule altogether. In regard to what is termed a liberal interpretation, or what is called giving fair play to the deed, or whatever other more palatable name may be given to the rule of construction which is opposed to strictness, I cannot adopt it in administering the law of entail. And, adopting the rule of strict construction, I consider that this entail is not good.

**LORD COREHOUSE.**—There are two modes of interpretation, between which it is necessary to choose, in construing entails. According to the first, entails are *strictissimi juris*, and are rigorously construed; according to the second they are to receive fair play, which, though a colloquial expression, is a very significant one, and is not of novel introduction into our Courts, as it was used nearly a century ago by my Lord Monboddo. If the first rule be adopted, its principle operates in this way, that if a term or phrase be found in an entail, which term or phrase has two meanings, the Court must select that meaning which is in favour of the liberty, and against fetters. There are many cases in entail law which afford striking illustrations of the application of this rule, especially the well-known case of *Dunbreath*. The term "heir" has two significations; it includes a party who takes up an estate by succession, and by service, for instance; and it may also include both in technical and colloquial language, a party who takes an estate as institute. There are various authorities to that effect. Balfour says, if a procuratory of resignation be granted for the purpose of infesting an apparent heir, in the fee of the lands contained in the procuratory, that person, so taking the estate, may, after the grantor's death, be called "as heir," in the actions referred to in that part of Balfour.<sup>1</sup> So that the term "heir" is expressly used there as applicable to a party who was the institute. Another illustration occurs in the case of *Gordon of Carlton*, reported by Lord Kilkerran, where the entailer disposed his estate not to himself, but to the heirs-male of his body; whom failing, to John Gordon, and his heirs-male; whom failing, to Nathaniel Gordon. The succession opened to this last party as the conditional institute, and he made up his title by service as heir of provision

<sup>1</sup> Balf. Pract. ancient Warrandice, c. 27 (p. 225, ed. 1754).

to the entail. This was held good ; and whether it was viewed as a declaratory or a transmissory service, it equally showed how far the law of Scotland went in considering an institute in some instances entitled to be technically characterised as an heir. No. 163  
Feb. 21, 18  
Speld v. Sp

Now, in regard to the species facti of the Duntreath case, although the maker of that deed of entail had undoubtedly regarded his eldest son, the institute, as one among the heirs of entail ; although the entailor's intention was clear and indisputable ; and although the term " heir " had in law a double signification, and, according to one signification, might even technically apply to the eldest son, who was the institute, still, on the principle of strict construction, as the fetters were only laid upon the heirs of entail, and as the word " heir " possessed a distinct and substantive meaning of a more limited sort, the House of Lords held that the fetters were not laid on the institute, the eldest son of the entailor. And the same rule had been applied in the previous case of Erskine.

If that principle of construction is to be applied to the entail of Ardovie now before the Court, I concur with Lords Gillies and Mackenzie, and think the entail is not good. And I could have had no hesitation in applying that principle of construction, but for cases subsequent to that of Duntreath, in which the opposite rule was allowed to govern. Thus, for example, although the term " dispositive " is one, having a definite technical meaning, implying a unilateral deed of alienation ; and although it is essentially different from letting in " lease," which is a personal contract, and out of which contract rights arise of a totally different character from those which arise under a disposition ; yet the House of Lords, in construing the import of a prohibition against dispositions of the entailed estate, have held it to strike at leases, where these leases are of a certain unusual duration. That was held, reversing a judgment of the Court of Session, and it was so held, only in consequence of a departure from the rule of strict construction, and the adoption of an opposite rule. But although this has occasioned some uncertainty as to the true principle of construction to be adopted in regard to entails, I am satisfied that a strict construction is the proper one according to the old and established law of Scotland. And there are some recent cases, such as that of Foddam, in which the House of Lords have adopted that construction. I hold it to be still the rule of our law. And on that account I concur with Lords Gillies and Mackenzie in holding this entail of Ardovie to be defective. Had the words in the irritant clause been " the provision last above-mentioned," there would have been a material difference thereby produced on the import of the irritant clause. But as the words now stand, the term " provision " may apply indifferently to any one of all the provisions above set forth in the entail ; as, for instance, the act of making up titles, not under the entail ; a provision to which irritancy applies, unless it be applied by this very term " provision " in the irritant clause. Then, in regard to the clause immediately preceding the irritant clause, it contains three distinct provisions, two of which are most material, prohibiting respectively sales, and debts. The term " provision " might apply perhaps to either, but certainly not to both of them. The word is evidently ambiguous in its application ; and as that principle of construction must be adopted which is against fetters and in favour of freedom, I am of opinion that this is not a good

pronounced this interlocutor :—" Find that the words of the

163. irritant clause of the deed of entail executed by Robert Speid, Esq. on the 10th October, 1791, can neither be extended to comprehend the three prohibitions against sale, the contraction of debt, and the alienation of the succession; nor applied to any one of these prohibitions in particular: Find, that the prohibitions are not therefore guarded in by the statute 1685, c. 22, so as to constitute a valid and effectual prohibition. Therefore repel the defences, and find, decern, and declare in terms of the conclusions of the libel; but find no expenses due to the pursuer."

W. GIBSON, W.S.—FOTHERINGHAM and LINDSAY, S.S.C.—Agents.

164. REV. JOHN FORBES and OTHERS (Kirk-Session of Outer High Church Parish of Glasgow), Pursuers.—*D. F. Hope—Moncreiff.*  
LORD PROVOST, MAGISTRATES, and COUNCIL OF GLASGOW, Defenders.—*Sol.-Gen. Rutherford—Ivory.*

*Trust—Burgh—Church—School—Title to Pursue—Contract.*—1. A donation was vested in the corporation of the town-council of a royal burgh on condition that they were to apply the annual dividends "in the support and maintenance, from time to time, of schools" in the burgh, taught on the kirk-session system; the council made an agreement with the several kirk-sessions of the burgh, binding themselves and their successors to pay over the dividends, among the kirk-sessions, each of whom, on the other hand, became bound to lodge with the council a written vidimus, "showing definitely that the donation was to be strictly applied in the promotion of the system of education proposed by the donor, and accompanied by an obligation binding the kirk-session to the same accordingly;" it was declared that, so long as each kirk-session was "and satisfied the town-council" that the obligation was carried into practical execution, it should have right to its share of the dividend, but should forfeit the right, on failure to fulfil these conditions; provision was made for admitting members of the town-council to the annual examination of the schools, "to themselves of the bona fide and legitimate application of the dividend," and this was done "strictly in terms of the deed of donation;" the town-council in the succeeding year refused to sanction this agreement.—Held that the agreement was not ultra vires of the preceding town-council; that it was no devolution trust, but a judicious mode of carrying it into practical execution; and that it was a valid contract, binding on the town-council, so long as duly implemented by the kirk-sessions. 2. An action was raised by one contracting party to enforce the agreement of a contract against the other; the defenders alleged that the parties were a kirk-session only quoad sacra, and had no title to pursue;—O'Connell repelled.

- Feb. 21, 1837. In 1831, the late Rev. Dr Andrew Bell of Egmore, Prebendary of the Collegiate Church of St Peter, Westminster, by a deed of entail executed between him on the one part, and the Provost of St Andrew and others, on the other part, transferred to them, as trustees, two one of £60,000, three per cent consol. bank annuities, and one of £10,000 three per cent, reduced bank annuities. The deed recited Dr Bell's intention to "take measures for the more effectual diffusion of the Madras system of education" within Scotland. He directed his trustees, after de-

ST DIVISION.  
J. Fullerton.  
S.

tain sums for expenses, “to divide the said stocks into twelve equal parts, and to transfer one such twelfth part unto the Provost, Magistrates, and Town-Council of Edinburgh; one other such twelfth part unto the Provost, Magistrates, and Town-Council of Glasgow,” &c. The deed contained this clause: ‘Provided always, and it is hereby expressly declared, at the respective transfers hereinbefore directed to be made, unto the respective corporations of the Provost, Magistrates, and Town Council of Edinburgh, Glasgow, Aberdeen, Inverness, and Leith, are, respectively, upon this indisputable condition, that the stock to be respectively transferred to the said corporations, be by them, and their respective successors, employed for the founding or maintenance of a school or schools in each of the last mentioned towns, for the instruction of children, whether male or female, or both, in the ordinary branches of education, but so that the tuition at every one of the said schools be upon the system of mutual instruction and moral discipline exemplified in the Madras school, and that every one of the said corporations shall stand possessed of the stock to be transferred to it as aforesaid, upon trust for ever, to apply the dividends, and interest thereof, in the support and maintenance, from time to time, of schools already founded, or hereafter to be founded, on the principles of the foresaid Madras system.’”

It was farther provided, that, on the transfer of the stock to each corporation respectively, “every corporation shall, before any appropriation or application of any part of the foresaid stock, make and execute a declaration and acknowledgment of the acceptance, by such corporation or body, of the several trusts herein declared.” The twelfth share appropriated to the Magistrates and Council of Glasgow was paid to them in the same year, and on receiving it they subscribed a deed of acknowledgment containing this clause: “We do, by these presents, admit, confess, and declare, that the sums which have been transferred for our behoof, as aforesaid, and the proceeds thereof, shall be held and applied by us, and our successors in office, in all time to come, upon or for the trust following, viz. That we, and our successors in office, shall for ever apply the dividends and interest on the aforesaid sums, or of the proceeds thereof, in the support and maintenance, from time to time, of a school or schools, already founded or to be founded, in the city of Glasgow, on the principle of the system of mutual instruction and moral discipline as exemplified in the Madras school, or what is known by the name of the Madras system.” At the same time the Town Council made a “remit to the Magistrates to have an early conference with the Ministers of the ten parishes of Glasgow, with a view to ascertain whether, and how far, Dr Bell’s plan of instruction and discipline, can with propriety be adopted in the parochial schools of this city already erected, or which may be erected.”

After several communications with the Ministers, the Magistrates and ~~the~~ entered into an agreement with each of the ten Kirk-sessions, following agreement with the Kirk-session of the Outer

No. 164  
Feb. 21, 183  
Forbes v.  
Town-Coun  
of Glasgow.

34. High Church parish; the direct parties to each agreement being the Lord Provost and a committee of the Council on the one hand, and the Minister and a committee of the kirk-session on the other. "Whereas it has been agreed between the said first party and the several kirk-sessions at Glasgow, that, in order more extensively and effectually to promote the system of education contemplated and prescribed by the Rev. Dr Bell the annual interest and proceeds of the said two sums, now vested in government securities, should be equally divided among, and paid over half-yearly, to the different kirk-sessions. Therefore the said second party as representing the foresaid Outer High Kirk-session, and as taking on them burden as aforesaid, do hereby bind and oblige themselves, and their successors in office, to lodge in writing, with the secretary of the said first party, a distinct vidimus or statement of the proposed application of the proportion of the proceeds, or annual interest, of the said two sums, falling to be paid to the said second party, showing definitely that the same is to be strictly applied in the promotion of the system of education proposed by the donor, the Rev. Dr Bell, and accompanied by an obligation, binding the Kirk-session to apply the same accordingly, declaring, as it is hereby provided and declared, that so long as the said second party shall continue to furnish an annual state or vidimus and obligation before mentioned, and shall, from year to year, satisfy the said first party, that the same have been followed out and carried into practical execution, the said second party, and their successors in office, shall be entitled to draw the proportion before-mentioned of the foresaid annual interest, or proceeds, from the said first party; but in the event of the said second party failing to lodge the said annual vidimus and obligation, or failing to satisfy the said first party of the same having been carried into effect, they shall forfeit their right to their proportion of the said interest and annual proceeds falling to be paid to the said Kirk-session, and the said first party shall be entitled to apply the same as fully and freely as if these presents had never been executed. Farther, the said second party bind and oblige themselves, and their successors in office, to hold annual examinations of the schools to be established and maintained, either partially or totally, by the proportion of the interest or annual proceeds payable to them as before-mentioned, and to give to the secretary of the said first party, at least six days previous notice of the time fixed for that purpose, so that the said first party, one or more of them, may have an opportunity of attending said examinations, and becoming satisfied of the bona fide and legitimate application of the foresaid annual interest or proceeds, and particularly that the same are applied agreeably to these presents, and strictly in terms of the deed of donation executed in favour of the said first party, by the said Rev. Dr Bell."

These agreements were dated on 16th and 28th Oct. 1833, being the period which intervened between Michaelmas of that year, which was the date when the ordinary annual election of Magistrates and Council



the old system would have taken place, and the date of completing a new election in November following, under the Burgh Reform Act, 3 and 4 Wil. IV. c. 76. During this intermediate space, the powers of the Magistrates and Council were prolonged by § 18 of that act. In a few days after signing the agreement, a vidimus, in the same terms as the following, was lodged by each of the ten Kirk-sessions with the Magistrates and Council. “ In terms of the contract entered into between the Lord Provost, Magistrates, and Council of Glasgow, on the one hand, and the Session of

No. 1  
Feb. 21,  
Forbes v.  
Town-Council  
of Glasgow

on the other, of date the

1833.

“ The said Session hereby undertake, that there shall be conducted, under their inspection, a school or schools for teaching English Reading, Grammar, and Religious Knowledge, with such other branches of education as may be required ; said school or schools to be divided into classes, over each of which a monitor shall preside, and under the charge of a master or masters appointed by the said Session, and for whom they shall be responsible ; and that the sum of, at least, £50 shall be expended in instituting and carrying on said school or schools, during the period of twelve months from this date.”

The whole income of the donation was then £293, 14s. 11d., affording £29, 7s. 5d. to each of the ten Sessions, and this sum was immediately paid to each of them. Two of the ten parishes, the Outer High Church parish, and the College Church parish, did not introduce into their respective parish schools the Madras system of education, but they formed a common school which was not situated within either parish, but in the parish of St David's, at which education was conducted in terms of the vidimus above quoted. The Magistrates and Council, who were elected in Nov. 1833, under the new system, declined to continue to make annual payment of the dividends to the Sessions, alleging that the ten agreements amounted to a devolution of the trust. The terms of the arrangement were then explained, on the part of the Kirk-sessions, to the Provost of St Andrews and others, Dr Bell's general trustees, who, in March 1835, passed a unanimous resolution that the contract “ was in perfect accordance with the spirit and letter of the said deed of indenture, and of the deed of declaration of trust, executed by the Magistrates and Council of Glasgow, in reference to it, and the meeting have no hesitation in giving it as their opinion, that the arrangement entered into betwixt the said parties provides for and secures a most judicious application of the money.” In June, 1835, the Minister and Kirk-session of the Outer High Church parish in Glasgow raised an action against the Magistrates and Council, alleging that they (pursuers) and the other Kirk-sessions had made considerable expenditure, and had also made a great change in the system of teaching in the parochial schools, on the faith of the contract of 1833, and concluding to have the defenders implement it by paying to them their tenth share of the which had accrued, or should thereafter accrue on the

14. fund "in all time coming, so long as the pursuers should fulfil and observe their part of the said contract."

237. No vidimus had been lodged subsequently to 1833; but during the dependence of this action, a vidimus for each succeeding year, in similar terms to the first, was put into process.

Defences were lodged which stated, inter alia, that the whole of Glasgow was truly one parish quoad civilia, though subdivided into ten segments or sub-parishes quoad sacra. On this ground they objected to the title to pursue for implement of such a civil contract as that founded on; besides defending on the merits. A record was made up, and Cases were ordered.

*Pleaded by the Pursuers—*

1. The pursuers were the parties with whom the contract had been entered into, which was now the ground of action. They were therefore entitled to compel implement of that contract, against the other contracting party. And independently of this, their title to pursue could be shown, if necessary, to be as good as that of the Kirk-session of any parish whatever.

2. There was no delegation of the trust, but merely a judicious mode of executing it, exemplified in the contract founded on. The obligation undertaken by the Town Council, on receiving the trust-fund, was to apply the dividends in the support and maintenance of schools in Glasgow on the Madras system. Ample discretionary powers as to the details of executing this trust were conferred on the trustees. And it was consistent with a fair and judicious exercise of these powers, to contract with the ministers of the ten parishes to pay over the dividends annually to them, to be applied, under their more immediate superintendence, in maintaining schools taught on this system. The Kirk-sessions had bound themselves that the schools should be so taught, and that the Magistrates and Council should have the fullest satisfaction on this head, by being present at the annual examinations of the schools and otherwise; and so soon as this condition was not fulfilled by any of the Kirk-sessions, its right to a share of the fund was forfeited, and the dividend thenceforward remained in the hands of the Town Council. All this was consistent with the power and duty of the trustees, and the arrangement had been expressly approved of by those parties with whom Dr Bell had entered into the deed of indenture, and who were well qualified to judge of his true intentions.

3. The terms of the vidimus, and relative obligation, sufficiently satisfied the requirements of the trust.

4. The contract was valid, although any of the Kirk-sessions might withdraw at pleasure, because they could only do so, on forfeiting all right and interest in the dividends. And in the mean time the pursuers had made considerable expenditure, and had instituted a school on the faith of the contract.

5. Although the pursuers were bound "to satisfy" the de

ey applied the funds in terms of the deed of donation, this was done by No. 164.  
 dging the vidimus, and giving notice of the school examinations, and Feb. 21, 183  
 enerally implementing the contract; all which had been done. And Forbes v.  
 ter the expense to which the pursuers had been put, and the arrange- Town-Counc  
 of Glasgow.  
 ents they had made, the defenders were bound to condescend upon some  
 sative and relevant ground of dissatisfaction before they could withhold  
 yment.

6. There were no specialties in the case which could affect the deci-  
 on of it. Though the agreement was concluded so recently before the  
 ntroduction of the new system of burgh election, it had been in progress  
 ng before; and the powers of the Town-Council were as great in  
 very respect at that date, as at any former period. The circumstance  
 f two parishes having but one school, was not of any moment, as it was  
 o essential condition of the agreement with the Town-Council that  
 here should be a separate school in each parish. There was no im-  
 roper failure to lodge a vidimus. It was only delayed in consequence  
 f the Town-Council refusing to pay the annual dividend. It had now  
 een lodged in this process, and would in future continue to be so. And  
 he system of education, conducted in terms of that vidimus, was that re-  
 quired by Dr Bell's trust.

*Pleaded by the Defenders—*

1. There was no parish of the Outer High Church, in Glasgow, pos-  
 essing a civil status or persona standi. It existed quoad sacra only.  
 uch a body could not validly enter into the contract founded on: and it  
 ad no title to pursue for implement of it.

2. The stock was vested in the defenders as a corporation, "upon  
 rust, for ever, to apply the dividends and interest thereof, in the sup-  
 ort and maintenance, from time to time, of schools" on the Madras  
 ystem. They alone were confided in by the truster Dr Bell to support  
 and maintain the schools with the funds committed to their charge.  
 Under this trust they possessed the absolute right of patronage in  
 electing such teachers as they preferred; the absolute control in deter-  
 mining what should be the teacher's salary; what should be the amount  
 of fees exigible in different branches of knowledge; what ordinary  
 branches should be taught: and how far it might be prudent to give  
 gratis education to the poorer classes. All these and other similar  
 powers of control were essential to secure the efficiency of the schools,  
 and were inherent in the trust, as conferred on the corporation by the  
 truster; but none of them remained to the corporation under the con-  
 tract in question. It therefore amounted to a delegation of the trust,  
 which was ultra vires and invalid.

3. The specification in the vidimus being merely of "English Read-  
 ing, Grammar, and Religious Knowledge, with such other branches as  
 are required," was too indefinite, as the deed of indenture required  
 to embrace generally "the ordinary branches of educa-

1837. 64. tion : " and the defenders had no power of adding any of the other ordinary branches to those above specified, if the contract was sustained. And farther, the vidimus merely provided that a monitor should preside over each class ; which was neither in terms, nor in substance, providing, as required by the deed of indenture for " the Madras system " of education.

4. There was no binding contract. Any of the Kirk-sessions might withdraw at pleasure, on merely forfeiting its share of the dividend. It ought to be equally in the power of the defenders to withdraw at pleasure, on merely liberating the Kirk-sessions from all obligation to lodge a vidimus, or apply the dividend in terms of the contract.

5. The pursuers were expressly bound " to satisfy " the defenders that the dividends were applied " strictly in terms of the deed of donation," and as the defenders were not satisfied of this, but convinced of the contrary, that alone was enough to entitle them to withhold all farther payment of dividends.

6. As the contract had been completed on the very eve of the expiry of the powers of the Town Council, chosen under the old system, there was no hardship in setting it aside as ultra vires, provided there were good grounds in law for holding it to be so. The fact of there being but one school between the Outer High Church and the College Church parishes, in place of a school in each parish, was contrary to the understanding upon which the contract had been made, especially as that school was not situated within either of these two parishes. And no vidimus had been lodged after 1833, until after the present action was raised. The contract, therefore, had not been duly implemented by the pursuers, and they had forfeited their right and interest in it.

The Lord Ordinary " repelled the objection to the title of the pursuers ; and, on the merits, found that the agreement libelled between the Magistrates and Town Council of Glasgow on the one hand, and the pursuers on the other, cannot be held as a valid execution of the trust created in them by the deed of the late Dr Bell, but truly imports a devolution of that trust on the pursuers, for such time as the pursuers choose to undertake it ; that such agreement on the part of the Magistrates and Town Council for the time was ultra vires, and cannot bind their successors in office : Therefore assoilzied the defenders from the general conclusion, that, in all time coming, the part or share of the annual interest or dividend libelled shall be paid over to the pursuers ; but appointed the case to be enrolled, that parties may be farther heard on the pursuer's claims for reimbursement, out of the annual interest or dividends falling due since the date of the agreement, of any expense that may have been incurred by them in the maintenance or establishment of a school or schools conducted in terms of that agreement, and decerned." \*

\* " NOTE.—Whatever may be the peculiarity of the constitution of

pursuers reclaimed.

No. 164.

GILLIES.—I entertain very great doubt as to this interlocutor. On looking at the terms on which this fund was vested in the town-council, it is stated in

Feb. 21, 1837.  
Forbes v.  
Town-Council  
of Glasgow.

of the Outer High Church of Glasgow, and of the other Kirk-sessions of the city, the Lord Ordinary has no doubt that the members of that Kirk-session, the parties with whom the alleged contract was entered into, have a title to the present action, seeking to enforce it. But, upon the merits, the Lord Ordinary thinks the action cannot be sustained.

The deed of indenture entered into between the late Dr Bell, and the persons who may be called his general trustees, the Magistrates and Town Council appointed trustees for the special purpose of establishing or maintaining the Madras system in the city of Glasgow. The words of the trust are general; and the Lord Ordinary thinks that these trustees had full power to bind themselves and their successors in office, in all contracts entered into in pursuance or furtherance of the objects of the trust. Accordingly, it rather seems to him, that a contract, binding themselves to pay annually, the whole, or a portion of the dividends, or interest, under their management, to the pursuers, or to any public body or individual having the power to undertake, and absolutely binding, for the permanent establishment or maintenance of a school, taught on the Madras system, would have been a valid exercise of their power as trustees. If, by a transaction with parties invested with the management of an existing school, they could, at a comparatively small annual expense, have permanently secured the conducting of that school on the Madras system, such transaction would have evidently been a fair and most advantageous act of administration. The agreement libelled is one of a very different kind. The Kirk-session of the Outer High Church, and the other Kirk-sessions, have no powers to undertake any obligation, nor do they profess to undertake it by the alleged contract on the ground of the present action. While, on the one hand, the Magistrates and Town Council irrevocably bind themselves to make over, in all time coming, the whole dividends and interests, in certain proportions, to the Kirk-session of the city of Glasgow, the pursuers, and those other Kirk-sessions, only bound to furnish annually a 'vidimus,' showing that those shares of the dividends and interests are to be applied in the promotion of the system of education proposed by the donor, Dr Bell, which vidimus shall contain an obligation binding on them to apply such annual payments accordingly. And the only consequence of failure to furnish that 'vidimus,' and to satisfy the other party of the same, has been carried into effect, is, that the Kirk-sessions, or Kirk-session that fails, forfeit their right under the contract, and that the Magistrates and Council are entitled to apply the funds so forfeited as if the said contract never had been entered into.

The Lord Ordinary cannot hold this to be a contract. The only obligation on the pursuers, and the other Kirk-sessions, is to apply funds, to be annually placed in their hands, 'in the promotion of the system of education proposed by the donor,' being just the general obligation imposed by the trust; and, in this view, the pursuers do not disguise that they claim a very considerable latitude. They fairly state, in their condescendence, that it is neither required in the contract or the vidimus, that a school or schools should be established in each parish. In short, they assert, under the transaction, a permanent right to a certain portion of the trust revenue, under the single obligation of applying it to the objects of the trust, and that only so long as they choose to undertake the duty. It seems to the Lord Ordinary that this is not a contract, in the proper sense of the word, but truly a delegation of the powers of the corporation, a substitution of the fund, to be vested in the ten Kirk-sessions of the city of Glasgow, for that established by Dr Bell. Whether or not the attempted transaction is a more beneficial employment of the fund is a different question,

184. the deed of conveyance in their favour to be, that they may employ it for founding or maintaining a school or schools in Glasgow, where the ordinary branches of education are to be taught, but so that the tuition shall be on the Madras system. On receiving that sum the town-council signed an acknowledgment, and bound themselves, and their successors in office, to apply the dividends "in the support and maintenance, from time to time, of a school or schools already founded or to be founded in the city of Glasgow," on the Madras system. This had in view the endowment of schools already founded, just as much as those which might afterwards be founded, provided that the tuition was according to the Madras system. The parochial system of education in Scotland is one of our institutions which has been universally approved and admired. And it would appear that the Town Council of Glasgow in 1831, as soon as they received this money, made a resolution to the magistrates to ascertain "how far Dr Bell's plan of instruction and discipline, can with propriety be adopted in the parochial schools of Glasgow already erected or which may be erected." I approve entirely of that resolution of the Town Council; and I think if they had thought fit to rely exclusively on their own opinion in regard to this matter, without taking such a step as this, they would have made a great omission. Then the various Kirk-sessions and the magistrates are of opinion that the application of Dr Bell's donation may be made available to the existing parochial schools, consistently with the conditions of Dr Bell's trust. And they enter into a contract for carrying the trust into execution in that manner. In doing so, I think there was no devolution of the trust, no transference to a third party, of the requisite control over the application of the trust fund. The Kirk-session became bound to lodge with the trustees a written vidimus stating the proposed application of the dividend, "showing definitely that the same is to be strictly applied in the promotion of the system of education proposed by the donor Dr Bell, and accompanied by an obligation binding the Kirk-session to apply the same accordingly." This is to be annually done, and so long as the Kirk-session do this, and satisfy the trustees that this obligation is duly carried into practical execution, they are to be entitled to the payment of these dividends. It is said there is no sufficient contract, as the Kirk-sessions may cease to implement the part when they please. I can scarcely suppose it to be meant that any penalty in case of such failure should have entered into this contract; but a very sufficient provision is made on the subject, for, so soon as such failure shall occur, it is to infer the forfeiture of all right to any future share of the dividend, which will thereon be in the hands of the Town Council. I am at a loss to know what other or better stipulation could have been made than this. I hold it an effectual con-

but that question has been determined by the truster himself, whose will must, in this particular, be the law.

"Holding this opinion, the Lord Ordinary thinks the general conclusion of the action, that a particular proportion of the annual dividends shall be paid to the pursuers in all time coming, cannot be sustained. But there may be a question, whether the pursuers, if they have maintained a school on the Madras system since the agreement was entered into, may not be entitled to some reimbursement for any expense thence incurred, out of the annual interests or dividends fallen due since the date of the agreement, and now in the hands of the defenders; and as this question has been hitherto little, if at all, touched upon by the parties, the Lord Ordinary has directed the case to be enrolled for further argument on this subject before finally disposing of the cause."

as long as it is fulfilled, the true objects of the trust will be attained No. 164  
 by the instrumentality of the Kirk-sessions; but, so soon as any of them  
 fail, the dividend of that Kirk-session will remain forfeited, and in the Feb. 21, 18  
 the Town Council to be by them applied in furtherance of the trust. I Strachan v.  
 that such a contract is a devolution of the trust, or in violation of the Edinburgh  
 think it is a judicious mode of executing the trust. And it is satisfactory Improvement  
 that it was so viewed by the general trustees of Dr Bell, who approved Commission  
 the management, when its details were communicated to them. I concur in the  
 which they expressed. And I may notice, that, at the date when the Magis-  
 Council of Glasgow entered into this contract, they held their office by  
 legal tenure, and with all the powers of any Town Council of Glasgow;  
 indeed being, as at that particular date, derived from the same Burgh  
 under which the defenders have since been elected. If the Kirk-ses-  
 fulfil their part of the contract, the defenders will obtain redress in a  
 7. But they will require to show that they have good reason to be dis-  
 h the management of the Kirk-sessions before they can hold themselves  
 from this contract; and as nothing of that sort has been instructed, I  
 Lord Ordinary's interlocutor should be recalled, and decree pronounced  
 the libel.

OREHOUSE.—I am of the same opinion.

RESIDENT.—I am of the same opinion. I cannot see how the Magis-  
 Council could themselves take a personal superintendence of the schools.  
 k the most judicious mode has been adopted of carrying this trust into  
 ion.

ACKENZIE.—If a bona fide statement was made and proved that there  
 rture by the Kirk-session from the provisions of Bell's trust, it would be  
 case. But, as that cannot be done here, I concur with your Lordship.

COURT then recalled the interlocutor, repelled the defences, and decern-  
 in terms of the libel, with expenses.

W. YOUNG, W.S.—CAMPBELL and MACDOWALL, W.S.—Agents.

HE STRACHAN, Pursuer.—*Sol.-Gen. Rutherford.*—*J. Anderson.* No. 165  
 GH IMPROVEMENT COMMISSIONERS, Defenders.—*D. F. Hope*  
 —*G. Grant.*

ion—*Clause—Statute.*—An Act of Parliament was passed for carrying  
 certain improvements in the city of Edinburgh, and, inter alia, for level-  
 at which was in the line thereof; by an operation on this street the pave-  
 lowered in front of one of the shops:—Held that a claim for damages at  
 s of the proprietor of the shop was competent against the Commissioners  
 act, although there was no provision in it for compensation in such a  
 the alleged damage was necessarily consequential on the operation  
 by it.

act of the 7th and 8th Geo. IV., commonly called the Edinburgh Feb. 21, 18  
 Act, certain Commissioners are appointed for carrying into 2d DIVISION  
 movements" upon the city of Edinburgh, and, inter alia, Lord Jeffr  
 T.



165. for "levelling" Bank Street, this being one of the streets in the line of the improvements. Power is given to the Commissioners to assess the inhabitants generally, and to assess at a higher rate the proprietors and tenants of houses or shops situated in the districts to be more immediately benefited by the execution of the improvements." By sect. 35 it is provided that corporations, heirs of entail, and other parties not entitled at common law to alienate or deal upon heritage in their possession, shall have power to convey such property, "and also to treat and agree with the said Commissioners for any damages alleged to be sustained in carrying into effect any of the purposes of this act." By sect. 36 it is enacted, that if any person or persons, bodies politic, &c. being proprietors or occupiers of lands and houses "which may be required for the purposes of this act, shall refuse to treat, contract, or agree to sell the same, or to settle the damages in respect of the same as aforesaid," the Sheriff of Edinburgh, or his substitute, shall, upon application from the Commissioners or their clerk, summon a jury, and so try the matter in dispute.

By the act 1st and 2d Will. IV., c. 45, (amending the preceding act) it is enacted (§ 44) on the narrative that in the course of executing the improvements, it may happen that lands, houses, tenements, or other heritages or parts thereof, of comparatively small value, may be required from the owners or occupiers thereof, for the purposes of the act, and "damage of a comparatively trifling nature may be thereby done or supposed to be done," to such owners or occupiers or to their properties, and the ascertaining of such damage by a jury, would cause an expense exceeding the object at issue,—that therefore if any person or persons, owners or occupiers of houses, &c. of comparatively small value, which may be required for the purposes of the act, shall refuse to treat or settle the damage in respect of the same, or of the injury done, or supposed to be done thereto, the Sheriff shall, upon application from the Commissioners, decern for such damage without a jury.

No express provision is made in either of the acts for compensation to be allowed to a party on the ground of damage done to his property by the operations of the Commissioners.

In August, 1835, the Commissioners commenced an operation on the pavement in front of the shop of the pursuer, Strachan, in Bank Street, whereby the pavement was lowered about 14 inches in front of the door, and also in front of the window, and a flight of three steps, instead of one as before was placed in front of the door. The pavement was increased in breadth about 18 inches along the whole street, which in consequence of the operation was rendered less steep than formerly. Strachan made no opposition at the time to this lowering of the pavement.

Thereafter he raised action against the Commissioners, setting forth their operations in Bank Street, and the alteration caused by them in the condition of his shop, and alleging that his property had been deteriorated in value, in so far as the access to the shop was rendered more diffi-

It, and it had been made to present an awkward and uninviting appearance, and concluding first for a sum of £500 damages, and, alternatively, have the defenders ordained to make application to the Sheriff for summoning a jury in the manner provided by the act, in order to determine the pursuer's claim of damages for the loss and injury sustained by him.

Against this action the Commissioners pleaded the following preliminary defences:—

1. The whole operations by the Commissioners of Improvements being specially authorized by statutes passed for the particular purpose of effecting an improvement in the city and in the locality where they were carried on, and for which improvement the inhabitants (and among others the pursuer) agreed to be assessed, there can be no claim competent against the Commissioners at the instance of any individual, on the ground that the said operations have not benefited and improved, but, on the contrary, have injured and deteriorated his premises.

2. The pursuer is barred, by the consent given, and otherwise, from now claiming damages, since the Commissioners' operations are strictly within the powers intrusted to them.

3. No action of damages against the Commissioners is competent in the Court of Session, as there is conferred on the Sheriff of the county of Edinburgh, with the assistance of a jury, an exclusive jurisdiction to settle all differences between the Commissioners and those who have claims against them on the alleged ground of damages. The conclusion in the summons, that the Commissioners should be decerned and ordained to make application to the Sheriff of the county for summoning a jury, is altogether incompetent under this action.

As a peremptory defence the Commissioners pleaded that the pursuer had no claim for compensation against the Commissioners, because his property, on the whole, in place of being injured and deteriorated, was greatly increased in value, by the operation of lowering and levelling Bank Street.

In support of these defences it was, *inter alia*, maintained that at common law there could be no claim for consequential damage in an action such as the present against public trustees,<sup>1</sup> and the statutes in question recognised no such claim as competent, the only case for which compensation was provided by the acts being that of property required for the purposes thereof, and the injury alleged in the summons being strictly consequential on the operations requisite for lowering Bank Street which were thereby authorised and directed.

Strachan in answer maintained generally, that there was nothing in the clauses of the acts, or in the circumstances of the case, which could render his claim for damages incompetent.

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<sup>1</sup> *Bolton v. Crowther* (2 Barnwell and Cresswell, 703).

165. The Lord Ordinary "repelled the preliminary defences," and added to his interlocutor the subjoined note.\*

1837.

R. v.

Fish

Market

Chambers.

\* "Assuming (as must be assumed *hoc statu*) that actual damage has been sustained, the Lord Ordinary conceives that the two first preliminary defences are palpably untenable. Because the statute recognises the operations which it authorizes as generally beneficial to the city, and properly to be considered as improvements, and because the pursuer (along with the great body of the citizens) has consented to their being carried into effect, can it be seriously maintained that this is inconsistent with the *certain fact* of their having been the cause of great damage to him individually? Or that, if, in the course of levelling the adjoining street, the defenders had actually brought his house to the ground, they would have been entitled to answer his claim for reparation of the damage by saying, 'What, do you talk of damage? We have done nothing but what you yourself recognised as a benefit. Have you not allowed that levelling the street was an *improvement*? and as we have done nothing else, instead of claiming damages from us, you are bound to pay us an additional assessment.' It appears to the Lord Ordinary, that if this would be but poor pleasantry, it is still worse as argument, yet it is exactly what is stated in those two defences, the defenders having actually founded upon the additional assessment to which the pursuer is liable, by having his house in this street, as a conclusive proof that he cannot possibly have suffered any damage from their operations in its neighbourhood. The short answer is, that though lowering or widening a street may be a benefit, and chiefly to those in the vicinity, the loss of the property taken to widen it, and the damage done to buildings in the course of lowering, are distinct injuries, for which compensation is due: And as the defenders are confessedly bound to pay the value of the property taken for widening, they must also repair the damage occasioned by lowering, although the claimants, in both cases, may be among those who are liable to a double assessment.

"At the debate those defences were sought to be supported by reference to the clause<sup>1</sup> of the statute beginning at the bottom of p. 22 of the copy in process, and providing that, where the owners or occupiers of lands, houses, &c. 'required for the purposes of the act,' shall refuse to sell such houses, &c. 'or to settle the damages in respect of the same,' the Commissioners may apply to the sheriff to summon a jury, 'who shall give their verdict for such damages, recompense, or price, as they shall judge fit to be awarded for any such lands, houses, &c. for their respective estates or interests in the same, or for any damage done thereto,' from which they inferred, that as the house of the pursuer was *not* 'required for the purposes of the act,' no damage could in any case be due on account of it. The first remark which occurs upon this is, that whether the clause in question affords a defence to the Commissioners or not, it certainly can never be cited in support of the *two special defences* that have been mentioned, and, indeed, furnishes per se a conclusive answer to these defences; the scope of those being, that the Commissioners can never be liable in damages at all, while only executing the improvements allowed by the statute, and the clause providing that they *shall pay damages* as well as prices to those whose property they take or injure in the course of their operations. But the limitation of this claim of damages to such as occur upon properties actually required for the purposes of the act, is not only without any reasonable meaning, but without any meaning at all, and incapable of any practical application. The properties required for the purposes of the act are of course taken by the Commissioners, and become their property. It is manifestly impossible, therefore, for any one else to claim damages for them. The former owners or occupiers are to be compensated by the 'value of their respective estates or interests therein;' but for the damage done thereto, it is utterly in-

<sup>1</sup> Sect. 36.

The Commissioners reclaimed.

No. 165.

LORD JUSTICE-CLERK.—I am much impressed with the importance of the case of Bolton v. Crowther, and if the claim of Strachan rested on the common law

Feb. 21, 183  
Strachan v.  
Edinburgh  
Improvement  
Commissioners

possible that the Commissioners can ever be liable, after they have become *themselves* proprietors. When pressed with this, the defenders endeavoured to maintain that the right to damages was at least limited to such as were occasioned, though to property *not* taken, yet in consequence of operations on what was so taken from other individuals ‘for the purposes of the act;’ and, therefore, did not arise here, where their operations were not on such newly acquired property, but upon what had all along been a public street. It is needless, perhaps, to observe, 1st, That there is not a word in the act that gives the least countenance to this construction; and, 2d, That, if adopted, it would lead to consequences the most inequitable and unjust. If a house, not itself taken or required for the purposes of the act, is injured by the operations of the Commissioners upon the ground adjoining, is it imaginable that the owner’s right to reparation should depend upon the fact, whether the adjoining ground had been always a public street, or was an area recently acquired for the purposes of the act from some private individual?

“*This*, then, it is humbly conceived, *cannot* be the meaning of the act; and to find out what it truly was, it is only requisite to go back to the immediately preceding section. This, indeed, is the more necessary, as in that on which the defenders rely there is an express reference to something antecedent, the whole of its provisions being for the case of the owners and occupiers refusing to agree to sell their lands, houses, &c. ‘or to settle the damages in respect of the same as *aforesaid*.’ Now the preceding section<sup>1</sup> (which is at p. 22) states, in the most unequivocal manner, what sort of damages were thus to be settled for. The immediate object of that section is to enable corporations, heirs of entail, tutors, trustees, and other persons not entitled at common law, to alienate or deal upon the heritage in their possession, to transact with the Commissioners under this act; and, accordingly, it expressly empowers all such persons to sell and convey their lands, houses, &c. ‘for the purposes *aforesaid*, and *also* to treat and agree with the said Commissioners *for any damages alleged to be sustained in carrying into effect any of the purposes of this act*.’ These words, it is thought, are quite unequivocal; and they prove two things, 1st, That the damages so to be treated for were not such as might befall the properties which were to be sold to the Commissioners, as to which, indeed, the claim must have been extinguished confusion; and, 2d, That they were not damages occasioned by the *improper* or *unwarranted* acts of the said Commissioners beyond the line of their duty (which was another surmise of the defenders), but, in the express words of the clause, ‘*any damages occasioned by carrying into effect any of the purposes of this act*.’ Now this is the first section in which there is any mention of damages, and is evidently that referred to in the immediately subsequent section, where provision is made, *inter alia*, for the case of persons not agreeing or refusing ‘to settle the damages’ as ‘*aforesaid*.’ It is the leading and governing enactment, therefore, on the subject of damages, and in it alone the description of damages for which the legislature intended that compensation should be given, is naturally to be looked for; and this description is as broad and general as the justice and reason of the case would have led any one, *a priori*, to expect,—‘*any damages alleged to be sustained in carrying into effect any of the purposes of this act*.’ It provides for the adjustment and settlement of *all such* damages by voluntary agreement, and

<sup>1</sup> Sect. 35.

185. independent of the statute, I should have doubts as to its relevancy, but I cannot  
 — take up the present case as one at common law. I am satisfied that the argument  
 1837.

1837.  
 1837.  
 1837.  
 1837.

the next section for the case of parties not being able to agree. The one, therefore, is relative to and complementary of the other; and the Lord Ordinary thinks it indisputable, that they are co-extensive as to the subjects to which they relate, and mean to settle the very same questions,—with reference merely to those two alternatives, of a *voluntary* or a *judicial* adjustment. It would be nothing else, indeed, than a manifest absurdity, to hold that persons should be entitled to 'trust for and agree' as to any kind of damages under the *first* clause, for which they were not entitled in case of disagreement to the verdict of a jury under the *second*, and, therefore, if the pursuer could have lawfully treated with the defenders for the damages he now seeks to have judicially awarded (which does not seem questionable), it follows that no construction of the *second* section can be sound which could exclude him from the benefit of such a verdict.

"The wording of that second section, indeed, is not very happy; and there is no doubt that, having chiefly in view the case of properties to be actually purchased and taken by the Commissioners, its language is generally accommodated to that case, even where it speaks of damages, which, it has been already seen, could never possibly accrue or be claimable in relation to such properties. But this verbal inaccuracy or imperfect expression can never be allowed to defeat the plain sense and policy of the act, or so construed as to render it at once a source of inconsistency and an instrument of injustice. Throughout the whole of its provisions, indeed, the language is singularly inaccurate, and, if rigidly construed, would lead, in many other instances, to the same inconsistencies which the defenders would charge upon it in the present. The section on which they rely, for example, confessedly provides for the case of a verdict for damages (of some kind or another), as well as for a price or consideration. But in all the immediately subsequent sections, as to who shall pay the expenses of the juries, the investment of the money, &c. &c., it provides *in terms* only for the case of a verdict for a price or value, although it is not supposed to be doubtful that all those provisions must be held equally applicable to that of a verdict for damages only. Take the clause as to expenses of trial as an example: The rule (p. 25 of act) here is, that 'if the jury shall find the premises to be of greater value than the sum offered for the same by the Commissioners,' the expense shall be on the Commissioners, if of less value, on the party who had refused the price offered. Now, as there may plainly be a trial and a verdict for damages only, it is manifest that the same rule for awarding the expenses must have been meant to be applied to that case also, though, from the imperfection of the wording, it is not expressly provided. In the same way, as to investing the sums awarded, in questions with heirs of entail, minors, or lunatics, the *literal* direction of the act would only enforce this in the case of sums paid as the price of properties actually taken and acquired, though the plain principle extends equally to all sums agreed on or awarded for damages done to properties belonging to such parties, and would no doubt be so applied under any judicial direction. The words of the section are (p. 26, 27), that 'if any money (exceeding £200) shall be agreed or adjudged to be paid for any premises purchased or acquired for the purposes of this act,' the same shall be first paid into a bank, and afterwards reinvested in other purchases, &c. There is here no express provision as to money agreed or awarded for damages; and yet, can it be doubted, that if a large sum were thus found due as damages to an heir of entail, the Court would direct it to be paid into bank, and reinvested, in terms of this provision of the statute? In all these cases, the true meaning is to be found by referring back to the *leading* provisions, and the true rule of construction is that by which their application is best secured. The present case, however, is far stronger than any of those last mentioned, both because there is here an express reference to the former section in the latter, and because, as there is confessedly

han is well-founded. My difficulty turns upon the form of the conclusion the summons. The first conclusion, which is simply for damages, I am to think cannot be entertained under the statute. Neither do I think that alternative conclusion to have the Commissioners ordained to take the statutory means for ascertaining the compensation due to the pursuer a proper conclusion. My difficulty, therefore, refers to the form and shape in which the conclusions ought to be enforced. I am not satisfied with the defence that, looking to the provisions of the act, whatever the Commissioners do in the particular districts to be provided, no claim for damages can be brought against them. I can find no authority which sanctions this view. Suppose my property to be benefited generally by improvements in a certain district, if a slice of that property be taken away, it will be a good answer to a claim of damages on my part to say that the property injured was in what is called an improved district? I am inclined to

No. 165.

Feb. 21, 1837.  
Strachan v.  
Edinburgh  
Improvement  
Commissioners.

admission of such a claim of damages as the present in the statute, it would be inconsistent at common law, even if not within the express provisions therein made for adjustment of all similar claims.

In the *third* preliminary defence the Lord Ordinary has had more hesitation. He agrees with the defenders, that the mode of settling claims of damage prescribed by the statute—viz. by the sheriff and a jury—is imperative and exclusive of *cases for which it is provided*, viz. cases in which the private party refuses to apply to the Commissioners, and the Commissioners apply for a jury; and he is inclined to think that it was intended that the same machinery should be employed where the Commissioners (as in this case) refused to move in any way, and thus put the private party under the necessity of making some application. But as the Commissioners alone are authorised to apply to the sheriff, he is clearly of opinion that the pursuer was bound to come here. The only doubt is, whether he should not have confined himself to the conclusion for having the Commissioners ordained to apply to the sheriff, and whether this should not have been done by summary petition to the sheriff rather than by an ordinary action before a single judge. Upon the first point the Lord Ordinary inclines to think both conclusions competent, in a case contested like the present, where a doubt is raised as to the meaning of the statute, which, if made good, might yet leave a competency at common law; and, in the event, if the second or alternative conclusion is sustained, a doubt as to the propriety of the first would be no ground for dismissing the whole action. On the second point, the Lord Ordinary conceives that an application by a party for the benefit of a public statute, and for having certain persons ordained to admit that benefit, is an application for the ordinary remedies of the law, and not for the exercise of extraordinary authority, for which it might be necessary to apply to the nobile officium of the Court; and though, if this had been *all* that was for, a summary petition might also have been competent, the combination of a direct claim for damages (it may be at common law), at the pursuer's own instance, seems to render preferable the course of an ordinary action.

The motion for sisting till the issue of a declarator at the defenders' instance, which embraces the grounds of the two first preliminary defences, is rejected, on the ground that the pursuer has not been called as a party to that action, and has no control over it. If the defenders wish only for a judgment of the Court on the merits of those two defences, their speediest way of obtaining it will be by discussion on their reclaiming note against this judgment. If, on the other hand, their object be delay, as the pursuer alleges, he seems entitled to insist that the case shall not be hung up till they find it convenient to bring to issue, and that he is not yet called in Court, and with which he has no concern as a

165. think that the circumstance of the pursuer's house being in such a district does not preclude him from his claim of damages, provided damage can be qualified. The act of 7 and 8 Geo. IV. is very loosely drawn, and is blundered in several of the clauses. (His Lordship then referred to the provisions of the acts.) If the Commissioners had levelled and lowered the street in such a way as to interfere with the arches and roofing of the cellars underneath, I think a claim of damages would have lain; and the same would be the case if they did any thing so as to obscure the window-lights, or impede the access into the shops or houses. I am disposed, therefore, to repel the preliminary defences.

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1837.  
R. v.  
right  
element  
injurers.

LORD GLENLEE.—I have no wish to go farther than the Lord Ordinary has gone. His Lordship has repelled the preliminary defences only, and the peremptory defences remain entire. The effect of what has been stated by the pursuer as to the injury done to his shop is reserved, and by adhering to this interlocutor we just allow the action to proceed.

LORD MEADOWBANK.—I agree, and, in addition to what has been stated from the chair, am disposed to hold that, if we can give these statutes a liberal interpretation, so as to entitle this party to reparation, we are bound to do so. This is a local act, and I have always understood that, in the case of such acts, a principle of construction applies different from that applicable to public statutes. This passed, like the old Scotch acts, *salvo jure cujuslibet*; and when the property of individuals is trespassed upon, we are to interpret it favourably to the right of such individuals to claim reparation. In the English case of *Bolton* the act in question was a public act.

LORD MEDWYN.—I differ from your Lordships. It was admitted at the bar that the claim of the pursuer for damages was rested solely on the Improvement Acts, and not on common law. Now, when a work for the public benefit is executed under powers conferred by an Act of Parliament, it requires consideration whether any individual whose property has not been taken nor materially injured has any right at common law to claim damage for an inconvenience directly arising from the operation authorized, and not from any carelessness or oppressiveness in the mode of operation. In *Bolton v. Crowther*, which was a claim against road-trustees, under the General Road Act, for damage caused by levelling a road, no damages for such a case being provided by the statute, the Court of King's Bench found that none were due at common law. In construing an improvement act, this affords a fit guide for discovering the principle of interpretation. The same principle was applied in the case of the *Caledonian Canal Commissioners v. Glengary* (June 5, 1830), which was a strong case to show that, under such an act as the present for carrying through a public work, held to be a public improvement, no claim for compensation will arise to a private party, unless recovered under the express provisions of the statute. It is admitted that the clauses here are loosely expressed, but it is said that the interpretation in such a case must be liberal. Now, I hesitate to say that there should be a liberal interpretation to supply the statute. This might be proper where the property of a party was taken or invaded against his will; but such is not the case here, and as, at common law there is no claim, and as the act does not expressly supply the defect of the common law, we must be satisfied that the clauses of the statute warrant us by implication in doing so. If legislators express themselves ambiguously, the common law should be left to take its own course. (His Lordship then referred to the



of the Improvements Act.) Upon the whole, I think the present case very No. 165.  
 r to the English case of Bolton, and to be ruled by it.

Feb. 21, 1837.

Heritors of  
 Annan v.  
 Herbertson.

THE COURT adhered.

DAVID GRAY, S.S.C.—JAMES BRIDGES, W.S.—Agents.

HERITORS and MAGISTRATES OF ANNAN, Suspenders.—*M'Neill*— No. 166.  
*G. G. Bell.*

GEORGE HERBERTSON, Respondent.—*Hunter.*

*School—Statute—Jurisdiction.*—Where the heritors of a parish had raised the  
 sum salary and divided it among three masters—Circumstances in which  
 that the justices of peace had not exceeded their powers, under the School-  
 masters' Act, in granting the accommodations of schoolhouse, &c. to the successor  
 of original parochial schoolmaster, notwithstanding the provision in § 11, that  
 in case the heritors are "exempted from the obligation of providing school-  
 houses, &c. for the teachers among whom the salary is to be divided in the manner  
 provided;" and Observed that this exemption only applies to the case of the teachers  
 and not to the successor of the original or proper parochial schoolmaster.

the Schoolmasters' Act, passed in 1803 (43 Geo. III. c. 54), it is Feb. 21, 1837.  
 enacted (§ 1), "That from and after Martinmas next, the salary of each 2<sup>D</sup> DIVISION.  
 parochial schoolmaster in every parish of Scotland, shall not be under Ld. Moncreiff.  
 the sum of 300 merks Scots per annum, nor above the sum of 400 merks  
 per annum, except in the cases herein after mentioned;" and (§ 8)  
 that in every parish where a commodious house for a school has not  
 yet been provided, pursuant to the directions in the above-recited  
 Act, and in every parish where a dwellinghouse for the residence of the  
 schoolmaster has not already been provided, together with a portion  
 of ground for a garden, to the extent after mentioned, the heritors  
 of every such parish shall provide a commodious house for a school,  
 and also a house for the residence of the schoolmaster, such house not  
 to consist of more than two apartments, including the kitchen, to-  
 gether with a portion of ground for a garden to such dwellinghouse,  
 and fields used for the ordinary purposes of agriculture or pasturage, as  
 may be convenient to the schoolmaster's dwellinghouse as reasonably  
 required, which garden shall contain at least one-fourth part of a Scotch  
 acre. It is farther enacted (by § 9), that, in the event of the heritors  
 neglecting or refusing to provide the accommodations authorized by the  
 Act, or of the schoolmaster being dissatisfied with them, it shall be com-  
 petent for him to bring the matter before the Quarter-Sessions; and it  
 is enacted, that "in all such cases the judgment of the Quarter-Sessions  
 shall be final, without any further appeal by advocacy, suspension, or  
 otherwise. Finally, by § 11, it is enacted, "that when the parish is

1836. of great extent or population, so that one parochial school cannot be of  
 1837. any effectual benefit to the whole inhabitants of such parishes, it shall be  
 1838. competent to the heritors and minister, if they shall see cause, on fixing  
 1839. a salary of 600 merks, or the value of three chalders of oatmeal, to be  
 1840. computed according to the provisions of this act, to divide the same  
 among two or more teachers, according to the extent and population of  
 the parish; and these proportions, so divided, shall be paid to teachers of  
 schools in the same way and manner, and under the same conditions as  
 hereafter are specified by this act for supplying vacant parochial schools  
 with masters; but in respect that the heritors of such parishes are to pay  
 an higher salary, they are hereby exempted from the obligation of pro-  
 viding schoolhouses, dwellinghouses, and gardens for the teachers,  
 among whom the salary is to be divided in the manner aforesaid."

At the date of this act, the schoolmaster of the parish of Annan, consisting of the royal burgh of Annan and a considerable landward district, possessed a schoolhouse, but he had no dwellinghouse or garden. Immediately on the passing of the act, the heritors held a meeting, at which the following resolution was adopted:—

"The meeting, being convinced, from the local situation of the parish, that there are two divisions thereof where the children, at least the youngest part of them, cannot attend the parochial school, unanimously agree that there shall be three schools in the said parish, situated as follows:—One in the burgh of Annan, another upon the estate of Bonshaw, near Breakenbeds, and the third at or near the junction of the estates of Brydekirk and Limekilns.

"The meeting in the view above mentioned, unanimously agree that the salary for the whole parish shall be six hundred merks, to be divided amongst them, in the following proportions, viz. four hundred merks for the school at Annan, one hundred merks for the school upon the estate of Bonshaw, and one hundred merks for the school upon the estates of Brydekirk and Limekilns."

The two additional schoolmasters were accordingly appointed. Thereafter, in 1805, the heritors and magistrates agreed that the schoolmaster at Annan was entitled to a dwellinghouse under the statute, and directed estimates to be taken in for building the same and a new schoolhouse, the old schoolhouse and ground attached being to be sold, and the price applied to defray, pro tanto, the expense.

This resolution of the heritors, however, was never carried into effect, and, in 1820, the old schoolhouse was pulled down, and a money-allowance made to the schoolmaster in lieu of it. In 1831, Forrest, the individual who had held the office of parochial schoolmaster at the passing of the act, died, and the respondent, Herbertson, was appointed in his stead. The minutes of his election by the heritors were not produced, but his examination and admission by the Presbytery was expressed in their minutes as follows:—"Mr Herbertson compeared, and a minute

election to the parish school of Annan having been produced, the  
 tery, in respect that Mr Herbertson had been examined, and his  
 ations highly approved of, when formerly elected to a parochial  
 within their bounds, declare him duly qualified for his new ap-  
 ent, and instal him, accordingly, as parochial schoolmaster of  
 declaring him entitled to the emoluments of the said office ; and  
 e Lords of Council and Session to interpone their authority for  
 ng the same effectual."

No. 166.  
 Feb. 21, 1837.  
 Heritors of  
 Annan v.  
 Herbertson.

Herbertson having, without success, applied to the heritors and magis-  
 trates for a schoolhouse, dwellinghouse, and garden, presented, in 1834,  
 a petition to the Quarter-Sessions of the county of Dumfries, narrating  
 the facts of the 43 Geo. III. above referred to, and praying them " to  
 order the said magistrates and heritors of said parish liable to provide the  
 necessary a schoolhouse, dwellinghouse, and garden, in terms of the  
 Parliament 43d Geo. III. chap. 54, sec. 8."

In his petition answers were given in by the heritors and magis-  
 trates in which, without maintaining any plea of incompetency or want  
 of jurisdiction on the part of the Justices, they contended, generally,  
 under the 11th section, where the highest salary had been raised  
 and added among two or more schoolmasters, the accommodations pro-  
 vided by the 8th section of the statute could not be demanded.

The Quarter-Sessions decerned for the accommodations craved, and  
 the expenses against the heritors and magistrates, who presented a  
 bill of suspension. This bill having been refused by Lord Gillies, Or-  
 der of a meeting of the heritors was held (October 1, 1835), at which  
 an offer was made to Herbertson, that, if he would abandon the process,  
 they would recommend to the magistrates to concur in providing, at joint  
 expense, a schoolhouse and dwellinghouse. Herbertson, who was pre-  
 sent, stated, that he would return an answer next day. He did not,  
 however, return an answer till the 10th, when he intimated his accept-  
 ance of the offer, it having been in the mean time agreed to by the ma-  
 gistrates on the 2d. The heritors, however, now required that Herbert-  
 son should pay the expenses incurred since the 2d, though what they  
 demanded, any, did not appear ; and Herbertson refusing this, the heritors  
 refused to abide by their offer, and, with the magistrates, presented  
 a new bill of suspension, which was passed by Lord Mackenzie,  
 J. The letters having been expedited, and a record made up, it

*Decided for the Heritors and Magistrates—*

The jurisdiction of the Quarter-Sessions in the matter of schools is  
 statutory, and under the 43 Geo. III. alone. Their judgments,  
 accordingly, can only be excluded from review when they keep within  
 the limits of the statute. They cannot possibly decern for the erection  
 of a school or schoolhouse, in respect of any agreement by former mi-  
 nisters of any circumstances other than the provisions of the statute.

1836. Then, in the first place, they are only authorized by the statute to decide in cases where no schoolhouse or dwellinghouse has previously been provided, and consequently, although the provisions of § 11 may not warrant the depriving a schoolmaster, after the increase and division of the salary, of any accommodations formerly provided to him under the act 1696, the remedy, if these are taken away and withheld, is not an application to the Quarter-Sessions, who have clearly no jurisdiction in such a case. As to the *schoolhouse*, therefore, the Quarter-Sessions could have no jurisdiction, whatever may be the view taken of the obligation of the heritors itself. In regard again to the schoolmaster's *dwellinghouse and garden*, the jurisdiction of the justices must depend on whether the statute authorizes these accommodations to be provided to any of the masters where two or more are appointed, and the maximum salary is levied and divided among them. If the heritors are not bound in such case to provide these accommodations, there can be no warrant for the justices to interfere, because their jurisdiction is exclusively dependent on the heritors refusing or neglecting to comply with the enactments of the statute. The provisions of the act, however, are express that under it and in respect of its enactments, no claim for the accommodations authorized where there is only one parochial schoolmaster (which is the only case treated of in § 8), can lie, where two or more have been agreed to be appointed, and the maximum salary levied. Nor can it be maintained that the exemption from this obligation extended only to the additional masters, for they are all equally proper parochial schoolmasters, and have been so treated by the Court;<sup>1</sup> and in the statute there is no countenance to the idea of a distinction; the salary might be divided equally among all, without any preference of one over the others, and the whole are referred to in the clause of exemption as "the teachers among whom the salary is to be divided," including necessarily the master situated at the place where the original parish school was established, as otherwise he could have no share of the salary. Then if the justices exceeded their powers their judgment cannot be protected, and there could be no prorogation of a jurisdiction which did not subsist under the statute, nor is there any pretence for the plea that the suspenders are barred by agreement from now persisting, Herbertson not having accepted their offer within the period limited.

*Pleaded for Herbertson—*

Under § 4 every schoolmaster is declared entitled to the accommodations provided by the act, and in case of neglect or refusal on the part of the heritors, he is authorized to apply to the Quarter-Sessions, whose decisions are declared to be final. The Quarter-Sessions have thus a general jurisdiction in regard to the matter of providing these accommodations,

<sup>1</sup> Murray, Dec. 5, 1834, ante, XIII. 128.

ugh by § 11, an exemption is introduced, it is a question on the No. 166.  
 whether in any particular case the exemption applies. In deter-  
 n this, the Quarter-Sessions may put a wrong construction on the Feb. 21, 1837.  
 out this is an error in judgment in a matter committed to them Heritors of  
 being subject to review, and not an excess of power which lays Annan v.  
 n to the review of this Court. Accordingly, here the suspenders Herbertson.  
 objection to the jurisdiction, but pleaded the exemption as on the  
 bus prorogating the jurisdiction and so barring themselves from  
 in the present suspension, as they also did by the agreement  
 first bill had been refused. Further, even if it were competent  
 ourt to review the judgment of the Quarter-Sessions, it is found-  
 ust construction of the statute. It never was intended to deprive  
 er parochial schoolmaster of accommodations to which he was  
 under the act 1696, and although the justices might not be war-  
 decern for the accommodations demanded in respect of contract  
 ous possession, they might properly take these matters into con-  
 n, and judge whether in the circumstances the claim should not  
 ed. But in truth the exemption only applies to the branch teachers  
 expressly described by that term "teachers," while the proper  
 schoolmaster is termed "schoolmaster." The respondent, how-  
 he proper parochial schoolmaster entitled to make up the militia  
 ct under the Parliamentary representation acts, &c., and holding  
 distinct from the mere branch teachers, and to his case the exemp-  
 not extend.

ord Ordinary repelled the reasons of suspension, and found the  
 derly proceeded, with expenses, adding the subjoined note.\*

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ie Lord Ordinary thinks that there is much ground for the plea, that the  
 s, having stated no plea on the record of the inferior court, objecting to  
 iction of the justices, are barred from insisting in such a plea now. He  
 s that the suspenders took a very sharp course when they retreated from  
 offer of settlement, after Lord Gillies's interlocutor, on the grounds now  
 He thinks that, in fairness, the acceptance should have been held suffi-  
 should not have been rejected.

the precise ground on which he decides the cause requires particular ex-  
 He thinks it clear that there was no abstract *incompetency* in the appli-  
 the justices, under the 8th section of the statute 43d Geo. III. and the  
 which apply, in broad general terms, to every parish in Scotland in which  
 master has not the accommodations pointed out. The 11th section of  
 Geo. III. does not *take away the jurisdiction* given by the 8th in *any* case.  
 declares an *exemption* from its application in a particular case. The sus-  
 penders stated their claim of *exemption*, for the judgment of the justices,  
 g any doubt as to their jurisdiction. The justices considered the claim of  
 master, with this claim of exemption as raised, under all the circumstan-  
 they had power to decide the question, the statute makes their decision  
 d it is really not easy to see how it can be otherwise than that they had  
 nd were bound to judge of it in the first instance; for, on any construc-  
 the statute, cases may easily be figured where the question, whether the

1. 166. The heritors and Magistrates reclaimed.

21, 1837. LORD GLENLEE.—I think the interlocutor right. There are views in the note distinct from each other. In the first place, I agree that there was no incompetency in

exemption applied or not, might be very doubtful. The case of the suspenders must therefore resolve into this, that, by rejecting the claim of exemption, and giving decree for the schoolhouse, &c. the justices have committed error of judgment, and, *by such error, refused effect to a particular clause in the statute.* Whether this would be enough to exclude the interference of this Court in a simple case under the act—as, for instance, if they had decreed for schoolhouses, &c. to all the three teachers appointed under the 11th section—the Lord Ordinary does not think it necessary to decide. The palpable deviation from the statute would probably be held to lay the case open. But the provision in the 8th section, specifically excluding all review in an application under it, necessarily supposes that matters requiring judgment as to the obligations of the heritors might be brought before the justices, and still that their decision should be final.

“The case is argued by the suspenders on the hypothesis, that the only question which could arise is, whether in a simple case of the salary of six hundred merks being awarded, and divided among three schoolmasters, the justices could, on a right construction of the 11th section, give decree for the accommodations to one schoolmaster. The Lord Ordinary does not think that question by any means free from doubt, on the true meaning of the statute, in its connexion with the act 1696; and he is not prepared to reject the able argument of the respondent on that point, though he thinks the question very doubtful. But he considers the present as a very special case, in regard to the *bona fide* meaning of the heritors, and the effect of their resolution, when they divided the salary of six hundred merks into three parts.

“The case is that of a parish where the schoolmaster was in possession of a schoolhouse and adjoining ground, before the resolution of the heritors to divide the salary was taken. Supposing that it had been proposed at the time, that that house and ground should be sold, and the price divided among the heritors, or any class of them, would it have been consistent with the statute, in its fair meaning, that the only obligation incumbent on them was to pay the six hundred merks yearly, and that the operation of the 8th section was entirely excluded? The Lord Ordinary doubts it much. But the case here is, that the heritors, though they seem to have contemplated the removal of the old schoolhouse, never dreamt of its being taken away otherwise than on the supposition of new accommodations being given under the statute. Upon the facts in the record, either not denied or proved by the minutes of the heritors produced, (particularly Min. 30th August, 1805; 17th April, 1806; 5th September, 1809; and 6th November, 1809,) it is perfectly clear that there was an old schoolhouse, and ground adjoining to it, which remained in the possession of the schoolmaster after the two other schools were instituted, and the salary divided—that it was an understood part of the arrangement, at last reduced into a firm agreement, that, in place of that schoolhouse and ground, intended to be sold, the schoolmaster should be ‘entitled to have the house built for him, in terms of the late Act of Parliament,’ &c., and that arrangements were accordingly made for the erection both of a schoolhouse and a dwellinghouse. Then it is averred in the record (Art. VII. respondent’s statement), that, in 1821, the old schoolhouse was taken down, and the materials sold, ‘and in lieu of it an annual allowance was made to the late schoolmaster.’ This last statement is not at all denied in the answers; and though the suspenders deny that the house was taken down, or the materials sold, ‘at least by them,’ it is plain, from the form of this expression, that it is not a denial of the fact, but only a colourable throwing of it from the heritors of the parish, as distinguished from the Magistrates of the burgh. But the Provost of the burgh is officially a suspender; and, at any rate, is

ication to the justices in the character truly belonging to the respondent of No. 166.  
 schoolmaster. The heritors plead the exemption, but do not state that the  
 ion was incompetent till the cause came here. The justices decide. It is Feb. 21, 1837.  
 that if the application were by the whole three teachers to provide accom- Heritors of  
 n to each, we would hold that it could not be made under the statute, Annan v.  
 excluded by the statute. But what is there in § 8 implying that an ap- Herbertson.  
 plication from one of them is incompetent? The application is not incompetent.  
 The justices might have been of opinion that the true meaning of § 11 excluded  
 the application, but the application not being incompetent, their decision that that de-  
 cision was ill-founded could not be incompetent if the application was competent,  
 consequently the declaration of finality applies; and it is impossible to say that  
 the application is incompetent because the justices put a wrong construction on  
 the statute. Such a rule would open the widest door to review in all cases. This  
 is a precedent, and besides I never saw any thing so unjustifiable as the whole  
 opinion of these heritors.

MR. MEADOWBANK.—I entirely agree. I think the conduct of the heritors  
 is reprehensible. On the competency I have nothing to add to what has been  
 said by Lord Glenlee, and on the merits I would have concurred entirely in judg-  
 ment with the justices. The act provides for the accommodations where not already  
 provided, in every parish. Then it enacts that the heritors may fix a salary of six  
 hundred marks to be divided among two or more—not “*schoolmasters*,” but  
 “*teachers of schools*.” This is very distinct, and it is clear that they are just allowed  
 to pay salaries to branch teachers, who are not parochial schoolmasters, and the  
 provision applies to these other teachers exclusive of the parochial schoolmaster.  
 This is the true interpretation, giving a fair and free construction, which I think  
 the legislature intended should be given to this act. In that reading of the  
 act I am borne out by the authority of these heritors themselves in their  
 opinion soon after the passing of the act. When I look to that and the whole

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content, from the previous minutes of *the heritors*, that the house was taken down  
 without the express sanction of the heritors, and on the faith of the accommodations  
 statute being given in place of it.

These being the special circumstances of the case, the Lord Ordinary is of  
 opinion, 1. That, upon the *claim of exemption*, made by the heritors before the  
 justices, it was competent and just for the justices to consider, not only whether  
 exemption would generally arise in such a case, but whether the heritors were  
 precluded from making the claim by the special facts, and by the clear under-  
 standing when the resolution to divide the salary took place; and that, if this was  
 within their competency, their judgment is final. And, 2. That in so far as it is  
 competent and necessary to consider the merits, the judgment is right. The sus-  
 pendings argue, that they stand on their defence, and have nothing to claim. But the  
 Lord Ordinary's view is different; that, on both statutes, the presumption is for  
 the schoolmaster's right, he being, in fact, without the accommodations, and that it  
 is for the suspenders to make out their claim of *exemption*.

The case of Dawson v. Allardyce was very different. That was an attempt to  
 remove the schoolmaster, against his will, of the schoolhouse already allotted to  
 him by the act 1696, or to remove it to a different situation.

The Lord Ordinary says nothing of the general reasonableness of the suspen-  
 sions. But the idea of the parochial schoolmaster, in such a place as Annan, being  
 removed from a schoolhouse, is, at the least, not a little extraordinary. The framers  
 of the act could never have contemplated such a result.”



, 166. subsequent proceedings, and to the circumstance that the schoolmaster was previously in possession of a schoolhouse, I am satisfied that the judgment of the justices is right. When the heritors adopted the resolution to divide the salary, Mr Forrest was parochial schoolmaster, and he could not be deprived of the accommodations he then enjoyed. On the whole, I think the proceedings of the heritors unfounded in law and most iniquitous.

LORD MEDWYN.—I agree that the heritors have behaved sharply, and I think both parties wrong in not having settled this dispute. I would have wished that the Court had decided the case on that ground, as I cannot concur in all the opinions delivered. The act 1696 is not touched by the late statute. But it provides only a schoolhouse, not a dwellinghouse. I would have said the schoolmaster's situation was not to be deteriorated by dividing the salary. But the only question is, what his rights under the 43d Geo. III. are? That act provides by § 1 a salary of not less than 300, nor more than 400 marks. By § 8 the justices are brought in on the failure of the heritors to give the accommodations thereby required. Under § 11 there is an exemption in the case of raising the highest salary and dividing it among one or more teachers. We are told these teachers are different from the parochial schoolmaster. I cannot think so. "Teachers" means all those who teach, including the parochial schoolmaster. Otherwise where is his salary—his share of the 600 marks which is to be divided among the "teachers"? Then the exemption applies to the same persons among whom the salary is to be divided. I do not mean to say that this clause excludes the proper parochial schoolmaster's claim to a schoolhouse under the act 1696, or from having had it before. Also, if he had a residence formerly he would be entitled to it still. I would hold that the exemption in § 11 withdrew the power in the case of a division to apply for the accommodations to the justices who have no power to give what is not provided by the statute, and therefore I thought the application incompetent. I cannot see how it should be incompetent if the whole three applied, and yet competent on the part of one if he has as little title as the others.

LORD JUSTICE-CLERK.—This is a most important question; but I fairly confess I have no difficulty in concurring with the Lord Ordinary. I lay aside all the objections to the conduct of the heritors, though, if the case were narrowed to that, I could scarcely have supported their plea; but I go at once to the Act of Parliament. Then as to the question of competency, admitting that § 11 is equivocal and ambiguous, I am not satisfied that it gives any aid to the plea of the respondents, because the question is, if, when the application was made to the justices, this party was in a condition to make it. He was elected parochial schoolmaster, and he puts in an application for the accommodations under the statute. The heritors assert that § 11 affords a defence. It is most material, however, that there is no indication of any denial of the right of the justices to dispose of the application. Then if the application was regular were they not entitled to judge of it? They may have erred, but is not their judgment final by this act as to their construction of that clause as on their construction of any other? Suppose we admit their construction to have been erroneous, still the judgment is unreviewable. We can't meddle with it. But we are driven to consider the questions discussed on the merits. Now as to these it would require the most express words to exclude the right to accommodations to every parochial schoolmaster. But § 11 is ambiguous, using the word "teachers," not used in any other part of the act. In construing it we are bound to keep in view the whole act and the object of it, and doing so,

ing a common sense and rational construction on it, I have not much difficulty in determining what it is. If common justice were done, according to their rates, the accommodations would have been provided. But the question arises, let us look at the clause. The exemption extends to the providing of houses which it is admitted the respondent is entitled to under the act 1696. Does not this give ground for holding that it only applies to the additional, and that the heritors are only to be relieved from the burden as to the salaries who are to get small shares of the salary. "Teacher" alone is a general term, and on a fair construction we are to apply it only to the additional, and not to the parochial schoolmaster. But who is the regular parochial schoolmaster of Annan? There are heavy duties which can only be performed by a regular schoolmaster—making up militia lists—registers under reform act, &c. If a branch teacher had done any of these things his acts would have been entirely invalid; and I therefore agree with Lord Meadowbank that the act looks to those as branch teachers, and so there is no admission of these as regular schoolmasters. Therefore I have not the same difficulty as Lord Moncreiff. It would have been very different if all the three had made application, as only one would have been competent, and if the justices had attempted to assign accommodations to each it would have been an unwarranted deviation from the law.

On both grounds therefore I am for adhering, and I have seldom seen a case where heritors have allowed themselves to be dragged into a litigation more

MEADOWBANK.—With reference to the observations of Lord Medwyn, the term "teachers" in the 11th section must include all the masters, be- mentions them as those among whom the salary is divided, I think this is the surplus above the minimum provided to the proper parochial school- by § 1, which surplus it is that is to be divided among the "teachers" or masters.

WILL.—The salary specified in § 1 is only so provided, "except in the cases mentioned."

THE COURT adhered.

WILLIAM STEWART, W.S.—WILLIAM MARTIN, S.S.C.—Agents.

JOHN RAE, Suspender and Defender—*D. F. Hope—Turnbull.*  
JAMES HENDERSON, Charger and Pursuer.—*Monteith—Neaves.*

No. 167.

*Prisoner—Lease—Jurisdiction.*—1. Held that a disposition omnium, executed under an application for the benefit of the Act of Grace, falls under the exemption of the stamp act applying to "all proceedings under the statute relative to the aliment of poor prisoners," and does not require a stamp. 2. Held, that such a disposition was, in the circumstances, truly executed under the Act, though not signed till about 16 days after liberation—the prisoner was liberated, under the act, on condition of signing it, and having signed it was prepared and presented to him. 3. Circumstances in which a judgment of the Lord Ordinary was acquiesced in, which suspended a charge on a debt removing, pronounced by a sheriff under an action which was founded on a claim of irritancy, but which involved several points besides that of the competency of the jurisdiction.

167. In 1823, John Rae, senior, let some heritable subjects in Uddingston to his nephew, John Rae, junior, for 19 years, at a rent of £100 annuum. The lease contained this clause, "declaring that, in case of said John Rae, junior, becoming bankrupt, in terms of the statute or under any other law or statute, this lease, in the option of the proprietors, shall, ipso facto, become null and void. The tenants and all co-tenants subject, without any declarator, to be summarily removed by ordinary or summary action before the Judge Ordinary, and without power or privilege of purging such irritancy."

John Rae, junior, was rendered bankrupt in 1833, at which time his uncle did not avail himself of the above clause to bring the lease to an end, but allowed Rae, junior, to continue in possession. He cultivated the farm, and paid rent subsequently to this. In December, 1834, John Rae, senior, whose affairs were embarrassed, was thrown into prison. He applied for, and was found entitled to the benefit of the Act of Grace, on condition of executing a trust-disposition omnium bonorum in favour of James Henderson of Peasebanks, as trustee for his creditors. He was allowed to leave prison before actually executing the disposition, but signed it as soon as it was presented to him, which was about 10 days after his leaving prison. The disposition was not extended on stamped paper. It included the heritable subjects let to Rae, junior; and Henderson, in virtue of that disposition, took infeftment in these subjects. In January, 1835, Henderson caused a search to be made for John Rae, junior, under the same letters of caption, in virtue of which Rae, junior, had been made bankrupt in 1833, the execution of search being intended to make him again bankrupt. Henderson then raised an action of removing against Rae, junior, founding on the clause in the lease, and on his bankruptcy in 1833, together with the recent execution of search, by which steps he contended that Rae, junior, was duly rendered bankrupt; that the lease had become, ipso facto, null and void; that Rae, junior, was subject, without any declarator, to be removed summarily by action before the Judge Ordinary; and concluding for decree of removing.

Among other defences, Rae, junior, pleaded, that as the disposition in favour of Henderson constituted Henderson's title to the subjects under the lease, was unstamped, it could not be pleaded in Court, and Henderson had therefore no title to pursue.

Henderson answered, that the deed was exempted from stamp-duty under that clause of exemption in schedule, P. II. § V. appended to the Act Geo. III. c. 184, which applies to "all proceedings under the Scots law relative to the aliment of poor prisoners."

After some intermediate procedure, the Sheriff "repelled the plea of want of stamp to the disposition omnium bonorum, founded on by Henderson, in respect it falls under the exception in the stamp-act of 1804, granted by the Act of Grace for the benefit of the Act of Grace; Forasmuch as the facts, on which the plea is founded, have been proposed by the

der; and of new, appointed him, within six days from this date, to find caution for violent profits, under certification of instant decree of removing being pronounced, in case of failure." No. 167.

Rae, junior, failed to find caution, a decree of removing was pronounced, and a charge thereon was given.

Rae, junior, presented a bill of suspension, alleging, inter alia, that his bankruptcy had been occasioned by bills which he had accepted for the accommodation of Rae, senior, his uncle. On advising the bill, with answers, the Lord Ordinary (Corehouse) "passed the bill upon juratory action."\*

After the letters were expedite, the suspender maintained those pleas which were referred to in the note of the Lord Ordinary, besides founding on the objection of the want of a stamp to the disposition omnium bonorum. He also alleged that he had made considerable disbursements and ameliorations on the farm, relying on the endurance of his lease.

Before completing a record, Henderson raised a declarator, in which, besides libelling on the procedure already narrated, he also libelled on a fact of Rae, junior, having been incarcerated for debt, at the instance of a third party, subsequently to the institution of the action before the sheriff. He concluded for declarator of the several acts of bankruptcy, and of nullity of the lease, in consequence of the irritancy having been

Feb. 23, 1837  
Rae v.  
Henderson.

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\* "NOTE.—There are several points in this case which appear to the Lord Ordinary to be attended with difficulty. The complainer was bankrupt in 1833; at this time, Mr Rae, senior, was landlord, who did not avail himself of the provision in the lease to declare the irritancy, and remove the complainer from the farm, but continued him in possession;—after Rae, senior, had granted the disposition omnium bonorum to the charger, in December, 1834, the charger, by virtue of the same letters of caption, on which the complainer had been incarcerated in 1833, rendered him again bankrupt by an execution of seurch, dated 28th January, 1835. But if the Act of Bankruptcy in 1833 was passed from by the landlord, may be questioned, whether a seurch on the same caption, and for the same debt, in 1835, would entitle a singular successor in the lands to declare the irritancy. It would still be more material if the complainer's averment were proved that this bankruptcy was occasioned by diligence on bills in which he was not the primary debtor, but which he had accepted solely for the accommodation of his landlord, as it is plain the landlord would not have declared an irritancy of the lease on that ground, neither could a singular successor in his right. But farther, if the complainer was allowed to continue in possession, and to cultivate the farm, as he paid the rent, it may be doubted whether it was competent to declare an irritancy in the Sheriff-Court, the case being materially distinguished in all its circumstances from that of Scott v. Wotherspoon, 27th February, 1829; and though an action of that nature were competent in the Sheriff-Court, it may be doubted whether the complainer was bound to find caution for violent profits, in the present case, for it is only in ordinary removings under the statute or Act of Session that caution can be required, not in extraordinary removings. Douglas v. Morrison, 18th February, 1628; Morrison, 13,892. The Lord Ordinary expressed no opinion on these points, some of which have not yet been argued, but he refused him to pass the bill on juratory caution."

167. incurred ; and for decree of removing. This action was conjoined with the suspension.

183, 1837.

afforded.

A record was made up in the conjoined actions, and the Lord Ordinary, "in the suspension, suspended the letters simpliciter, and decerned ; found the suspender entitled to the expenses thereof, both in the Inferior Court, in the Bill-Chamber, and in this Court, previous to the conjunction of the processes, with the half of the expense of this debate ; and in the declarator, repelled the defences, and decerned in terms of the conclusions of the libel ; and found the pursuer entitled to the expenses thereof, reserving entire the suspender's claim for improvements and meliorations, and the objections thereto, as accords."

Rae reclaimed against this judgment, but did not insist in any plea excepting (1.) that the disposition omnium bonorum not having been signed until some time after liberation had taken place, and after Henderson had failed to lodge aliment, was not truly granted under the Act of Grace ; and (2.) that even if it were so, yet the exemption of the stamp act, though reaching all proceedings under the Act of Grace, did not apply to the execution of the disposition omnium bonorum, which was not required till a later act, 6 Geo. IV. c. 62, § 7 ; but applied only to the petition and answers, the proof, if any, and generally to the other steps of process under 1696, c. 32.

Henderson read, in answer, so much of the procedure in the application for the Act of Grace (which had not been printed) as was necessary to instruct the statements on this subject, which are above noticed. He contended, that the disposition omnium bonorum was a "proceeding" under the Act of Grace exempted from stamp-duty both by the letter and the spirit of the exemption in the stamp act.

LORD GILLIES.—The proceedings under the application for the benefit of the Act of Grace should have been printed and laid before us, so far as was necessary for disposing of the question whether this deed was truly executed under the act. But from what has been now read, I am satisfied that it was neither more nor less than a disposition omnium bonorum under the Act of Grace. The prisoner was liberated a few days before signing the deed, but it was only after being found entitled to liberation provided he executed the deed ; the execution of it was a condition of his liberation ; and accordingly, though he was not kept in jail till it was prepared, he signed it as soon afterwards as it was brought to him. I think the deed required no stamp, and that this reclaiming note should be refused.

LORD MACKENZIE.—My opinion is the same. The execution of such a disposition is just an ordinary part of the proceedings under the Act of Grace, and falls completely within the exemption of the Stamp Act. As to the objection that the prisoner was liberated in consequence of no aliment being lodged, that circumstance does not show that the liberation was not under the Act of Grace, but is perfectly consistent with his having been so liberated. I think the note should be refused.

**PRESIDENT.**—I am of the same opinion.

**COREHOUSE.**—I retain the same opinion as when I pronounced the inter-  
under review.

**THE COURT** adhered.

**LOCKHART, HUNTER, and WHITEHEAD, W.S.—A. HAMILTON, W.S.—Agents.**

**No. 167.**

Feb. 24, 1837.  
Magistrates of  
Stirling v.  
Gordon.

**ISTRATES AND COUNCIL OF STIRLING, Suspenders.—Sol.-Gen.**

*Rutherford—A. Dunlop.*

**DR ROBERT GORDON** (Collector of Ministers' Widows' Fund),  
Charger.—*Robertson—Grant.*

**No. 168.**

*ch—Vacant Stipend—Ministers' Widows' Fund.*—A parish contained a burgh and a land-ward district; two ministers officiated in the parish; in the town-council, who were patrons, applied to the Presbytery to revive and institute a third charge within the parish, which had formerly been established by authority of the church courts; the Presbytery did so, "on condition that the council bind themselves to make up the stipend of the third charge to the minister per annum:" the council agreed to this, and, as patrons, granted repeated contributions to the third charge, and, on the death of one of the ministers holding the charge, they paid £100 as Ann, to the widow, and £100 to the Ministers' Widows' Fund, as a half-year's vacant stipend; the stipend was payable out of the various funds of the burgh; on a subsequent vacancy, the council refused to do anything in name of vacant stipend to the Ministers' Widows' Fund:—Held that the endowment of the third pastoral charge was of a permanent nature; that the charge was a benefice in the sense of the statutes relative to the Ministers' Widows' Fund; and that the vacant stipend, which was for half-a-year, being due as due to the Fund.

As early as 1643, there was only one Minister in Stirling, which is a burgh including a landward district, besides the royal burgh; the stipend is payable out of the teinds of the parish. In that year a second charge was established with the sanction of the Presbytery, whose stipend was payable, partly out of funds mortified for the purpose, and partly by the Magistrates out of a converted mulcture belonging to the burgh. These two ministers officiated in one church, called the East Church. In 1731 the Magistrates and Council resolved to fit up the West Church, and, on the settlement of a third minister by the authority of the Presbytery, they bound themselves to pay to him a yearly stipend of 1200 merks Scots. The Rev. Ebenezer Erskine was inducted into the third charge; but after his suspension, secession, and deposition, the charge was not filled up, and the Synod of Perth and Stirling, in 1758, passed a resolution, declaring that there was no sufficient foundation for perpetuating it.

On March 12, 1817, the Town-Council, on the narrative of deficient accommodation in the East Church, and the propriety of celebrating public worship in the West Church by an unordained assistant, resolved that the sum of £150 sterling, yearly, shall be raised as a provision for the said assistant," by contributions from the funds of certain burghs. The first and second charges were at this period vacant,

Feb. 24, 1837.  
1st Division.  
Ld. Corehouse.

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168. and the Council afterwards resolved, in place of having an unordained assistant, that it was expedient to have an ordained third Minister, "and that he and the other two ministers shall preach alternately in both churches, so as always to form only one parish, with one kirk-session, and having the sacrament dispensed by all the three ministers alternately in the East Church; reserving always to the Magistrates and Town-Council their right to the patronage of the said third charge, thus instituted by them, with a salary of £150 sterling yearly, as fixed by the said act of Council, of date the 12th day of March last."

The Town-Council petitioned the Presbytery to approve the proceedings, and to institute the third charge "on the terms above mentioned and agreeably to the rules of the church." The Presbytery granted the petition, "and did and do hereby revive and institute the third charge of the town and parish of Stirling, upon this condition, that the Magistrates and Council bind themselves to make up the stipend of the third charge to £200 per annum."

In July, 1817, on considering this deliverance of the Presbytery, an act of the Town-Council was passed, resolving to grant a presentation to Mr Bruce; "and the Council further, in addition to the salary of £150 sterling yearly for the third minister mentioned in their petition to the Presbytery, unanimously resolve to guarantee a further allowance of £50 sterling yearly to Mr Bruce during his incumbency, which they propose to raise from the seat-rents or by private subscription, reserving always to the said Magistrates and Town-Council, and their successors in office in all time coming, the right of patronage of the said third charge, as being the founders and endowers thereof, and as being undoubted patrons of the said kirk and parish of Stirling." The deed of presentation, executed on the same day, bore, that the Town-Council granted to the presentee "the yearly salary settled upon him by act of Council, of date the 12th day of March last, with the addition thereto guaranteed to him by act of Council, of this date, during his incumbency in the said third charge."

In August, 1817, the Town-Council passed this act:—"Having resumed consideration of their act of 12th March last, relative to the stipend for the third minister, they unanimously agree, that no part of the stipend shall be taken from the funds of the hospitals, without the consent of the Guildry and Trades; but that the Council shall, in terms of their guarantee already reported to the Presbytery, raise the same, the mean time, from the converted mulcture, and any other funds under their administration, and from private subscriptions and contributions from the seat-holders."

In October, 1817, Mr Bruce was inducted into the third charge, and during his incumbency he preached in the West Church, the other two ministers preaching alternately in the East Church. In 1818 an act of Council was passed granting an addition of £50 yearly to Mr Bruce.



out of the church seat-rents payable to the town," making his whole stipend £250, "during his incumbency as third minister." No. 168.

Mr Bruce died in 1824. He had become a contributor to the Ministers' Widows' Fund, on his induction, and at his death his widow received the benefit of the fund. She also received £100 from the Town-Council, in name of Ann. After the death of Mr Bruce, the Town-Council appointed the Rev. Archibald Bennie as his successor, by an act, in which, considering that the Council had granted "an allowance of £50 a-year to the late Rev. Mr Bruce in addition to the stipend of £200, for which they became bound to the Presbytery, and that during his incumbency only, which it is now therefore in the power of the Council to continue or withdraw, they do unanimously resolve to continue the same during the incumbency of Mr Bennie; and do hereby grant him the said additional allowance of £50 per annum accordingly." The presentation in Mr Bennie's favour bore that the Town-Council, "during all the days of his life," disposed "to him the yearly salary or stipend of £250, in terms of said act of Council, during his incumbency therein." Feb. 24, 1831  
Magistrates &  
Stirling v.  
Gordon.

Mr Bennie was next year translated to the second charge, and the Town-Council passed an act of presentation in favour of Mr Marshall, and farther, resolving "to continue to Mr Marshall, during his incumbency in the said third charge, the stipend of £250 sterling allowed to the late Mr Bruce and to Mr Bennie; reserving to the Magistrates and Council, if they shall see cause, to reduce the stipend of the said charge to £200 (for which amount only they are bound to the Presbytery) after Mr Marshall's incumbency therein shall have ceased."

In 1829 Mr Marshall was removed to the second charge, and, in December, 1830, the Town-Council granted a presentation to Mr Macfarlane. They paid to the Ministers' Widows' Fund the sum of £100, as a half-year's vacant stipend of the third charge accruing prior to Mr Macfarlane's induction. Before granting this presentation the Town-Council passed a resolution that the "stipend of the minister to be appointed to the vacant third charge shall be £200, being the sum for which the Burgh was pledged to the Presbytery, agreeably to the proceedings which took place in July, 1817, more especially as the state of the Town's funds will not afford a larger stipend."

The presentation to Mr Macfarlane was "to the third charge during all the days of his life, giving and disposing to him during his incumbency therein the yearly salary or stipend of £200, being the stipend for which his predecessors in office became bound to the Presbytery, at the revival of the third charge in the year 1817." While Mr Macfarlane held this charge he officiated in both East and West Churches, during one diet, at each Sunday. The other diet was supplied at each church by the first and second ministers respectively. Mr Macfarlane was translated to the first charge, and in June, 1832, more than six months' vacancy having elapsed, a presentation was executed by the Town Council in favour of Mr Ritch.

168. The second and third charges had never been sanctioned by the Teir Court. The stipend of the third minister had always been paid out of the ordinary burgh funds, there being no special fund set apart thereto.

h. 1837.  
rates of  
R. v.  
B.

A charge was given to the Town Council, by the collector of the Ministers' Widows' Fund, for £100, as vacant stipend accruing from Michaelmas, 1831, to Whitsunday, 1882, and the Council presented bill of suspension and interdict, contending that the enactment of 5 Geo. III. c. 169, founded on by the charger, did not apply to the provision made by them for the third minister. The enactment is in these terms:—"That when any parish in the Church of Scotland becomes vacant by the death, translation, resignation, or deprivation of an incumbent holding the pastoral cure and benefice of such parish, and the vacant stipend thereby arises subsequent to the crop and year 1813, and vacant stipend, in so far as it has heretofore been applicable by the patron to pious purposes, shall thenceforth, and in all time to come, be levied in manner herein mentioned, and paid to the said general collector."

Parties were at issue whether there existed any practice of levying sums, under the name of vacant stipend, in cases similar to that of the third charge in Stirling. The bill was passed, and the suspender pleaded, 1. No parish became vacant by the translation of M Macfarlane, as there was but one parish of Stirling in which the ministers officiated, and the third minister had never had a parish of his own. 2. The third charge was merely a pastoral charge, erected by the authority of the church courts alone, and was not a benefice recognised or erected by the Court of Teinds. But it was to such benefices alone that the statute applied. 3. The statute merely gave the vacant stipend "in so far as it had heretofore been applicable by the patron to pious purposes." But the provision made for the third minister out of the burgh funds, was not of such sort that any sum would, before the statute have fallen under the administration of the patron to be applied to pious purposes, during a vacancy. The Widows' Fund had no right but such as previously was in the patron prior to the statute. The right of the patron to the vacant stipend, arose originally from his having endowed the benefice, and from there being a permanent subject in existence which yielded fruits during the vacancy, and which the patron drew, while there was no incumbent; the patron entering into possession, and reaping the fruits, which for a considerable period he had right to appropriate to his own purposes, but which were afterwards by a series of statutes directed to be applied by him to pious uses, and have now been transferred to the Widows' Fund. The Fund, however, could have nothing which a patron originally could not have claimed. Now here there was no subject yielding fruits; there was merely a contract to provide a minister during his incumbency, and there was no obligation to pay the provision to any party during a vacancy. The patron never had right to such provisions during a vacancy, as is expressly stated in

Forbes, the only institutional writer who touched this question.<sup>1</sup> In regard to the payment of the Ann, that was regulated by the terms of the statute 1672, c. 13, which were very comprehensive in referring to all ministers ; but the application of that statute could not afford a precedent as to a question dependent on the extent of the patron's original right. The suspenders also contended that there was no previous decision, and no practice, to warrant the charge. 4. The stipend should at least be computed only at the rate of £150, as the suspenders were not bound to continue a higher stipend, and the charge should therefore be restricted from £100 to £75.

No. 161  
Feb. 24, 18  
Magistrates  
Stirling v.  
Gordon.

The charger pleaded, 1. Vacant stipend arose in burghs where there were no teinds as well as in landward parishes ;<sup>2</sup> and such stipend always arose when any one of the ministers of a collegiate charge died, or was translated. It was not affected by the circumstance of there being several ministers officiating in an undivided parish, if each held a charge of the nature of a benefice. 2. The third charge in Stirling was permanently endowed, and was a benefice in the sense of the statutes regulating the Ministers' Widows' Fund.<sup>3</sup> 3. The contract under which the Town Council became bound to provide the third charge, on condition of its being revived and instituted by the Presbytery in 1817, was not of a temporary character, limited to the first individual appointed to the charge. It was of a permanent and enduring kind, having reference to the constant endowment of that charge. While an incumbent existed, the annual sum contracted for was payable to him ; and during a vacancy, the annual sum was vacant stipend, subject to the Ann, and subject to the act 54 Geo. III. c. 169. The vacancy was not to become a source of gain to the suspenders in any contingency. And if necessary to go into the practice in similar cases, the charger averred that it existed to a considerable extent in his favour. 4. The minimum of fixed stipend was £200, that being a condition of the institution of the charge by the Presbytery ; having been expressly agreed to by the Town Council before proceeding with the first presentation, and repeatedly acknowledged in their minutes to be the tenor of their obligation. The sum of £100 was therefore correctly charged for.

The Lord Ordinary found " that the third pastoral charge in the burgh of Stirling, being permanently endowed by the Magistrates and Town Council of that burgh, with the consent and under the authority of the Presbytery of Stirling, is to be held as a benefice in the sense of the act 7th Geo. II. c. 11, and other acts relative to the fund for provision of the Widows and Children of Ministers in Scotland : That £75 sterling, being one-half of the permanent annual stipend, which was payable to the

<sup>1</sup> Forbes on Tithes, p. 50.

<sup>2</sup> Magistrates of Dundee, Nov. 18, 1829 (ante, VIII. 66).

<sup>3</sup> Gordon, Feb. 18, 1836 (ante, XIV. 509).

166: last incumbent when he was loosed from his charge, is due to the fund  
 1837. and therefore to that extent found the letters orderly proceeded, an  
 tes of decerned; and found the suspenders liable in expenses."

Both parties reclaimed; the suspenders in so far as they were subject  
 ed in a sum of £75 and expenses; the charger in so far as he had not been  
 found entitled to the full sum of £100.

**LORD COREHOUSE.**—In disposing of this question the first thing to be attended  
 to is the nature of the endowment of the third pastoral charge at Stirling. The  
 Magistrates and Council being satisfied that a third charge was required at Stirling  
 resolved to make an adequate provision, and to apply to the Presbytery to revive  
 and institute the third charge. They did so, and the Presbytery revived it  
 charge, upon the express condition of the Council binding themselves "to make  
 up the stipend of the third charge to £200 per annum." The Council agreed to  
 this condition, and exercised the right of patronage, which they had expressly re-  
 served to themselves in the arrangement, by presenting to the third charge, a  
 revived; and the existence of their obligation to pay a stipend of £200 is repeatedly  
 referred to in their subsequent minutes relative to succeeding ministers. The  
 Council have reaped the full benefit contemplated by them in coming under a  
 obligation for the endowment of the third charge, and I think that endowment was  
 a permanent one. Now I believe it has been settled that ministers are entitled to  
 all the benefits of the Widows' Fund though their stipends are not paid from the  
 teinds; and I think it of no importance, in this question, whether a particular fund  
 or mortification was set apart, yielding annual fruits, as a provision to the minister.  
 There was a permanent endowment, under the contract entered into by the Town  
 Council; an endowment as permanent as the charge itself. I think therefore that  
 the statute, as it applies to any vacancy which occurs by the death, translation, or  
 otherwise, of an incumbent in the benefice, applies to this case, because it is, in  
 the sense of the statutes regulating the Widows' Fund, as much a benefice as  
 the stipend arose from teinds, and clearly as much so, as in the case of any second  
 minister who is not paid out of the teinds. Dealing with this third charge, there-  
 fore, as with a benefice, the only question is whether vacant stipend is not due to  
 the charger, because it is said that nothing would have been applicable to pious  
 uses by the suspenders, if the statute 54 Geo. III. c. 169, had never passed; and  
 that that statute merely grants vacant stipend to the charger "in so far as it has  
 heretofore been applicable by the patron to pious purposes." Now I consider that  
 the statute is to receive a liberal construction, according to the true meaning and  
 intent of its provisions. And it appears to me that these limiting words were in-  
 troduced so as to guard against the Ann being supposed to be encroached upon  
 by the statute in favour of the Widows' Fund; and that the statute meant to con-  
 vey to that fund the whole vacant stipend except what fell under the Ann. If  
 however, the statute was to be construed so as not to give any vacant stipend  
 the fund unless it was such as the patron, but for the statute, would have been  
 bound to apply to pious purposes, it would require more consideration before de-  
 ciding that the suspenders would have been bound so to apply the sum charg-  
 ed for. I incline, however, to think that they would, and that, after satisfying the  
 Ann, they must have so applied the vacant stipend. In regard to the reclaim-  
 ing note of the suspenders, I think therefore it ought to be refused; but in regard

to that of the charger, as it now appears to me that the permanent annual stipend was £200, the interlocutor should be altered to the effect of sustaining the charge for the full sum of £100 in place of limiting it to £75. I must have overlooked the circumstance that the payment of £200 was a condition of the revival of the charge, when I limited the sum as in the interlocutor under review.

No. 166

Feb. 24, 18  
Magistrates  
Stirling v.  
Gordon.

LORD GILLIES.—I think the charge was well-founded for the full sum of £100. I am at a loss to discover upon what ground the Council could propose at any time to reduce the stipend to £150 in the face of their resolution agreeing to the revival of the third charge, and exercising the patronage of it, after the Presbytery had revived it on the express condition that the endowment of the charge should be £200. The suspenders might as well attempt to reduce the endowment to any sum, however nominal, as to reduce it to £150 in the face of that agreement. They never can exercise their patronage by appointing a minister to this third charge, without the condition taking effect, which was attached to the revival of the third charge.

LORD MACKENZIE.—I think that the note for the suspenders should be refused, and that for the charger sustained. I apprehend that a perpetual benefice was instituted when this third charge was revived. It was not merely the appointment of an individual clergyman which was then in question, but the institution of a permanent charge, and this was so distinctly in the view of the Town-Council that they expressly reserved the patronage to themselves. And supposing that they were not duly to exercise that right of patronage to fill up a vacancy, assuredly I do not conceive that the charge would thereby come to an end, but merely that the *jus devolutum* would take place, and the Presbytery would present to the benefice. The suspenders, possessing the right of patrons, are liable to the same obligation with other patrons, not to abuse their right, but to administer it fairly. Suppose that the suspenders, though liable in the stipend, had not retained the right of patronage till now, and that a third party was patron. I think such party would have been entitled to insist, during a vacancy, that the suspenders should not possess the stipend, but should apply it to pious purposes. And although the suspenders be themselves the patrons, that does not diminish their liability in this respect.

LORD PRESIDENT.—I think the interlocutor should only be altered so far as to sustain the charge for the full sum of £100. I look on this third charge as being properly a benefice in the sense of the statutes respecting the Widows' Fund. It was under the agreement between the Town Council and the Presbytery, that the third charge was revived and instituted. No party complained of that agreement, or took the deliverance of the Presbytery to appeal; so that their deliverance had just as much force as if it had been confirmed by the General Assembly. And as to the objection that this is not a benefice because the authority of the Third Court was never interposed, it will be observed that it was not a new charge which was created in 1817, but merely an old charge which was then revived and instituted by the Presbytery. It was made a condition of reviving it, that there should be an annual sum of £200 payable to the incumbent: and though the Town Council appear to have thought they could reduce this to £150, they had no power to do so, and apparently became aware of this themselves. The charge was therefore well-founded, and should be sustained.

Mr. Advocate.

The Court adhered, with the exception of substituting in the interlocutor

168. the sum of £100 for that of £75 sterling; and awarded additional expenses against the suspenders.

1837.

J. and J. N. FORMAN, W.S.—H. INGLIS, W.S.—Agents.

169.

JOHN YOUNG, Suspenders.—*D. F. Hope—Patterson.*

JOHN JOSEPH CHARLES SHERIDAN, and MANDATARY, Chargers.—

*Sol.-Gen. Rutherford—Ivory.*

*Oath on Reference—Extrinsic or Intrinsic.*—1. The acceptor of a bill of exchange referred to the oath of an indorser whether he had paid value or not to the indorser; he deposed that he had paid value, and that he did so "partly in money, partly in professional services, and partly" in agreeing to grant a license to the indorser, for using a certain patent-manufacture invented by the indorsee:—Held that the oath was negative of the reference, and that no part of this statement was extrinsic, because "the point referred, being, value or not? it was of no consequence whether the value was of one kind or another; for example, whether it was given in money, in goods, or in services." 2. Observed that if the suspender wished to have a fuller explanation as to the services rendered, it was his business to have examined the charger more minutely than he did.

1837.

PETER YOUNG of London took out a patent for manufacturing vinegar, papier maché, &c. from mangel wurzel, and, in November, 1834, employed John Young, S.S.C. to sell the patent for him, which John Young did to Robert Liddell and Company of Leith, for a price of £500, and one-sixth of the profits which should arise from the patent-manufacture. In remuneration for his employment, John Young, besides his professional charges, was to receive one-fourth of this price from Peter Young. In January, 1835, Peter Young drew on John Young a bill for £50, as "on account of my agreement with Messrs Liddell and Company of Leith;" and in February, 1835, he drew another bill for £25 as for "value received on account of my patent." John Young accepted these bills, and Peter Young indorsed them to John Joseph Charles Sheridan, manufacturing chemist in London. They were not paid when due, as John Young alleged that they were accepted for the accommodation of Peter Young, who was his debtor; that he had never been paid his fourth share of the price of £500 or his professional charges; and that Sheridan gave no value for the bills, but was merely acting for behoof of Peter Young, with whom he was a copartner in reference to the patent. The bills were protested, and the instruments of protest were, by a clerical error, extended in name of John James Charles Sheridan in place of John Joseph Charles Sheridan. Letters of horning were raised; a charge was given; a bill of suspension was presented, followed by answers, and a reference to the oath of the charger, which was taken on commission, at London, before the error in substituting the name James for Joseph was discovered. On the oath being reported, the bill was passed on caution. The charger then ex-

ew instruments of protest, setting forth his designation correctly, No. 169. letters of horning were also raised, and a charge given ; intima- Feb. 24, 1837. made to the suspender, at the same time, that the previous charge Young v. to be insisted in, and that the charger was ready to pay the Sheridan. incurred under it. A new bill of suspension was presented and and it was conjoined with the first process of suspension, reserv- questions of expenses. Parties agreed to hold the deposition under the first suspension, as possessing the same legal effect as if under the second. The matter referred was thus stated :—" The is not an onerous holder of the bills in question. He never gave e for them to the said Peter Young, and merely holds the said er an arrangement with that individual, his copartner, for the of trying to obtain payment, and thus to defeat the just claims omplainer."

leposition negatived the allegation that the charger was a partner Young, or held the bills for the purpose of defeating any claim as John Young and Peter Young themselves ; and the deponent being ated " If he ever gave any value for the said bills to the said Peter depones that he did." The charger further deponed " That he ve value to the acceptor John Young, for both or either of the said he gave value to the indorser, the said Peter Young. Depones, deponent gave value, partly in money, partly in professional ser- aiding him to complete the patent taken out by the said Peter and partly in a license agreed to be granted to the said Peter for an invention of the deponent's, for an improvement in the ture of malt, for which invention the deponent holds a patent." ath was taken without any party attending for the suspender ; ad received due notice to attend, and had transmitted written in- ories to the Commissioner, which were put to the charger. In e to the terms of the oath, the suspender pleaded, 1st, That the t of value having been given in professional services, and an nt to grant a license as to the malt-patent, was extrinsic, and re- be proved aliunde ; 2d, That if such a statement of value was le, the particulars should have been more fully specified wherein ed value consisted ; and 3d, That the use of the malt-patent was d to have ever been taken by Peter Young, so that it did not e had ever received that item of the value at all. The charger l, 1st, That the question referred was, value or not ; and that he essly sworn he gave value. He was ready to answer all perti- rrogatories as to the kind of value given, and had done so ; but ot liable to do more than this, or to lead a proof of value, whe- nisted in money, in goods, in professional services, or other- ly. The suspender had full notice to attend at the examination, at his own fault if he did not cause every requisite inquiry to be t in reality he had done so, and the deposition was full and



1837. 1837. satisfactory; and 3d, That the value in regard to the malt-patent was stated to be the actual granting of a license to use it, which value was not affected by the circumstance whether Peter Young used the license or not, after obtaining it.

The Lord Ordinary "decerned against the defender, in terms of the libel; found the pursuer liable to the defender in the expenses which were incurred with regard to the first Bill of Suspension, in consequence of the pursuer being erroneously designed in the charge; and found the defender liable to the pursuer in all the expenses subsequently incurred." \*

The suspender reclaimed.

**LORD GILLIES.**—I can have no doubt that the interlocutor should be adhered to. This would be an important case indeed, if it could be shaken.

**LORD PRESIDENT.**—The suspender should have made fuller inquiry as to the nature of the professional services, at the time, if he was not satisfied with the explanation given. The interlocutor is quite right.

**LORD MACMENZIE.**—I am of the same opinion.

**LORD CORNHOUSE.**—I remain of the same opinion as when I pronounced the

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\* "NOTE.—The reason of suspension is, that the pursuer did not give value for the bill in question, which was indorsed to him by Peter Young, and the fact is referred to his oath. He depones, that he did give value to the indorser; and being asked, what the value was? he depones, that 'he gave value partly in money, partly in professional services in aiding him to complete the patent taken out by the said Peter Young, and partly in a license agreed to be granted to the said Peter Young, for an invention of the deponent's, for an improvement in the manufacture of malt; for which invention the deponent holds a patent.' The defender says, that the statement in the oath, with regard to services and the use of the patent, are extrinsic qualities which the pursuer was not entitled to adject. This is plainly a mistake. The present case is not that of an action for money lent, in which the defender, on a reference, admits the loan, but pleads compensation in extinction of it. That is an extrinsic quality; because it would be equivalent to the defender's bringing an action on a separate ground not involved in the first issue, and proving his libel by his own oath. But in this case, the point referred is, value or not? and it is of no consequence whether the value be of one kind or another, for example, whether it was given in money, in goods, or in service. Certainly it could not be relevantly pleaded, that an indorsation was not overruled because the indorsee had been the factor or manager of a company, and received it as part of his wages.

"Then, it is said, that the services are not sufficiently specified, but that was the fault of the defender. He ought to have examined the pursuer more minutely upon the subject. Lastly, the defender observes, that part of the value was for the use of a patent, which the pursuer agreed to give to the indorser; and that it is not stated that the indorser had ever obtained the use of the patent. But the value sworn to is the obligation which the pursuer contracted to give the use of the patent. Why the indorser did not avail himself of that obligation, is a point on which the pursuer was not interrogated, and it is doubtful whether he could have been interrogated on the subject, except to the effect of proving, either that he himself had failed to fulfil his obligation, or that the bargain had been rescinded of consent of parties. No attempt of this kind is made, and, therefore, the Court, looking exclusively to what is sworn, must hold, that value was given for the bill, and that it was the value specified in the deposition."

erlocutor under review. The question referred was, value or not? If the suspender thought that the explanation as to the value was not sufficiently minute, he could have put more particular interrogatories than he did.

No. 169.

Feb. 24, 1837  
Paget v. Earl  
of Galloway.

THE COURT adhered, and awarded additional expenses against the suspender.

J. YOUNG, S.S.C.—J. IMRIE—Agents.

SIR ARTHUR PAGET and SIR JAMES R. G. GRAHAM (late Earl of Galloway's Trustees), Pursuers.—*Anderson.*

No. 170.

EARL of GALLOWAY, Defender.—*Sol.-Gen. Rutherford—Robertson.*

*Entail.*—Held that no improvement-expenditure by an heir of entail is chargeable under 10 G. III., c. 51, against the succeeding heirs, if the expenditure was made while the entail remained unrecorded.

In 1804, John, Earl of Galloway, executed an entail of his estates containing the requisite prohibitory, irritant, and resolute clauses, to render it effectual against creditors so soon as recorded. He died in 1806, and George, Earl of Galloway, made up titles to the estates as heir of entail and provision under this deed. The entail was not recorded until 1823, prior to which period his Lordship had contracted debts to the amount of £293,903. In the following year a private Act of Parliament was obtained, authorizing the sale of the entailed estates, in respect of their being liable to be adjudged for his Lordship's debts, contracted before the recording of the entail.

Feb. 24, 1837  
1st DIVISION  
Ld. Fullerton  
D.

In 1808, and again in 1812, Lord Galloway had given notices under 10 G. III., c. 51, in reference to improvement-expenditure which he intended to make on the estate and on the mansionhouse. Considerable sums were disbursed in these improvements. His Lordship died in 1834, and left a disposition in favour of the Right Hon. Sir Arthur Paget, and the Right Hon. Sir James Robert George Graham, as trustees, conveying to them specially his claim against the next heir of entail for three-fourths of the improvement-expenditure, which was stated to amount to £32,851. The trustees, founding on 10 G. III., c. 51, raised an action against Randolph, now Earl of Galloway, for payment of three-fourths of this sum, so far as not exceeding six years of the free rents of the estates, which, after deducting the interest of debts affecting them, amounted to about £2024. The defenders, besides defences of a special nature, pleaded, 1st, That no claim for improvement-expenditure, which was made on 10 G. III., c. 51, could lie, on account of expenditure which was made while the entail remained unrecorded; and 2d, That all the expenditure on these improvements, was anterior to 1823, and was provided for under the private Act of Parliament, authorizing sales of the estates for payment of the debts of the late Earl, so that if any part of the improvement-expenditure was now allowed to become a permanent charge.



appeared that it was recorded entails, good against creditors and all the world, which alone were regarded; and the enactments corresponded with this. The amount of expenditure which was made chargeable against the next heirs was defined to be, in reference to the subjects improved, an amount equal to four and two years "free rent of the said entailed estate, after deduction of all public burdens, liferents, and interests of debts which may affect the estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed." In order to compute this charge, it was essential to know what debts might affect the estate, so as to deduct the interest, in estimating the free rents. And as these never could be known, where an entail was not recorded, (because then the estate was liable for all the debts of the heir,) it became practically impossible to ascertain the amount of charge against the next heirs. But farther, if the entail was not recorded, and a charge for improvement-expenditure, of the mansionhouse for instance, was made against the next heir, it might happen that the mansionhouse itself should afterwards be adjudged and evicted from that heir, for a debt contracted by the preceding heir-disburser, who had made the expenditure while the entail was not recorded. It would, therefore, be highly unjust, and contrary to the true import of the statute to extend the remedy to unrecorded entails.<sup>1</sup>

The Lord Ordinary "sustained the first plea in law upon the part of the pursuer, and repelled the first and second pleas in law for the defender." \*

<sup>1</sup> Fletcher, July 4, 1826 (ante, IV. 788, or new ed. 795); 2 St. 3, 58; 3 Ersk. 8, 25 and 26; Smollett's Creds., May 14, 1807 (Dicty. v. Tailzie, App. No. 12); Nairne, March 10, 1757 (15605).

\* "NOTE.—The first plea upon both sides raises the question, Whether an heir holding under a strict entail, but unrecorded, is entitled to avail himself of the provisions of the 10th George III., c. 51, in regard to money expended upon improvements? The Lord Ordinary thinks no sufficient grounds are assigned on the part of the defender for refusing that benefit to an heir so circumstanced. The provisions of the statute in question confer certain privileges on 'the proprietors of entailed estates,' who lay out money on improvements according to the regulations there specified. Even in the strictest and most technical language, an estate is justly said to be entailed, although the entail is not recorded, so that the letter of the statute is against the plea maintained by the defender. Looking at its object and spirit, the case appears to be equally clear. Its object was to enable entailed proprietors who laid out money in improvements to raise a right of credit, to a certain amount, of these improvements in their own persons against the succeeding heirs of entail. According to the expression of the statute, it enables such proprietors to become 'creditors to the succeeding heirs of entail,'—an object which could not be effected at common law, whether the entail was recorded or not. It is true that, in this latter case, debts contracted by the heir in possession might be made good against his successors; but that circumstance, which is the main foundation of the defender's argument, affords no well grounded inference in favour of his attempted limitation of the effect of the statute. For, in the first place, the statute was intended not for the benefit of creditors advancing the money laid out in improvements, but for the benefit of the heir in possession, who

1370. The defender reclaimed. The Court called on the pursuers to  
 the interlocutor, without calling on counsel to support the Recl  
 1887. Note. Counsel for the pursuers was accordingly heard.  
 v. Earl  
 of Argyll.

LORD GILLIES.—I think the interlocutor should be altered. The statute 10 Geo. III. c. 51, was passed for the relief of those heirs on whom the fettered entail were effectually imposed, as against creditors and all others. Then recorded entails alone. Where there is no registration of the entail, every one who advances money to the heir, contracts with a person whom the law will not be neither fettered nor protected by an entail in any question with him. But if entails are duly recorded no money could be raised on the credit of the estate, less the remedy of the statute 10 Geo. III. c. 51, applied to them. It is all different where the entails are left ineffectual against creditors, and there, the remedy was not equally required, and has not, I think, been provided.

LORD PRESIDENT.—I am of the same opinion. And I think the other side is well founded also. After getting a private Act of Parliament to pay off Earl's debts, amounting to near £300,000, it appears to me in the circumstances that it would be just a double payment of a part of these debts, if a charge allowed to be good for improvement-expenditure against the present heir.

LORD MACKENZIE.—I think the remedy of the statute 10 Geo. II. applies only to recorded entails, and that every part of the statute shows that it begins by referring specially to entails under 1685, c. 22, and the effect of that statute gives them "when completed and published in the manner directed by the said act," as being "effectual against purchasers, creditors, and others forever." No unrecorded entail can fall under this description; and, indeed, on important respects, an unrecorded entail may be said in law to be no entail. And the reason of the act, when duly attended to, confirms this construction. Where an entail is recorded, then the succession to the estate is for ever fixed to the heirs of entail in their order, and there is obviously justice in enabling the heir in possession who makes improvement-expenditure on the estate, to himself, by a certain procedure, the creditor of succeeding heirs for a certain proportion of that expenditure. If they are subject to that burden, they are benefited by receiving the estate as improved. But if the entail was not re-

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might lay out his own money for that purpose, which money, in the case of an unrecorded entail, he never could make good against a succeeding heir through the intervention of the statute. 2dly, If the improvements were made by borrowed money, the benefit of the statute, even in the case of an unrecorded entail, is equally apparent. For if the entailed proprietor expressly burdened the estate with the debts so contracted, he must have exposed himself to a decree of irritancy, and if he did not expressly burden the estate, then his separate personal estate must have been made available for them, either directly or in the form of relief, at the instance of the creditors, or in the form of relief, at the instance of the succeeding heirs, so that, even in the case of an unrecorded entail, there is no ground for saying that the provisions of the statute were superfluous or unavailing. On the contrary, they evidently confer on an entailed proprietor, whether the entail is recorded or not, an important benefit, viz. that of securing a right of credit against his successors, for a certain amount of the improvement on an estate understood in law to be his own,—an object which clearly can be attained at common law."

then the heir-disburser may leave debts behind him, all of which will affect the estate, and may cause it to be wholly evicted from the succeeding heir. It is impossible therefore to render him the creditor of that succeeding heir for improving an estate or a mansionhouse, which estate or mansionhouse may itself be carried off at any time from such succeeding heir for the debts of the heir-disburser. And there is another clause of the statute which shows that it necessarily refers to recorded entails alone. It is provided by § 15 that a party holding a decree against the next heir, for improvement-expenditure by his deceased predecessor, shall “in all questions of competition for the rents of the entailed estate” “be preferred to the other creditors of the heir of entail who has succeeded to the estate.” Now if the entail was not recorded, it would not be merely on the rents of the estate that such a competition would arise among the creditors; and it seems evident that unless recorded entails alone had been contemplated, a very different phraseology would have been used in the statute. On the whole I am decidedly of opinion that the benefit of the statute extends to recorded entails alone.

LORD COREHOUSE.—I am entirely of the same opinion. It was once held that a judge could not argue from the preamble of a statute, as to the import and effect of the body of that statute; but that view has long since been altered, and it is now admitted that though the statement in the preamble will not control or defeat a substantive enactment in the body of the statute, it is nevertheless an authentic source from which to elucidate its object and meaning. The preamble of the statute 10 Geo. III. c. 51, explicitly refers to entails under 1685, c. 22, and to entails “completed and published in the manner directed by the said act,” so as to be “effectual against purchasers, creditors, and others whatsoever.” I consider, therefore that the claim of the pursuers is without any foundation in the words of the statute; and that, on principle, a claim like theirs was never meant to be sanctioned by the legislature. The object of the statute was to encourage heirs of entail to make improvements on the entailed estates. From the brief and limited interest which an individual heir enjoyed under a strict entail, it was equitable, when he made improvement-expenditure, to give him some relief against succeeding heirs who were sure to reap the benefit of it. But it would not have been equitable to allow such expenditure to be reared up as a debt against them, unless they were secured in the enjoyment of the subject improved, which they could not be in the case of an unrecorded entail. After the death of the heir-disburser, any creditor of his might by a special adjudication sweep away the mansionhouse, or estate, with all its improvements. I cannot therefore see any ground for subjecting the heirs succeeding to an heir-disburser, in liability for improvement-expenditure made by him while the entail was unrecorded. And there is no hardship in this, for any heir may record the entail at any time; and sibi imputet if he does not choose to do so. I am, therefore, decidedly of opinion that the interlocutor should be altered.

THE COURT were understood also to concur with the Lord President as to the separate defence founded on the circumstances under which the private Act of Parliament had been passed for paying the late Earl's debts. Their Lordships accordingly altered and assoilzied the defender, with expenses.

171.

1837.

1837.

MRS DARLING and CHILDREN, Pursuers,—G. G. Bell.  
JAMES ADAMSON, Defender.—M'Neill—H. Bruce—Neaves.

*Sale—Warrandice.*—Trustees were directed, after the lapse of a specified period, to expose certain lands to sale, and to bind the representatives of the truster in absolute warrandice; the sale did not take place at the time appointed, delays having been interposed chiefly at the instance of one of the trustees; in an action to have this trustee ordained to concur in a sale, the Court found that the trustees were bound to proceed immediately to expose the lands in terms of the trust-deed; thereafter articles of roup were approved of by the Court containing a clause of warrandice in terms thereof; objections having been stated by intending purchasers to the sufficiency of the title to the lands, which were not without foundation.—Held, that the lands must be exposed to sale, under the conditions as to warrandice in the articles of roup, and that it was incompetent in the circumstances to take measures, by declarator or otherwise, for removing the objections to the title.

1837.

By  
Division.  
Jeffrey.  
B.

By trust-deed dated in 1805, the late Mr Stormonth authorized and directed his trustees, amongst whom were the pursuer, Mrs Darling, and the defender, Mr Adamson, after the lapse of ten or twelve years, to dispose of his lands of Inverchroskie and others by private sale or public roup, to grant the necessary deeds, and "to bind the truster in absolute or other warrandice, as the nature of the right should require." Stormonth thereafter died. Some years having elapsed after the period mentioned in the deed had expired, and no sale having taken place, Mrs Darling and her husband raised action against the other surviving trustee, Adamson, concluding to have him ordained to concur with them in selling the lands, as provided for by the deed, and to do or cause to be done whatever should be necessary "for rendering the title of the trustees valid and sufficient, in case the title under which they at present hold the lands should turn out in any respect insufficient or objectionable." The Court found (Nov. 17, 1830) that Adamson was bound to proceed immediately to sell the lands in terms of the trust-deed, and with the benefit of the warrandice thereby authorized. Steps were taken accordingly, but the sale was delayed from various causes, particularly from doubts as to the trustees' ability to give a good title to purchasers. Articles of roup were prepared, and approved of by the Court (July 9, 1835), which provided that the trustees should be bound and obliged to grant a valid disposition of the lands to a purchaser, containing, inter alia, a "clause of warrandice from fact and deed as to themselves, and binding the heirs and representatives of the said James Stormonth in absolute warrandice."

A remit was made by the Lord Ordinary to Mr Richard Mackenzie, W.S., to report as to the objections to the title stated by intending purchasers. The reporter was of opinion that the title to Inverchroskie was doubtful, unless the defect should be held to have been cured by prescription, but that as Mr Stormonth's representatives were liable in absolute warrandice, this doubt might safely be disregarded.



Delays being still opposed by Adamson to the sale, the pursuers, after being allowed to state the circumstances in a minute, moved the Lord Ordinary to remit to Mr Mackenzie to re-expose the lands of Inverchros-  
 No. 171.  
 Feb. 24, 1835.  
 Darling v. Adamson.  
 kie at a reduced upset price. This motion was opposed by Adamson, who maintained that it was still competent and was now proper that steps should be taken for removing what objections might exist to the title to the lands in question, and that a remit should accordingly be made to Mr Mackenzie to take the necessary measures for this purpose.

The Lord Ordinary pronounced the following interlocutor and note : \*  
 —“ The Lord Ordinary having resumed consideration of this minute, with the answers thereto, and heard parties thereon, and on the motion of the pursuers for a renewed warrant, or order to sell, and made avizandum with the whole process, finds, 1mo, That it is not now competent, consistently with the final interlocutors in the cause, and especially with the interlocutor of 9th July, 1835, approving of the amended articles of roup, and the report of Mr Jollie thereon, to order (or allow) the lands to be exposed under any other conditions or provisions as to warrandice, or otherwise, than those distinctly expressed in the articles of roup, thus finally approved of ; or at least that it is not competent to vary or depart from these conditions, except on the ground of such a change of circumstances as might absolutely require such a variation : Finds, 2do, That the legal objections to which it is surmised in the answers to the minute, that the title to the lands may be liable, can in no way be considered as such a change of circumstances, in respect that the whole facts and circumstances on which such objections are raised, have confessedly been from the very beginning in the knowledge of all the parties : Finds, 3tio, That the lands must therefore be exposed under the condition of the purchaser being entitled to the warrandice specified in the said articles of roup, and that

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\* “ The Lord Ordinary conceives that he has no power to vary the articles of roup, or the obligations of the parties under them, after they have been adjusted *in contraditorio*, and approved of by final interlocutors : But he thinks it right to say that, if it were open to him so to vary them, he would not be in the least degree disposed to do so. The trust-deed empowers the trustees to bind the trustee, the late Mr Stormonth himself, in absolute warrandice to purchasers ; and since his death, the only equivalent security is consequently the whole body of his representatives. But, wherever representatives are bound or liable as such, it is understood to be certain that they are all liable *singuli in solidum* to third parties, though entitled to relief rateably *inter se*. As Mr Adamson appeared to dispute this maxim, or at least the application of it to his case, it has been thought right to express it in the interlocutor ; and it will be borne in mind that, besides his fourth share of the lands now in dispute, he has succeeded to a very large portion of Mr Stormonth's property, in which the other parties have no participation. As he intended a purpose to exercise his undoubted right to take this interlocutor to review, the Lord Ordinary thought it best to postpone the day of sale till after the time when his reclaiming note, if he shall be advised to present one, must be lodged ; and at the same time, for the sake of the other parties, to put the other disputed matters between them into the shape of findings, on which a final judgment may be at once obtained.”

171. the disposition to be granted to the said purchaser in terms thereof must accordingly contain a clause binding the trustees as such in warrandice from fact and deed, and the representatives of the late Mr Stormonth in absolute warrandice : Finds, 4to, That the import and effect of the latter part of this clause will be to bind not only the parties to this action, but all who truly represent the late Mr Stormonth in the character of successors titulo lucrativo, or otherwise, singuli in solidum or jointly and severally, to the said purchasers in the first instance : But finds, 5to, That this joint liability in respect to the purchasers will not in any degree affect or impair the right of any of the said representatives, who may be subjected, or sought to be subjected therein, in the event of eviction, to be relieved by the other representatives, rateably or in proportion to the shares they may have obtained of Mr Stormonth's succession : And farther, and in respect that the attempt to dispose of these lands by private bargain has not succeeded, and that the sale thereof has been very long and inconveniently delayed, remits of new to Mr Richard Mackenzie, to re-expose the said lands of Inverchroskie and Whitefield, at the former upset price of £15,000, and that upon the 3d day of September next to come (if not previously disposed of by private bargain, with the consent of both parties), in terms of the articles and conditions of roup above-mentioned, with such variations only as to the terms of entry and payment of the price, as may be necessary in consequence of this change in the time of sale."

Adamson reclaimed and contended that there was nothing incompetent in having the title put in a proper state before the lands were sold, all he required being that the title should be mended, not that the articles of roup should be in the least altered, or the clause of warrandice struck out; that it was very reasonable that the trustees should have it in their power to sell with a good title, if the Court could enable them so to do; and that it was not expedient to turn the sale of the lands into a matter of speculation and dispose of them at a lower price than would otherwise be given, in consequence of the risk of the title being bad.

The pursuers answered that according to the trust-deed of Mr Stormonth the lands should have been sold in 1807; that the defender had no interest in the matter except as trustee, and as such he was not entitled to state any objection but was bound to sell in terms of the deed and with the warrandice thereby conveyed; and that the question of warrandice was already settled by the interlocutor of 17th November, 1830.

LORD GLENLEE.—I take it to be finally settled that by the articles of roup absolute warrandice must be given by Mr Stormonth's representatives; and it is premature to say how the warrandice when incurred may strike against different individuals. As to the title, I have doubts about the incompetency of stating an objection to it if the objection be a good one. Supposing the people on taking advice are told that the title is not good, I am not sure that the defender will

justified in making this demand, especially seeing the Lord Ordinary has No. 171.  
 d to Mr Mackenzie to report on the objection to the title. He has reported  
 s that the objection to the title of Inverchroskie is not yet obviated by pre- Feb. 24, 1837.  
 n. He thinks that an action of declarator would be all that is necessary, Darling v.  
 it would not be advisable to stir. But can we force people to be prudent Adamson.  
 their will?

D MEADOWBANK.—I have considerable doubt. It would be strange if we  
 compel parties to go on with the sale in the face of an objection to the title ;  
 m not sure whether old Stormonth did not anticipate all this when he order-  
 trustees to expose the lands to sale and absolute warrandice to be given.  
 w the state of his own title and probably was aware of the objection, and  
 made the trust-deed in these terms, binding himself and his heirs in absolute  
 lice. I am inclined to think that the interlocutor of Court in 1830 has  
 the point that the sale is to take place immediately. At the end of so long  
 I have difficulty in saying that any farther delay should be allowed. An  
 of declarator, which is the remedy contemplated for removing the objection,  
 ring a hornet's nest about these parties.

D MEDWYN.—I also have doubts. The defender is both a trustee and bene-  
 interested in the deed ; and as there now seems to be no great risk in the  
 the title, and this question is brought forward at so late a period,—the very  
 which has taken place tending to remove the risk, I am not inclined to accede  
 emand. I agree with Lord Meadowbank that Stormonth must have been  
 of any objection to his title, and I also think that the defender must have  
 of it. At this late hour, therefore, I am not inclined to listen to his proposal.

D JUSTICE-CLERK.—I had from the first an impression in favour of the in-  
 or. Why was not this objection brought forward at an earlier period, when  
 have been put with more force ? The matter just comes to this, that it  
 for the parties who make offers to consider what abatement they should  
 their offers in consequence of the risk. Looking to the whole circumstan-  
 ink there is little risk run ; and considering the provision in the trust-deed  
 lute warrandice, it seems clear that this objection could not have escaped  
 ce of any of the parties concerned. I am for adhering to the interlocutor.

D GLENLEE.—One thing reconciles me to the opinion of the rest of the  
 viz. that the trustees could not have considered it necessary to perfect the  
 ewise they would themselves have proceeded to raise a declarator. So we  
 air own confession that they were satisfied that things should just remain as  
 re, and that it was not necessary to take this step.

THE COURT adhered to the first four findings of the interlocutor, and recalled  
 the fifth finding as premature, reserving all questions of expenses.

J. S. DABLING, W.S.—D. TURNBULL, W.S.—Agents.

172.

1837.

EDWARD HENRY, Pursuer.—*D. P. Hope—A. McNeill.*WILLIAM MATHER, Defender.—*Patison.*

*Summons—Personal Objection—Process.*—The second year of the reign of Geo. IV., ended on Jan. 28, 1822: A petitory summons for payment of an account, raised in name of Geo. IV., bore in gremio to be "given under our signet, at Edinburgh, the 27th day of January, in the second year of our reign, 1823;" it also bore this marking, "27th Jan. 1823," in the hand-writing of the under-keeper of the signet; an execution, dated "twenty-seventh day of January, eighteen hundred and twenty-three years," was indorsed on the summons, citing the defender to the "twenty-fifth day of February next to come:" peremptory defences were lodged denying the debt, and not objecting to the regularity of the summons; and various procedure followed, at long intervals, during a space of above 10 years, after which the defender objected that the summons was a nullity, in respect of a fundamental error in the date of signeting, as the year of the King's reign was stated to be the "second," whereas the year of grace was stated to be 1823;—Held that, if a summons bore one distinct date, in reference to the King's reign, or the year of grace, an error in the other date did not necessarily amount to a nullity, though it might occasion ambiguity, and found a dilatory plea, if timefully stated: that, in the whole circumstances, the defender had recognised the summons as bearing the date of Jan. 27, 1823, as its true date, and that he was now barred from recurring to any objection in reference to the date.

1837.

FISHER.

Horton.

1.

EDWARD HENRY, flesher in Edinburgh, raised an action before the Court of Session, against William Mather, also flesher there, concluding for payment of an account. The summons ran in name of Geo. IV., and at the end it bore these words, "Given under our signet, at Edinburgh, the 27th day of January, in the second year of our reign, 1823." It was signed "John Grahame," and there was a date prefixed, in the hand-writing of the under-keeper of the signet, which was "27th Jan. 1823." The warrant of citation, agreeably to the style then in use, authorized Mather to be charged, on 27 days' warning, to compare before the Lords, "upon                      day of                      next to come." There was an execution indorsed on the summons, which bore date the "twenty-seventh day of January, eighteen hundred and twenty-three years," and cited Mather to appear on "the twenty-fifth day of February next to come." The execution referred to the within written libelled summons, but did not specially recite the date of the summons. The summons was called in Court on May 16th, 1823. It was taken out to see, and on 24th May, was returned, with peremptory defences, denying that the debt was due. It was then enrolled in the ordinary action roll, and on 30th May a debate took place, according to the existing practice. The Lord Ordinary pronounced this interlocutor: "Having heard parties' procurators, appoints the pursuer, within eight days, to give in a condescendence, framed in terms of the act of sederunt, of the facts and circumstances which he avers and offers to prove in support of his libel." The action was allowed to fall asleep without any condescendence being lodged. Henry brought a waking in 1832, which was taken out to see, and returned without defences. In March, 1833, as the former

rdinary had been removed to the Inner House, Henry petitioned No. 172.  
 mit to a new Lord Ordinary (Fullerton), which was duly intima-  
 Mather's agent. On March 8th, 1833, the action was remitted to Feb. 25, 1837.  
 Fullerton, after which it again fell asleep, without any farther pro- Henry v.  
 being had in it. Henry brought another waking in March, Mather.

which was taken out to see, and returned without defences on May 5. Henry now lodged the condescendence which had been or-  
 y the interlocutor of May 30th, 1823, and, having enrolled the  
 he Lord Ordinary, on Jan. 16, 1836, pronounced this interlocu-  
 Holds the process as awakened, in virtue of the summons of wa-  
 produced, and appoints answers to be lodged to this condescend-  
 within fourteen days from this date." Mather lodged answers, as

Henry then applied for an order to revise the condescendence  
 vers, to which Mather took the objection, that the whole proce-  
 s funditus null ab initio, in respect of an error in the date of the  
 s, which was as fatal as an error or erasure in a date in an instru-  
 sasine. It was stated in words, and in gremio of the summons,  
 been given under the signet in the "second" year of the reign  
 ge IV., which ended on 28th January, 1822. But the summons  
 e to be given under the signet on 27th Jan. 1823, and these con-  
 y dates were destructive of each other. The summons was,  
 e, in the same situation as if it were totally without date, in which  
 was a mere nullity, and could not be sustained to any effect what-  
 And in regard to the subsequent procedure, that could not cure a  
 nullity, which had the necessary effect of placing parties on the  
 ting as if they attempted to dispense with a summons altogether,  
 e into Court spontaneously; which was altogether incompetent.  
 ver, any one of the two dates on the summons could prevail over  
 r, it was that which was written in words at length, and purported  
 ss the "second" year of the reign; and so it had been decided.<sup>2</sup>  
 his date was above a year and day prior to the execution, the  
 s had fallen, as a warrant of citation, and there was no legal cita-  
 r given; and on that ground also the subsequent procedure was  
 nwarrantable as if it had followed on a summons having no date

r answered that, since there was a discrepancy between the two  
 the year of grace, and the year of the King's reign, as given in  
 nons, which arose from a clerical error, there might have been  
 taking an objection, if this had been timefully done. But there

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<sup>1</sup> Feb. 13, 1835 (ante, XIII., 461.)

<sup>2</sup> March 5, 1829 (ante, VII., 547); Cooper, July 4, 1833 (ante, XI.,

April, June 28, 1826 (ante, IV., 766; new ed. 774); Cumming, Nov.  
 (ante, XII., 61.)

172. was no true analogy between this case and that of a sasine; and the error here was of that nature which might be cured by the consent of parties.  
 1837. The defender had lodged peremptory defences, without taking any objection, and, after so much lapse of time and repeated wakenings, had lodged answers to the pursuer's condescendence before objecting, so that he was now as effectually barred by his acts and deeds from taking the objection, as if he had barred himself by an express writing from doing so.

Minutes of debate were ordered, after which, the Lord Ordinary, "in respect that no objection to the summons was originally stated by the defender, that peremptory defences were given in, and various other steps of procedure have taken place during a course of years, inconsistent with any other supposition than that the defender recognised the summons as bearing the date of the 27th day of January, 1823,—Repelled the objection, and in respect the objector declined to acquiesce, found him liable in expenses to the pursuer." \*

Mather reclaimed.

LORD GILLIES.—The interlocutor is quite right. The blunder in the summons did not amount to a nullity, and as the defender, in place of availing himself of it, lodged peremptory defences, he waived his right of objecting, and cannot do so now.

LORD PRESIDENT.—I am of the same opinion. After all the procedure which

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\* "NOTE.—In this case, the summons proceeds in the name of 'George the Fourth,' &c. and the date is in the following terms:—'Given under our signet, the 27th day of January, and second year of our reign, 1823.' It is signed, 'John Grahame,' with date prefixed, 27th January, 1823, and the execution bears the same date. As the second year of the reign of George the Fourth terminated on the 28th of January, 1822, there is clearly a disagreement between the date of the summons, by reference to the year of the King's reign, and the date in figures 1823. There is, therefore, an error in either the one or the other; and had nothing farther taken place upon this summons, and the objection been originally stated, the Lord Ordinary must have been bound by the decision, *Cooper v his Creditors*, 4th July, 1833, to hold that the date, by the year of the King's reign, was the overruling date, and that an error in it could not be remedied by a reference to the subjoined date, by the year of God. But here no objection was taken to the date; peremptory defences were given in, and various procedure took place absolutely inconsistent with any other supposition, than that the defender understood the 27th of January, 1823, to be the true date of the summons, and that the error lay in a misstatement of the year of the King's reign. As the summons apparently contained two dates, according to one of which, the defender was not bound to make appearance, while, according to the other, he was so bound; and as he did choose to make appearance without stating any objection, the Lord Ordinary must hold him to have admitted, by implication, that the 27th of January, 1823, was the true date; and as there seems no reason to question that this is a point upon which an admission may validly be made, the Lord Ordinary does not think, that after a lapse of ten years, and after all the procedure has taken place, the defender can be allowed to invalidate the whole of that procedure by the critical objection in point of form, which, if competent at all, ought to have been stated at the outset, and which evidently cannot receive effect now, without the risk of very great injury to the pursuer."

was taken place under this summons, it is quite out of the question to allow the No. 175  
defender to plead this objection now.

**LORD MACKENZIE.**—I concur. In the summons, as it originally stood, there Feb. 25, 18  
was an ambiguity as to its true date. But if the defender knew it to be accord- Campbell v.  
ing to the truth of the case that the summons was signeted in the third, and not Campbell.  
in the second year of the King's reign; and that 27th January, 1823, as stated on  
the summons, was the actual date of signeting, there was nothing to prevent him  
from appearing and admitting the summons to be what it really was. He was not  
bound to take advantage of the clerical error, and if he waived it, he just did what  
my honest litigant might very well do. In the circumstances I think his conduct  
did amount to a waiver of the objection; and as it was an objection such as he  
might completely waive, he cannot now be permitted to recur to it.

**LORD CORNHUSE.**—If the want of either of the two dates in a summons re-  
ferring respectively to the King's reign, and to the year of grace, were a nullity,  
the plea of the defender might still be in time, and it might be *para judicis* to re-  
fuse to sustain procedure on such a summons. But there is no such nullity. This  
case is different from that of an instrument of sasine, in which it has been held  
essential to have these two dates inserted, and both of them accurate. That was  
so decided consistently with the immemorial practice for centuries. But although  
it is the common practice in summonses to express a two-fold date, it is enough if  
a summons bears one distinct date, and there is no nullity although there be only  
that one. When this summons came first here, the defender might have said that  
one of the dates was right, but the other was wrong, and he could not tell which  
was right and which was wrong. If he had maintained this in limine, it would  
have been a good dilatory plea. But he did not do this. He pleaded peremptory  
defences; and procedure has followed, at intervals, during a space of about 10  
years, so that it is impossible for him now to take the objection, just because the  
error did not amount to a nullity, and he by his conduct has waived the right of  
objecting, which would have been originally in his power.

THE COURT adhered, and awarded additional expenses against the reclamer.

R. JOHNSTON, W.S.—J. PATISON, Jun. W.S.—Agents.

Mrs SUSANNAH CAMPBELL, and HUSBAND, and OTHERS, Pursuers.— No. 173.

*D. F. Hope—Thomson.*

CHARLES CAMPBELL and TRUSTEES, Defenders.—*M'Neill—Patton.*

**Record—Process.**—Circumstances in which the Court recalled the interlocutor  
of a Lord Ordinary, making *avizandum* with a process, preparatory to closing the  
record; and remitted to his Lordship to allow a farther revival of papers, and to  
use any diligence which might be necessary for that object.

In May, 1835, Mrs Susannah Campbell of Sonachan, with concur- Feb. 25, 1837  
one of her husband, as one of the substitute heirs under a deed of en- 1st Division  
tailed, raised an action, along with other substitute heirs, to declare an in- Ld. Fullerton  
terdict, and forfeiture of the estate, against Charles Campbell of Combie, 2.  
and in possession. Defences were lodged in June, 1836. This was



173. followed by a condescendence lodged at the second box-day in the autumn vacation; by answers on 5th December; revised condescendence (1837. on 15th January, 1837, and revised answers on 5th February. The pursuers then moved for avizandum, preparatory to closing the record, which was met by the defender with a motion for a diligence, with a view to a farther revisal. The Lord Ordinary "refused the motion, *hoc statu*, and made avizandum with the process preparatory to the parties closing the record." \*

The defender reclaimed, and prayed for a diligence against havers, or at least for permission to re-revise his answers.

It was explained to the Court, that owing to the sudden death, in autumn, of the agent who was originally employed to conduct the defence, and owing to the confusion in which his papers were left, the defender had been exposed to unusual difficulty in making up the record; and that very recently, a large mass of papers had been sent to the new agent, the inspection of which had suggested the necessity both of re-revising, and of asking for a diligence. The defender also maintained generally, that considering the very important interest at stake, and that only one revisal had yet been allowed, he was entitled, independently of any specialities, to a farther revisal.

#### THE COURT, and especially LORDS MACKENZIE and COREHOUSE,

\* "NOTE.—It has been determined in various cases, that there is no absolute incompetency in granting, during the preparation of the record, a diligence for the recovery of writings, which might be recoverable after it was closed, in *modus probationis*. The ground upon which this has been done is, that the production of the writings was necessary in the particular circumstances of the case, to enable the party to make his averments.

"Even as so limited, the practice frequently leads to great delay, and to great unnecessary prolixity of statement.

"But the present case is very different. Every party is bound to know at least whether he is enabled to make his averments or not. Now, here the defender answered the condescendence and revised his answers without any call for writings, and it was not till the record was completed by the giving in of his revised answers, that he met the motion of the pursuer for avizandum with a motion for a diligence, without alleging any circumstance newly emerging or coming to his knowledge as the ground for such an application.

"The abuse of the power of revisal is already become an intolerable grievance. It too often happens that the parties take no very serious consideration of the statements on which they ultimately mean to rest, until they have exhausted all the epithets, simple and compound, by which their multiplied pleadings can be designed.

"But the abuse would be increased tenfold if the present application were sanctioned, and if a party, after admitting by the clearest implication that the production of writings was not necessary to enable him to prepare the record, were to be held entitled to demand a diligence, on the simple statement that it might possibly enable him to amend or alter those averments on which he had already put the case.

"The defender may ultimately get the production now sought in *modus probationis*, but the Lord Ordinary is clearly of opinion that his demand must *hoc statu* be refused."

expressed their concurrence in the general observations of the Lord Ordinary in his note. But, in the particular circumstances of the case, their Lordships held it expedient to recal the interdictor, and remit to the Lord Ordinary to allow a farther revisal, and to grant such diligence as might be necessary for that purpose.\*

No. 173.  
Feb. 25, 1837.  
Macgregor v.  
Macgregor.

J. W. MACKENZIE, W.S.—H. GRAHAM, W.S.—Agents.

ROBERT MACGREGOR, Petitioner.—*G. G. Bell.*  
MRS JEAN HOWIE or MACGREGOR, Respondent.—*R. Thomson.*

No. 174.

*restment—Aliment—Husband and Wife.*—The wife of a retired barrack-r, living in separation from her husband, had been found entitled, by decree of the Commissaries, to an aliment of £40 yearly out of his pension, which was regularly paid; having arrested her husband's funds in security and for payment of annuity, the Court recalled the arrestments, on the husband producing a discharge by the wife of the sums of aliment already due, together with an assignation in her favour authorising payment of the £40, and a certificate by the provost-marshal in the barrack department that this allowance would be made good to

the QUEL of the case reported ante, XIV. 707.

After the arrestments used at the instance of the respondent, Mrs Macgregor, had been recalled (March 11, 1836), various communings took place, without any result, in regard to the security to be given by the husband, the petitioner Macgregor, for payment of the yearly aliment of £40 awarded by the Commissaries. No sum of aliment was past due, and Macgregor was in solvent circumstances. Thereafter Macgregor again used arrestments in the hands of Sir William Pines and Company, “in security and for payment of the foresaid aliment of £40, at the terms and in the proportions specified in the Commissaries’ decret;” and she followed up this diligence by an action of coming.

Macgregor then presented a petition, praying for recal of the new arrestments, “and that without caution, or at least either upon the petitioner granting a proper authority, so as to enable the said Jean Howie Macgregor to uplift the pension due to him, to the extent of the an-

In the course of the discussion, LORD GILLIES took occasion to repeat a censure which his Lordship has frequently passed, on the omission to print the dates of the decrees or documents laid before the Court. His Lordship also expressed his disapprobation of a suggestion by the Dean of Faculty, that the whole series of interdicts pronounced by a Lord Ordinary, in the Outer House, should be printed and laid before the Court, along with a reclaiming note, as it was often important that the Court should thus see the previous history of the case. The other Judges concurred to concur with Lord Gillies in regard to both of these points.

174. nuity claimed by her, or upon the petitioner finding caution for the annuities, on account of which the arrestments complained of have been used." *Major v. Major*, 1837.

*Major v. Major*.

In support of the prayer of his petition, he pleaded—

1. The arrestments were incompetently or unwarrantably used, in respect no aliment or annuity was due at the date of the arrestment, whilst the petitioner, as the debtor, was neither insolvent nor vergens ad inopiam. The cases of *Macdonald*<sup>1</sup> (Jan. 15, 1811), and *Lockhart v. Sharp*<sup>2</sup> (Nov. 13, 1828), where arrestments for aliment at the instance of wives against their husbands were sanctioned by the Court, differed from the present case in so far as the husband was either insolvent at the date of the arrestments, or in such circumstances as fully justified an arrestment either for arrears or for future aliment.

2. Mrs Macgregor's arrestments are, in the circumstances, unnecessary, nimious, and oppressive.

Mrs Macgregor in answer contended, inter alia, that the arrestments complained of were perfectly competent and regular, having been used in execution for a debt constituted by an extracted decree, for which Macgregor was liable from the date of that decree, though it was exigible only for the periods and at the terms specified therein; that she was entitled to be adequately secured in her annuity, in default of which security the present diligence had been used.

THE COURT were of opinion that the arrestments ought to be recalled, but that the respondent was entitled to security for the future payments of her aliment; and accordingly pronounced the following interlocutor:—

"The Lords having considered this petition with the answers and heard counsel thereon, upon the petitioner producing a discharge by the respondent of the sums of aliment already due, together with an assignation or other proper deed in favour of the respondent, by which she will be duly authorised and enabled to obtain payment of £40 yearly, out of the pension receivable by the petitioner as a retired officer in the Barrack department of the army, with a certificate or other document by the proper officer in that department that the said allowance of £40 will be made good to the respondent, and that by two half yearly payments, recall the arrestments complained of and decern."

SCOTT, RYMER, and SCOTT, S.S.C.—W. HUNT, W.S.—Agents.

<sup>1</sup> F.C.

<sup>2</sup> Ante, VII. 1.

ANDREW AITKEN, Pursuer.—*Sol.-Gen. Rutherford—J. Anderson.*

JAMES FINLAY and OTHERS, Defenders.—*D. F. Hope—Penney.*

No. 175.

Feb. 25, 1837

Aitken v.  
Finlay.

**Reparation.**—A party executing diligence on the regular decree of a competent court cannot be sued for damages, although the decree should be ultimately found to be erroneous, and although steps had been taken at the time of using the diligence for bringing it under reduction.

THE pursuer Aitken brought an action before the Magistrates of Glasgow, Feb. 25. 1837 against the defenders Finlay and Nelson, which was decided in favour of the defenders, and decree for expenses allowed to go out in name of Barlas, their agent. Prior to the decree for expenses being obtained, Aitken had taken steps for bringing a reduction of the judgment of the Magistrates, the summons in which was executed 8th March, 1834. Barlas having extracted his decree, charged Aitken upon letters of caution raised thereon; of which charge a bill of suspension was passed, but on caution only, and it subsequently fell from no caution being found. Thereafter, letters of caption having been taken out, Aitken was incarcerated on the 18th June. He then presented a bill of suspension and liberation, which was remitted by the Inner House to be passed upon juratory caution; and he was liberated from prison accordingly before the middle of July. The action of reduction above-mentioned was proceeded with, and on 17th February, 1835, the Lord Ordinary reduced the Magistrates' decree. His Lordship's interlocutor was acquiesced in.

In these circumstances Aitken raised action against Finlay and Nelson, and also against Barlas, narrating the grounds of his action before the Magistrates of Glasgow, the proceedings had therein and in the subsequent process of reduction, the steps of diligence instituted by Barlas, and his incarceration, and alleging that "the pursuer's imprisonment and detention in jail were wrongous, illegal, and oppressive, in so far as there is no just claim or debt due by the pursuer to the said defenders, or either of them; but, on the contrary, the defenders Finlay and Nelson are largely indebted to the pursuer on the transaction out of which the proceedings arose;" from which proceedings and imprisonment he averred that he had suffered injury; concluding to have the defenders ordained to make payment of a sum in name of damages and solatium.

In defence against the action it was maintained, 1st, That the proceedings complained of afforded no relevant ground for a claim of damages, the defenders being legally entitled to use them, and they being perfectly regular. 2d, That in regard to Finlay and Nelson the claim of damages is farther excluded on the separate ground, that as the decree for expenses in question was obtained and followed out by Barlas for his own behoof, they could not in any shape be made answerable for the consequences.

175. A record having been made up and the cause remitted to the jury, the following draft-issue was prepared, the defenders contending before the jury-clerks that the pursuer was not entitled to have any issue sent to the jury; "Whether, on or about the 18th day of June, 1834, the defenders, or any of them, wrongfully apprehended and imprisoned in the jail of Glasgow, or wrongfully caused to be apprehended and imprisoned in the said jail, or wrongfully detained, or wrongfully caused to be detained the pursuer in the said jail from on or about the said day till on or about the day of July, 1834, or during any part of the said period, to the loss, injury, and damage of the pursuer."

The cause having returned before the Lord Ordinary, the defender moved his Lordship to disallow the issue, whereupon minutes of debate were ordered as to the relevancy thereof and generally of the action of damages.

*Pleaded for the Pursuer—*

Where a party has carried on judicial proceedings unsuccessfully, he is virtually subjected in damages by having expenses awarded against him, damages and expenses being synonymous terms;<sup>1</sup> but in point of principle the pursuer is as much entitled to reparation for the damage he has sustained by the wrongous imprisonment suffered by him on a decree ultimately found to be bad, and still more as the diligence in question was put in execution while he was in course of bringing under review the proceedings on which it was founded. It is no sufficient defence to an action against the party using such decree, however it might be to an action against an officer executing it, to say that the decree while standing unreduced was a sufficient warrant for the imprisonment; the party is liable for any fundamental objection to the decree, and this imports essentially a heavier responsibility than any mere irregularity in the proceedings, which is an ordinary ground for damages; but no objection can be more fundamental than this, that instead of being creditors, the defenders were in point of fact debtors to the pursuer, and were wrongously resisting his just claim at the time the decree was taken. The view for which the pursuer contends is likewise in accordance with the train of decisions.<sup>2</sup>

*Pleaded for the Defenders—*

In enforcing the decree in question the defender Barlas was exercising a clear and undoubted legal right. No claim of damages arises in consequence of a party having carried on judicial proceedings which are ultimately unsuccessful, provided they are regular,<sup>3</sup> and this rule has been

<sup>1</sup> Inst. iv. 16, 1; Stat. 1592, c. 142; Dallas's Styles.

<sup>2</sup> Leslie, Nov. 18, 1761 (M. 11749); Clark v. Thomson (1 Murray, 161); Milhollan v. Dalrymple, Dec. 21, 1826 (F.C. and ante, V. 170, new ed. 155); Gordon's Executors v. Dunlop, July 13, 1825 (3 Murray, 515).

<sup>3</sup> Cree v. Collier, Nov. 27, 1821 (ante, I. 169, new ed. 162); Gordon v. Royal Bank, Dec. 19, 1826 (ante, V. 164, new ed. 150).

extended to steps of an executorial character, such as the present, duly No. 175.  
 and regularly taken in the course of such proceedings.<sup>1</sup> The same prin- Feb. 25, 1837.  
 iple is applied in cases where the proceedings were mainly of an ex Altken v.  
 parte description, and which therefore might be said in a peculiar sense Finlay.  
 to be taken *periculo petentis*, it being held in regard to such proceedings  
 that something extrinsic to the merits of the cause, and of the nature of  
 malice and mala fides, was indispensable to found a claim of damages;<sup>2</sup> a  
 fortiori, therefore, no claim of damages can arise in the present case on  
 account of the enforcing of a decree regularly obtained in foro con-  
 tentioso.

Thereafter the Lord Ordinary, without having the record closed,  
 made *avizandum* with the cause, and issued the subjoined note.\*

<sup>1</sup> Graham v. Dundas, July 9, 1829 (ante, VII. 876).

<sup>2</sup> Moir v. Hunter, Nov. 16, 1832 (ante, XI. 32); Duff v. Bradberry, May 19,  
 1825 (ante, IV. 21, new ed. 23); Swayne v. Fife Banking Company, June 27,  
 1835 (ante, XIII. 1003).

\* "The Lord Ordinary thinks the question important, especially as it is  
 argued by the pursuer. If that argument be good, he sees no alternative, but  
 that, wherever a man holding a clear and confessedly legal decree of a competent  
 court, executes diligence on that decree, he must be liable in damages as for false  
 imprisonment, if at any distance of time it be found that the decree was either  
 directly or consequentially erroneous. Much is no doubt made in parts of the  
 argument, of the fact that here the decree was under reduction before the diligence  
 was put in execution. But it would be very dangerous to go on such a ground.  
 The plea at bottom rests on the assumption, that because it was at last found that  
 there was not a just claim of debt by the principal party, the decree for expenses  
 was for a debt not truly due, and this would equally apply though the reduction  
 had not been brought for *thirty-nine years*. The ground of argument will not do,  
 that the reduction had been raised, unless it can be also held, *either* that that ren-  
 dered it *illegal* to execute diligence on the decree for expenses, or that the party  
 using such diligence did it *at his own peril*, with the certification of being liable  
 in damages for *legally* executing such *legal decree*, where no stay of execution  
 existed, if it should be found that there was error in the original decree. The first  
 alternative is untenable, it being clear, and having been decided in this cause itself,  
 that the reduction was no stay of diligence on the decree for expenses. It is diffi-  
 cult, therefore, to see how the existence of the reduction affects the principle as to  
 the claim of damages. It may in a vulgar popular view, but it seems to make no  
 difference in the legal matter for judgment.

"The Lord Ordinary should think it right that such a case as this should be  
 under the eye of the Court, before it is sent to trial or otherwise disposed of, in  
 order that the real meaning and bearing of the issue may be understood, if it is to  
 be tried, and that the rule of judgment may be clearly understood, if it should be  
 otherwise determined.

"The pursuer strives hard to draw out of his averments in the record some *spe-  
 cial* grounds of liability, other than the simple statement that it was ultimately  
 found that the original debt sued for, and of course the expenses were *not due*. But  
 this cannot really be of any avail. The amendment of the summons proposed could  
 make no difference. Indeed, it would make it worse than it is; for it would leave  
 the summons insufficient in the main point of it, as not specifying *any* ground on  
 which the general averment rested. At any rate, it makes it no better than it is;  
 and it is necessarily left to rest on the averment of its having been at last found  
 that no debt was due, and nothing else. The mere insinuations by which this  
 has been inflamed to a jury, are unsuitable and useless when addressed to the

176. The case was this day put out for advising.

6<sup>th</sup> 1837.

**LORD JUSTICE-CLERK.**—I agree with the view taken by the Lord Ordinary. If we were to allow a jury trial in such a case as this, we should be opening a door to interminable litigation, and doing great injury to the public interest. If this action is relevant, parties might lie by for 39 years and get damages against a man who has made use of the proper executorial of the law upon a decree which, on any ground whatever, is within the period of prescription found to be erroneous. I think, under the circumstances, we should find that nothing has been stated relevant to warrant an action of damages.

**LORD MEDWYN.**—I am entirely of the same opinion. This is one of the results of the proceeding by reduction instead of advocacy. The party invites execution upon the decree by so bringing it into Court.

**LORDS GLENLEE and MEADOWBANK** concurred.

**THE COURT** accordingly pronounced an interlocutor "closing the record, and finding that, under the circumstances here stated, there were no relevant grounds for the conclusion for damages, and absolving the defender with expenses."

**JOHN CULLEN, W.S.—JOHN FORBES, W.S.—Agents.**

No. 176. **JAMES WILKIE and FRANCIS RENWICK, Petitioners.—R. Thomson.**

*Bankruptcy—Stat. 54 Geo. III. c. 137—Composition.*—Where a party, whose estate had been sequestrated under the Bankrupt Act, absconded from the second diet of examination appointed by the sheriff, without taking the oath prescribed by the 33d section of the statute,—Petition for approval of a composition offered by a friend of the bankrupt and agreed to by the creditors, refused as incompetent.

**Court.** The main point stands thus: The diligence was used on a lawful decree of a competent court: It was executed at a time and under circumstances when it was lawful to use it: It was executed in all due and legal form. These are the points. The question for the Court is—Is the party so correctly using legal diligence on a lawful decree liable in damages on that account, because that decree has since been set aside? There is nothing else in the cause, all the rest of the pursuer's statement being mere amplification for effect.

"Now the Lord Ordinary wishes the more especially to put this question before the Court, because he is entirely unable to distinguish the present case from that of *Graham v. the Writers to the Signet*, according to the opinions of the whole judges. See the report, and the opinion quoted, p. 14 of the revised minute for defenders. He cannot at all enter into any of the distinctions attempted, and is of opinion that if the issues in the present case are thought to be admissible, it would be the worst course to say at once that that case, however solemnly decided, was erroneous. The Lord Ordinary does not think so; but he gives the pursuers the opportunity of making what they can of the point with the Court.

"It will be observed that the record has not been closed. Unless the case shall be remitted for trial, this must be done before any judgment can be pronounced."



THE estate of Peter Wilkie was sequestrated under the statute 54th No. 176. s. III. c. 137, and the petitioner, Renwick, was chosen trustee. on application by him to the Sheriff of Edinburgh, two diets were appointed for the examination of the bankrupt, which were duly advertised and notice given to the creditors. Wilkie attended the first diet the examination, but did not attend the second, nor take the oath prescribed by the 33d section of the statute. Renwick was unsuccessful in attempt to apprehend him on a warrant from the sheriff, and was led to understand that he had absconded.

Feb. 28, 1837.  
2d Division.  
F.  
Cunninghame  
v. Cunnings-  
hame.

Meanwhile, at a meeting of creditors duly called by the trustee, an offer of composition of ten shillings in the pound, with security, was made to them in name of the friends of the bankrupt. This offer was entertained, and subsequently agreed to at a general meeting of the creditors, though it turned out that the only party making the offer was the petitioner, James Wilkie, father of the bankrupt.

Thereafter, under the 59th section of the statute, James Wilkie, and Renwick, the trustee, with concurrence of the requisite number of creditors, presented a petition stating the circumstances, in substance as above mentioned, and praying for approval of the composition. Renwick at the same time gave in a report of the proceedings in the sequestration, with a scheme of ranking.

THE COURT refused the petition as incompetent, the bankrupt having absconded from the second diet of examination and never taken the oath.

WILLIAM HUNT, W.S.—Agent.

JOHN SMITH CUNNINGHAME and OTHERS, Advocators and Defenders. No. 177.

*Sol.-Gen. Rutherford—Deas.*

ALEXANDER CUNNINGHAME, Respondent and Pursuer.—*Hunter—Hector.*

*Process—Furthcoming—Arrestment.*—The factor on a trust-estate rendered to the trustees an account of charge and discharge, showing a certain balance in his favour, but never gave in a complete state of his intromissions; thereafter a creditor of the factor used arrestments in the hands of the trustees of the sums due to him, and brought an action of furthcoming;—Held, in an advocacy, that there were no termini habiles for giving decree in the process of furthcoming for the sums appearing on the account or to any other amount, until a complete state of the factor's intromissions should be made up; and that the duty of exhibiting such state was legally incumbent on the creditor.

On a considerable time subsequent to the year 1825, David Hous-  
land, an agent and factor for the advocators, Smith Cunninghame, Ltd. Moncrief R.

Feb. 28, 1837

2d Division  
Moncrief R.

1877. and others, trustees of the late William Simson, and in this capacity made advances for behoof of the trust, and intromitted with the trust-funds. On 21st June, 1831, he rendered to the trustee an account of charge and discharge, showing a certain balance in his favour, but he explained, in a relative letter, that this account did not contain a complete state of his factory-accounts, and that the real balance could not be ascertained without farther investigation. These accounts were never balanced, and the claims of Houston and the trust-estate respectively continued illiquid, the account-books remaining in Houston's possession till 1834.

In 1832, a creditor of Houston's, in whose right the respondent Cunningham now stood, having raised action against him for a debt, used arrestments in the hands of the trustees, and on obtaining decree, brought a process of furthcoming against Houston and them, stating, *inter alia*, that the trust-estate was creditor to Houston, who had rendered an account to the trustees showing a certain balance in his favour, and concluding to have them ordained to make furthcoming the sums owing by them to the common debtor.

In defence against the action the trustees maintained that Houston had never furnished them with a full state of his intromissions, and that they were not indebted to him in any sum whatever.

The sheriff found "that the pursuer has validly arrested any sum that may have been due by the defenders to David Houston at the date of the pursuer's arrestment, and is entitled to have the same made furthcoming to him to the extent of his debt, but under deduction of any sum which the defenders can instruct to have been due to them by the said David Houston at the same period on the business accounts of the late William Simson."

Simson's trustees thereafter brought an advocacy of this judgment and of certain others, following it up, and pleaded, *inter alia*,

1. That the respondent, as an arresting creditor, can only maintain the same pleas, and is subject to the same liabilities as the common debtor, Houston; and as he would not be entitled to decree against the advocates in the terms pronounced by the sheriff, so neither is the respondent.

2. That the balance alleged to be due to the common debtor, Houston, not being admitted, or in any way constituted against the advocates, cannot be held to form to any extent a liquid claim against them, and the advocates are at all events entitled to set off against that balance the sums due to them by Houston, especially as their claims against him arise out of the same intromissions and transactions relative to the late Mr Simson's estate, to which the foresaid balance relates.

3. That the advocates are not responsible as in a question with the respondent, who comes in place of the common debtor, Houston, for the delay or difficulty of making up proper states of his intromissions, which

ight to have been furnished by Houston himself, who was bound to  
 ive duly constituted his claim against the advocates, if any such  
 isted, and for whose neglect and omissions the respondent is respon-  
 ble.

No. 17  
 Feb. 28, 1834  
 Cunningham  
 v. Cunningham  
 same.

It was pleaded in answer—

1. The respondent having validly arrested in the hands of the advoca-  
 rs all sums due by them to the common debtor, and having established,  
 r evidence, that certain sums were so due, is entitled to a decree in his  
 ation of forthcoming, to the extent of the debt owing to him.

2. Although the advocates might have been entitled to have deducted  
 om the amount any sums arising out of counter claims by them against  
 e common debtor, prior to the arrestment, had they proved the exist-  
 ace of such counter claims, yet, after ample time and full means had  
 een allowed to them, having failed so to do, decree was legally and  
 arrantably pronounced against them, notwithstanding their vague and  
 indefinite allegations of the existence of counter claims.

The Lord Ordinary pronounced the following interlocutor, adding the  
 ubjoined note : \*—“ Finds it admitted in the summons and record, that  
 David Houston acted, for a considerable time, as the agent and factor of  
 he advocates, Simson’s trustees, and that it is in these capacities that he  
 s alleged to have become a creditor of the trust : Finds, that, although  
 appears that he had, on the 25th June, 1831, rendered a certain  
 ccount, No. 12 of process, it is clearly instructed, by his letter of that  
 ate, that that account did not contain a full statement of his intromis-  
 ions as agent and factor, and that he then engaged that so soon as his  
 investigations, then said to be in progress, were completed, he would  
 ender a full state : Finds it not alleged that any such full state of Hous-  
 on’s intromissions was ever rendered to the trustees, though the books  
 emained in his possession till the 24th June, 1834 : Finds that the  
 espondent, as an arresting creditor and pursuer of a process of forth-  
 coming, can be in no better situation, in respect of the arrestees, than his

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\* “ The case appears to be very simple in principle, however difficult it may  
 e to extricate it. Here is a factor and agent who had large intromissions with  
 e constituent’s funds. *Confessedly he has not accounted for them*, though he  
 s made up and rendered, at a particular time, an account of his *own claims* in  
 e characters. Can any creditor of his, by arresting, deprive the constituents  
 their right to refuse to pay any such partial account, till he or his debtor shall  
 der a full state of *his intromissions*? It is impossible to maintain such a pro-  
 ition. *There is nothing liquid to warrant any decree*, the duty of accounting  
 g wholly on the factor.

“ The Lord Ordinary is therefore under the necessity of altering the sheriff’s  
 gments. But, being in some doubt whether it may be most for the interest of  
 parties, that the cause should be advocated or remitted with instructions, he  
 appointed it to be enrolled before adopting either course.

“ There is no averment in the record that Houston was a partner of Simson.”

177. debtor, David Houston, in whose right he sues ; and that it is incumbent on him to prove that, at the date of the arrestment, the arrestees were debtors to the said David Houston : Finds that the rendering of such an account as that, No. 12 of process, is not sufficient to instruct any liquid debt, even at the date of rendering it, while it is proved and admitted that he had not rendered any full state of his intromissions with the rents and property of the trust-estate : Therefore finds that there are no *termini habiles* for giving decree in the process of forthcoming, for the balance appearing on the said account, or to any other amount, whether upon caution or without it, until a full and complete state of all the intromissions of the said David Houston shall have been made up : Finds that the duty of exhibiting such a state is legally incumbent on the respondent, and that, if the advocates are willing to undertake to make the investigation in this process, full and ample time, and every facility, must be afforded to them for that purpose ; the respondent, as standing in the place of Houston, being answerable for all the difficulties occasioned by his failure to render full accounts and vouchers, according to his duty : Therefore sustains the reasons of advocacy ; but, before disposing of the cause otherwise, appoints it to be enrolled : Finds the respondent liable in the expenses of the advocacy hitherto incurred, and remits the account, when given in, to the auditor to be taxed ; but reserves all questions as to other expenses."

The respondent reclaimed, but

THE COURT adhered, finding expenses due since the date of the Lord Ordinary's interlocutor.

GIBSON and HECTOR, W. S.—ROBERT NICHOL, S. S. C.—Agents

No. 178. WILLIAM FORRESTER, Pursuer. — *Sol.-Gen. Rutherford-Naves.*  
ANDREW FORRESTER and OTHERS, Defendants.—*D. F. Hope—Maitland.*

*Proof.—Witnesses.—Interest.—Relationship.*—1. In an action of proving the tenor of a will, a witness was examined in Jamaica, having previously made affidavit as to the subject-matter of his examination—Held that this was no objection to the admissibility of his evidence. 2. Question, whether in such action the natural brother of a legatee under the will, not a party to the cause, is an admissible witness?

b. 28, 1837. THIS was an action of proving the tenor of a last will made in Jamaica, in which a proof was allowed, and thereafter certain objections which had been reserved in the course of taking it, came to be advised by the Court.\*

\* It was suggested by the *Solicitor-General*, for the defenders, that the objec-

It appeared that Dinham, one of the pursuer's witnesses resident in Jamaica, and an instrumentary witness to the will of the testator, de-  
 oned, on his examination in causa, when cross-interrogated, that he had  
 sworn to two affidavits, along with Jones, another instrumentary witness,  
 the same effect as his present examination.

No. 178  
 Feb. 28, 1834  
 Forrester v.  
 Forrester.

It was objected for the defenders, 1st, That the affidavits should not  
 have been taken at all; 2dly, That they ought to have been cancelled,  
 the previous deposition of the party, before his examination; and,  
 3dly, That this was a case of two witnesses being precognosced together,<sup>1</sup>  
 and that, if the agent in Jamaica received instructions from the party's  
 agent in Scotland, the proceedings objected to became the act of the  
 Scottish litigant.

It was answered for the pursuer, that, admitting the fact, the objec-  
 tions in question were not a ground of disqualification,<sup>2</sup> more especially  
 looking to the country where the examination of the witness took place,  
 and that the objection was too late of being stated, and ought to have  
 been taken before the witness was examined as to the merits of the  
 cause.

LORD JUSTICE-CLERK.—We cannot reject the testimony of this witness. The  
 objection ought to have been taken before a question was put as to the merits of  
 the cause. But in itself the objection is not valid to exclude, however in the  
 circumstances it may affect the witness's credit. It is very customary in England  
 and Ireland to take a man's affidavit and afterwards adduce him as a witness, and  
 the circumstance of Dinham having made affidavit along with Jones is no ground  
 for setting aside his evidence.

The other Judges having concurred,

THE COURT repelled the objection.\*

The other reserved points in the state of the proof were disposed of  
 without argument.

ALEX. DOUGLAS, W.S.—R. MACFARLANE, W.S.—Agents.

ions should be taken up when the whole case came afterwards to be advised; but  
 the *Dean of Faculty*, for the pursuer, contended that they ought to be decided  
 now, as in the case of objections in the course of a proof on commission brought  
 before a Lord Ordinary; with which view the Court agreed.

<sup>1</sup> *Duncan v. Thomson*, July 16, 1834 (ante, XII. 935).

<sup>2</sup> *Mackenzie v. Henderson* (2 Murray, 217); *Millar v. Fraser* (4 Murray, 114  
 and 120); *Mackay v. Macleods* (4 Murray, 279).

\* It was objected by the defenders to the evidence of another witness that he  
 was the natural brother of a legatee under the will in question, and interested  
 therein, and therefore disqualified.<sup>1</sup> To this it was answered, that although near

<sup>1</sup> *Anderson v. Jeffrey* (4 Murray, 105); *Angus v. Magistrates of Edinburgh* (4 Murray,  
 the *Practice of Jury Trial*, p. 141.

179.

WILLIAM FRASER, Petitioner.—*Patterson.*

1837.

*Trust.*—Where a trust-settlement was conceived in favour of the trustees, and the survivor of them; and one of two surviving trustees became insane: the Court granted authority to the other trustee to wind up the trust, with the full powers conferred on the trustees, or survivor, but only on condition of his finding caution.

t, 1837.

VISION.

THE late Mrs Margaret Stewart or Denholm, by a general trust-settlement disposed her estate and effects to William Fraser, clothier in Edinburgh, and two other trustees, and "to the survivors, or survivors of them, or such other person or persons as they, or the survivors or survivor of them, should assume as trustees." These three parties accepted, but one of them died, and another became insane and was put under judicial curatory, before the trust was wound up. William Fraser, the remaining trustee, then presented a petition to the Court, stating that he was not in terms of the trust-deed, the sole surviving trustee, though he was the sole trustee capable of acting; that the extent of his power under the trust was therefore doubtful; that he was ready to pay over the whole estate to the beneficiaries under the trust, and that the period was arrived when this ought to be done; and he prayed the Court "to grant warrant to, and authorize the petitioner to bring the aforesaid trust to a conclusion, as sole trustee capable of acting therein, and to act with the full powers conferred on the trustees, and the survivors or survivor of them, by the aforesaid trust-deed, in trust, and for the purposes therein expressed."

THE COURT granted the petition, but only on condition of the petitioner finding caution.

JARDINE, STODART, and FRASER, W.S.—Agents.

relationship to the party, or direct interest in the cause, might disqualify a witness, there was no ground for holding that a witness was disqualified by relationship to an individual having an interest in but not a party to the cause.

The Court, considering the point thus raised to be doubtful, made *avizandum* therewith, but it is understood they will not be called upon for a judgment.

JAMES HUNTER, Advocate.—*D. F. Hope—M<sup>r</sup> Neill.*WILLIAM FAIRWEATHER, Respondent.—*Neaves.*ALEXANDER MERCHANT, Respondent.—*Ivory.*

No. 180.

March 1, 183  
Hunter v.  
Fairweather.

*Proof—Reparation—Carrier—Jurisdiction—Process.*—1. Circumstances in which, held to be proved that a coach-parcel, containing a process and title-deeds, as duly delivered at the office of one of the agents in the process; and, having been mislaid for several years owing to the negligence of that agent, or some party to whom he was responsible, held, that he was liable for the expense of certain processes thereby occasioned.—2. An action was raised before a burgh-court, against a law-agent, who had his writing-office within the burgh, but whose dwelling-house, at the date of the summons, was without the burgh: the action was accessory to a process already depending in the burgh-court, and bore to be raised for the purpose of being conjoined with it: a statute was, soon after, passed, enlarging the territory of the burgh, so as to include the dwelling-place of the law-agent, and, thereafter, he was cited at his dwelling-place, in common form: Held that he was liable to the jurisdiction of the magistrates, and that he was duly cited.—3. In a question as to the delivery of a coach-parcel, pending between the coach-proprietor, and the party to whom the parcel was addressed, held that the evidence of the coach-porter, who was charged with the delivery of the parcel, was not inadmissible on the ground of interest, though the coach-proprietor had not discharged him of liability in case the parcel was not duly delivered by him; and, therefore, after the porter's death, evidence allowed to be adduced by the coach-proprietor of what the porter had stated on the subject.—4. Where a party to a process executes a private trust-disposition for behoof of creditors, held unnecessary to delay the advising of the process until intimation should be made to the trustee.

THE late William Fairweather, merchant, Dundee, employed James Hunter, writer there, to raise an action before the Sheriff of Forfarshire, against Whitton and Petrie, for payment of £200. The firm of John William Baxter and John Boyd Baxter, writers, were the opposite agents. The process fell asleep, and was sent by Hunter, in January, 1825, to Forfar, to Thomas Carnaby, depute sheriff-clerk of Forfarshire, for the purpose of obtaining a precept of wakening. Carnaby prepared the precept of wakening, and inclosed the parcel in a process addressed to Hunter at Dundee, which was duly delivered and booked at the coach-office, in Forfar, of the Railway coach, on 31st January. That coach travelled between Forfar and Dundee, and the coach-books at Dundee bore an entry as to this parcel that the carriage of it had been duly paid, as on delivery. It appeared, however, from a correspondence between Hunter and Carnaby, in the beginning of March, 1825, that Hunter did not then know where the process was, but supposed, first, that it was still lying with Carnaby, and next, that it had been lost by the people of the Railway coach, of which Alexander Merchant, innkeeper in Dundee, was proprietor. Considerable search and enquiry was made for the parcel, without success, and a process of proving the tenor of the missing deeds was resorted to by Fairweather, in which, decree of proving the tenor was obtained. Afterwards, in 1829, William Fairweather, jun., as representing the late William Fairweather, raised an action against Merchant, before

March 1, 183

1st Division  
Ld. Corehouse  
B.



- To. 80. the Magistrates of Dundee, concluding for payment of the expense which  
 - 1837. had been occasioned to him by the loss of the parcel, libelling that it  
 in. had never been delivered to Hunter, but lost by the persons in charge of  
 the. the coach, for whom Merchant, as proprietor, was responsible.

Merchant, in his defences, alleged that it had been duly delivered to Hunter.

In the course of the process, a diligence against havers was granted, and, John Boyd Baxter, writer, who had been a partner of J. W. and J. B. Baxter already mentioned, was named commissioner. He recollected, during the examination before him of Hunter as a haver, that the process, *Fairweather v. Whitton and Petrie*, was actually in his own possession. He himself was afterwards examined as a haver, and produced the process. This occurred in 1829; the process had been in Baxter's possession for years, and it was his strong impression that he had received it from Hunter; but the chief charge of conducting that process had been taken by Baxter's former partner, John William Baxter. No trace existed either in the books or papers of Hunter or of Baxter to indicate any thing as to the date, or manner, of the process having been received by either of them.

Fairweather thereafter raised an action against Hunter before the Magistrates of Dundee, setting forth the dependence of the process against Merchant, and that if Merchant, in that process, should prove that the coach-parcel had been duly delivered to Hunter, then Hunter was liable to him (Fairweather) in the whole expenses concluded for in the action against Merchant, and in all the expenses incurred in that action itself. The summons further set forth, that this action against Hunter should be conjoined with the depending action against Merchant; and it concluded for decree against Hunter, as above, in the event of Merchant proving that the coach-parcel had been duly delivered to Hunter.

The dwelling-house of Hunter was situated, at this date, beyond the jurisdiction of the Magistrates of Dundee; but, on the 23d August, 1831, an Act of Parliament was passed which enlarged their jurisdiction, and included within the territory the dwelling-house of Hunter. Hunter's writing-office was within the old territory of the burgh. The summons, dated 12th August, 1831, contained a warrant of service on Hunter "personally, or at his dwelling-place." It was executed at the dwelling-place, but not until after the 23d of August.

Besides defences on the merits, including a denial of the delivery of the parcel to him, Hunter objected to the jurisdiction of the Magistrates, in respect that, at the date when the warrant of service was granted, he lived beyond the jurisdiction, so that the warrant, as granted, could not reach his dwelling-place; and as both the warrant and the dwelling-house remained the same at the date of actual citation, the citation was unauthorized. If the pursuer wished to avail himself of the enlargement of the Magistrates' jurisdiction, he ought to have obtained a fresh warrant, issuing under the authority of the new statute.

Fairweather answered, that the Magistrates possessed jurisdiction over No. 180  
 Hunter in reference to the subject-matter of this suit, at the date when March 1, 18  
 the summons was raised, in respect that Hunter's business as a writer Hunter v.  
 was carried on in an office within the old limits of their territory ;<sup>1</sup> and Fairweather  
 also in respect that the action was of an accessory or supplementary nature  
 to one already pending in the Burgh Court. If, therefore, the citation  
 was duly given, there was no objection for defect of jurisdiction. And  
 the citation was valid, because the summons contained warrant to cite at  
 the dwelling-place, which warrant was executed by citation at the dwell-  
 ing-house, not given until after 23d August, at which date the enlarged  
 territory included the dwelling-place.

The Magistrates repelled the objection to their jurisdiction, and con-  
 sidered the actions.

Merchant afterwards raised an action of relief against Hunter, alleging  
 that the parcel was truly delivered to him, and that all the subsequent  
 trouble and expense had been occasioned by an act of negligence of  
 Hunter in mislaying it, or failing to produce it; and therefore Hunter  
 must relieve him of the action at Fairweather's instance.

A proof was led, in the course of which, witnesses were asked as to the  
 statements of one Mollison, the porter at the railway coach, now deceased,  
 who, when enquiry was first made respecting the loss of the parcel, had  
 distinctly asserted that he duly delivered the parcel at the office of Hun-  
 ter. Hunter objected to the admissibility of these interrogations, in  
 respect that Mollison had an interest which disqualified him, because he  
 would himself have been liable for the parcel unless he exonerated himself  
 by stating that he had duly delivered it. Fairweather and Merchant  
 answered, that, though the situation of Mollison laid him open to obser-  
 vation as to his credibility, it did not affect his admissibility; otherwise no  
 servant, or shop-boy, or carrier, employed to deliver goods or parcels,  
 could ever be called to prove the fact of his having delivered them; which  
 would be equally contrary to principle and practice. The objection was  
 repelled and the evidence received.

Upon weighing the proof, though it was attended with considerable  
 difficulty, and though Hunter had been exposed to some hardship in con-  
 sequence of the lapse of so many years before he was made aware that he  
 was to be charged with having lost or mislaid the parcel, the Magistrates  
 were satisfied that it must be held to have been duly delivered to him, or  
 at least to some one in his office for whom he was responsible; and that  
 he was liable, both to Fairweather and Merchant, in terms of their respective  
 joined actions. As the parcel was traced into the hands of Mollison the  
 porter, and was duly addressed to Hunter; and as it was afterwards  
 found in the hands of the opposite agent; there appeared to be no other

mode of accounting for this, excepting by its having been delivered at Hunter's office, to some person there, and having been soon after sent by Hunter, or by some one in the office, to the opposite agent, and then forgotten. In coming to this conclusion, little was rested on the statements of Mollison, who appeared to have been a person addicted to drunken habits. But the admitted facts of the case did not appear susceptible of any other explanation which was not much more improbable than this. And nothing whatever was imputed to Hunter, as reflecting in the least on his integrity; or implying any thing more than some degree of negligence either on his own part, or on the part of some of the persons in his office, in consequence of which the process Fairweather v. Whitton and Petrie had been lost sight of, soon after its delivery from the coach, and transmission to Baxter.

The Magistrates, therefore, decerned against Hunter, with expenses. He brought an advocacy, and the Lord Ordinary found "that it is not proved, that the parcel containing the process in question, raised before the Sheriff of Forfarshire, at the instance of Fairweather v. Whitton and Petrie, was mislaid or missent through the negligence of the proprietors of the coach, called the Railway coach; found it proved that the parcel was duly delivered to the advocator, and that he is liable for all the damages and expenses occasioned by its supposed loss; therefore remitted the cause simpliciter to the Magistrates, and decerned, and found the advocator liable in expenses."

Hunter reclaimed. Before disposing of the reclaiming note, Fairweather had executed a trust-disposition for behoof of creditors, and Hunter, at the advising, moved that intimation should be made to the trustee, before deciding the cause. Fairweather answered that though that was necessary where a sequestration had taken place, it was not necessary in reference to a private trust-deed.

LORD GILLIES.—I think no intimation is necessary where there has been no sequestration.

The Court concurred, and directed the case to be pleaded, without delaying to intimate.

The pleas as to jurisdiction, and as to the inadmissibility of Mollison's statements, were again pleaded and repelled.

In regard to the jurisdiction, it was observed by Lord Gillies that if personal citation had been given to Hunter, within burgh, at any time after raising the summons, it would have been effectual; and that the citation at the dwelling

‘NOTE.—“This is entirely a question of evidence. It is thought that the proof is quite satisfactory, and that the Magistrates are right in all their findings.”

as was equally so, as it was not given until after the dwelling-house was included within the territory of the burgh. The other judges severally expressed their concurrence in this opinion. No. 180  
March 1, 1836  
Greig v. Christie.

LORD GILLIES also expressed a decided opinion that Mollison would have been admissible if alive, and therefore that his statements might be proved, now that he was dead. In this opinion also the Court were understood unanimously to concur.

### On the merits

THE COURT unanimously adhered, and awarded additional expenses against Hunter.

WILLIAM MARTIN, S.S.C.—JAMES STUART, S.S.C.—WILLIAM MILLER, S.S.C.—Agents.

JAMES GREIG and CHARLES MORTON, and LYELL'S TRUSTEE, Pursuers. No. 181  
—Sol.-Gen. Rutherford—Pyper—Russell.

MISS CATHERINE CHRISTIE, Defender.—D. F. Hope—Buchanan.

*Confirmation—Executor-creditor.*—1. The creditor of a defunct having obtained a decree of constitution, cognitionis causa, raised an edict in the commissary court, on February 12th; it was published at the market-cross and parish church, respectively, on 14th and 16th February; notice of the application was published in the Gazette of February 21st; decree, decerning the party executor-creditor, was pronounced on February 26th; the oath, emitted by the creditor, related to the amount of the estate left by the defunct, and given up in inventory, and it did not relate to the verity of the debt; sentence of confirmation as executor was pronounced on March 1st: Held that the confirmation was regularly expedite, and was not objectionable, either (1.) in respect of the oath not having deponed to the verity of the debt, as that is not required by 4 Geo. IV. c. 98; or (2.) in respect of the lateness of the notice in the Gazette, as the advertisement was duly given, in terms of that statute, and the explanatory A. S. Nov. 12, 1825, § 19, as to the Commissary Court.—2. In granting commission to take the oath of a party applying for confirmation, and who resides in a different commissariat from that in which confirmation is applied for—Held no irregularity to appoint a party to be commissioner who was not commissary clerk, or commissary clerk-depute of the district in which the oath was to be taken.

IN a competition among the creditors of the late Robert Jamieson, March 1, 1836  
W.S., Miss Catharine Christie, his sister-in-law, founded on a confirmation as executor-creditor, including the whole fund in medio. The late 1st Division  
Ld. Fullerton  
S.  
John T. S. Lyell, executor-dative of the deceased Major Lyell of Kinneff, was conjoined with Greig and Morton, W.S., as executors-creditors of the deceased, under a posterior confirmation. They raised a reduction of Miss Christie's confirmation, and, Lyell having died during the dependence of the action, his trustee was sisted in his place. On November 18, 1836,<sup>1</sup>

<sup>1</sup> See ante, p. 41.

1831. the Court, on reviewing an interlocutor of the Lord Ordinary, which repelled the reasons of reduction, under a certain reservation, pronounced this interlocutor: "Adhere to the interlocutor reclaimed against, in so far as it repels the reason of reduction grounded on the objection to Miss Christie's decree of constitution, as having proceeded on a general charge and summons irregularly executed; and before answer, quoad ultra, ordain the parties to make up, see, interchange, lodge, and box minutes of debate on the question whether the confirmation of Miss Christie, as executor-creditor of Robert Jamieson, was correct, and regularly proceeded in according to the provisions of the act of the 4th of Geo. IV. c. 98." Their Lordships at the same time granted warrant for transmitting to the process, the various steps of procedure in the respective confirmations, from the Commissary Court, and the stamp-office, respectively. The question thus ordered to be discussed, turned on the following facts.

The late Robert Jamieson, W.S., died domiciled at Arden, in the parish of Newmonkland, Lanarkshire, on 7th December, 1832. On January 21, 1834, Miss Catharine Christie obtained decree of constitution, *cognitionis causa tantum*, of a debt amounting to £1403, 10s., besides other sums. On February 12th, she raised an edict in the Commissary Court of Lanarkshire, libelling on the decree, for the purpose of obtaining herself confirmed executor qua creditor. On 14th February the edict was published at the market-cross, and on Sunday 16th February, at the parish church-door. On 21st February the application was notified in the Gazette. On 26th February, the Gazette containing the notice was produced in Court, and no appearance having been made to oppose it, decree was pronounced by the Commissary at Glasgow decerning her executor qua creditor. Miss Christie then presented a petition to the commissary praying that, as she resided in Edinburgh, a commission should be granted to T. B. Ferrie, W.S., to take her oath as to the inventory. A commission was granted accordingly on 27th February, and, an inventory having been prepared, stating the movable estate of the deceased, at £687, 10s., Miss Christie, on March 1st, deponed before the commissioner, "That the said deceased Robert Jamieson died on the 7th day of December, 1832, without leaving any will or settlement of his affairs: That the foregoing inventory, which is signed by the deponent and commissioner as relative hereto, is a full and true inventory of all the personal or movable estate and effects of the said deceased Robert Jamieson, wherever situated, already recovered or known to be existing, belonging or due to him beneficially at the time of his death, and that the said estate situated in Scotland is of the value of £687, 10s. sterling, and under the value of £800 sterling.—All which is truth, &c." The inventory and deposition were then produced in the Commissary Court, and on March 8th, Miss Christie was confirmed executor-dative qua creditor of the deceased.

the pursuers of the reduction of these proceedings objected to their No. 181.  
clarity, on the following grounds.

By 4 Geo. IV. c. 98, § 4, the procedure of every executor-creditor regulated, which section applied equally whether the confirmation embraced the whole of the estate of the deceased, or a part only. It acted "that in the case of confirmation by executors-creditor, such confirmation may be limited to the amount of the debt and sum confirmed, to which such creditor shall make oath." This was an explicit enactment that the creditor should make oath both to the debt, and to the sum confirmed. And so the statute had been interpreted, both by institutional writers,<sup>1</sup> and by the commissaries of Edinburgh in laying down regulations on the subject.<sup>2</sup> The practice of the commissariat of Edinburgh, was conformable to these instructions, and the same practice had been followed in Aberdeen and other parts of Scotland.<sup>3</sup>

The same section of the statute farther provided "that notice of every application for confirmation by any executors-creditor shall be inserted in the Edinburgh Gazette, at least once, immediately after such application shall be made; in evidence whereof, a copy of the Gazette in which such notice shall have been inserted, shall be produced in Court before any such confirmation shall be further proceeded in." The object of this enactment was to certify all creditors throughout Scotland, so that they might have an opportunity to apply to be conjoined in the confirmation. The old form of publication was inadequate for this purpose, and a Gazette notice was superadded on it. But such notice could not receive full effect unless it was given as early as the publication of the edict, and therefore the statute directed it to be made "immediately" after application to be confirmed, and before the "confirmation was farther proceeded in," which, both in letter and spirit, meant, before publication according to the old forms took place. For if that publication might be current, or perhaps nearly expired before the notice appeared in the Gazette, the purpose of such notice might be defeated at any time. In the present case, two Gazette notices passed after the application, without the notice being given; and on the third, published on 21st February, only five days elapsed before decree was taken. By the practice of the Court, sentence of confirmation might be taken, on the same day with this decree<sup>4</sup> if no competitor appeared; and thus, if such procedure was sustained, the Gazette intimation might always be made nugatory.

8. This question was not affected by the provision of A. S. November 1, 1825, relative to the Commissary Court. That A. S. directed the notice to be inserted in the Gazette "within ten days after the edict had been signed by the clerk," which would therefore render proceedings

March 1, 1833  
Greig v.  
Christie.

<sup>1</sup> 2 Bell, 489.

<sup>2</sup> Instructions of Commissaries dated 31st December, 1823.

<sup>3</sup> Certificates of Commissary clerks produced in process.

<sup>4</sup> Certificate by Commissary clerk-depute produced.

181. objectionable if a longer delay occurred, in reference to any commission in Scotland, however remote, and whatever might be the special circumstances causing the delay. But though it fixed the limit, beyond, the statutory word "immediately" could not in any case be extended. It did not fix the opposite limit, so as to declare that a party in Edinburgh or Glasgow who allowed every Gazette except the last, during the rancy of the nine days induciæ, to pass without notice, should be nevertheless to have "immediately" given such notice as required by statute.

4. It was irregular and incompetent to have the oath administered to the defender by any other commissioner than the commissary clerk of the district.

The defender answered—

1. Where an executor-creditor confirmed the whole estate of deceased, the procedure was regulated by § 3, of 4 Geo. IV. c. 98, which required no oath except as to the amount of the estate. But even if applied to such a case, it required no oath of a different sort as the oath was exacted merely in reference to fiscal considerations. And according to the practice of Lanarkshire, Perthshire, Renfrewshire, and the other parts of Scotland, no oath of verity was required.<sup>1</sup>

2. The edict having been raised on 12th February and published on the 14th and 16th; the notice having been inserted in the Gazette on 21st February; and the Gazette being produced in the Commissary Court "before the confirmation was farther proceeded in," the statute was duly complied with, in taking decree, decerning the defender executor-dative qua creditor on 26th February. And it was not followed by sentence of confirmation until March 8th, during all which period no other creditor might have been conjoined.

3. But all question as to the effect of the statutory word "immediately" was at an end in consequence of the A. S. 12th November, 1825, § 1, which was passed expressly to regulate it, and to fix a general term reference to all the commissariots in Scotland, within which the notice should be given in the Gazette. That was fixed to be ten days "after the edict has been signed by the clerk." In this instance only nine days elapsed before the advertisement, and therefore it was duly given.

4. The commissioner who administered the oath derived his authority from his commission only, and there was no incompetency in selecting any party to be commissioner who was not the commissary clerk of the district.

At the first advising of the cause, on November 18th, it was observed by Lord Balgray, that as the statutory word "immediately" would be liable to a certain looseness of construction when applied to different commissariots, some of which were more and others less remote from Edinburgh,

<sup>1</sup> Certificates of Commissary clerks produced.



re the Gazette was published, it had appeared to the framers of the No. 181.  
 of Sederunt to be desirable to define a specific term, applicable alike <sup>March 1, 1837.</sup>  
 the whole of Scotland, within which term the notice must appear in <sup>Lords Commis-</sup>  
 Gazette, and within which term it should be held that such notice was <sup>sioners of the</sup>  
 ful, if inserted. But his Lordship added that as such an enactment <sup>Treasury v.</sup>  
 ht perhaps be ultra vires, he concurred with the rest of the Court in <sup>Mackenzie.</sup>  
 ring the minutes of debate. These were now advised.

ORD GILLIES.—I perceive nothing to indicate any undue conduct or proce-  
 on the part of the defender in taking out this confirmation as executor-credi-

The oath was never required but as to the inventory given up. I think the  
 le of the pursuer's objections are ill founded.

ORD PRESIDENT.—I have formed the same opinion.

ORDS MACKENZIE and COREHOUSE severally intimated that they also concur-

THE COURT then adhered, and awarded expenses against the pursuers since  
 the date of the Lord Ordinary's interlocutor.

GRIG and MORTON, W.S.—FERRIE and JAMIESON, W.S.—Agents.

LORDS COMMISSIONERS OF THE TREASURY, and LORD ADVOCATE, No. 182.  
 Petitioners.—*Ivory.*

OMAS MACKENZIE, W.S., and OTHERS, Respondents.—*D. F. Hope.*

*Process—Enrolling—A. S. 11th July, 1828.*—The pursuers of an action,  
 ch had fallen asleep, raised a summons of wakening and transference, which  
 called so late in the Winter Session as to make it impossible in the regular  
 ne for the process to be proceeded in till the ensuing session; a petition was  
 sent immediately after the calling, for warrant to enroll the process of waken-  
 in the regulation roll, and obtain decree of transference, and in the principal  
 ne for warrant to the Lord Ordinary to pronounce decree of constitution in  
 ms of the libel:—Held that such application was incompetent, notwithstanding  
 ain grounds which were alleged to render the necessary delay very prejudicial  
 the pursuers.

In the year 1832, the Lords Commissioners of the Treasury, and the March 1, 1837  
 rd Advocate, raised action against Mrs Catherine Munro, and others, <sup>2D DIVISION.</sup>  
 representing the late George Ross, Alexander Gray or Ross, John <sup>R.</sup>  
 llvie, and Augustus Saltren Willett, army agents, concluding for  
 ment of the balance of certain sums received from Government by  
 ie parties many years ago for the use of diverse regiments, and not  
 ounted for. The last interlocutor in the cause was pronounced in  
 ary, 1834, after which the process fell asleep.

In the mean time, in consequence of the death of certain of the defen-  
 s, Mr T. Mackenzie, W.S., had been appointed judicial factor on the  
 t-estate of George Ross, and it was found necessary to institute a  
 mons of wakening and transference against him as having come in

**182.** place of the deceased parties, and also against Mr Andrew Drummond of London, assignee on the estate of Alexander Ross and Ogilvie. This summons was duly executed, and the induciæ having expired on the 19th February last, it was called on the 23d. The defenders having entered appearance, and availed themselves of their right of taking the summons out to see, it was impossible for the pursuers to have the summons enrolled in the regular course in the printed rolls of the Winter Session, so that without a special dispensation neither the process of wakening and transference nor the original process could be proceeded in till the Summer Session.

In these circumstances, on the narrative, inter alia, that the pursuers would thus be "shut out not only from all opportunity of proponing and enforcing their just rights and interests, as creditors of the said George Ross, and Alexander Gray or Ross, entitled to claim and to be preferred upon the price and proceeds of the estate of Cromarty, formerly belonging to their said debtors, in the process of ranking and sale, which has so long been in dependence before your Lordships; but will also be prevented from attaching, by adjudication and other legal diligence, certain heritable debts belonging to the representatives above named, of the said deceased Augustus Saltren Willett," &c. the Lords Commissioners of the Treasury, and the Lord Advocate, acting for his Majesty's interest, and as mandatory for their lordships, presented a petition praying the Court "to grant warrant to the keeper of the rolls for enrolling the process of wakening and transference in the first printed rolls, and to remit to the Lord Ordinary, before whom the same shall be so enrolled, either himself to pronounce decree of transference, statu quo, or to remit the process to the Lord Ordinary in the principal cause, that he may pronounce such decree; and in the principal cause to grant warrant to the Lord Ordinary to pronounce decree of constitution, in terms of the libel, reserving all objections contra executionem, and to dispense with the minute-book, so as such decree may be immediately extracted, in order thereby to enable the petitioners to compare, and lodge their interest in the said process of ranking and sale, as well as to proceed with all necessary adjudications against the parties above named; and, if need be, to remit the said original process, which formerly depended before Lord Mackenzie, to such one of the Lords Ordinary as to your Lordships shall seem meet."

This petition was intimated on the 23d February, and having been this day put out for advising, the respondents appearing by counsel at the bar, the Court were unanimously of opinion that it was incompetent.

The petition was accordingly withdrawn of consent, and the respondents found entitled to expenses.

WISHAW and COLTNESS RAILWAY COMPANY, Pursuers.—*D. F. Hope—  
Monteith.*

HENRY STEUART'S REPRESENTATIVES, Defenders.—*Sol.-Gen.  
Rutherford—Anderson.*

WILLIAM DIXON, Defender.—*Sandford.*

No. 183.

March 1, 1837  
Wishaw Rail-  
way Company  
v. Steuart's Re-  
presentatives.

—*Joint-Stock Company—Contract.*—In a question between a joint-company, constituted by Act of Parliament, and two shareholders, certain contracts entered into prior to the passing of the act, and subsequently recognised by the parties as existing,—Held to be binding and effectual, though not mentioned in the act.

Wishaw and Coltness Railway Company was projected for the purpose of connecting the Clydesdale or Upper Coalfields of Lanarkshire with the Forth and Clyde Canal and the markets of Glasgow and Edinburgh. With the view of obtaining the concurrence and support of the proprietors of that district, the promoters of the railway addressed certain proposals, in which it was stated, inter alia, that the estimated expense was £60,000, of which it was proposed the proprietors should advance one-third; but that, as it might not be convenient for them to advance or come under direct bonds for so large a sum, “the instalments should not be payable till the railway was opened to the satisfaction of the subscribing proprietor, and then only by annual instalments at the rate of 7½ per cent;” it was “also understood, that the proprietors of the Railway Company will agree, after the act is passed, to pay, as the work proceeds, the whole sums so subscribed by the landowners on the above terms.”

James Steuart of Allanton was a proprietor in the dispute, and had originally subscribed £500 to the undertaking. Shortly subsequent to the above proposals, and it having been represented to him that the railway would be carried through his property, he increased his subscription to £3000.

At a preliminary meeting of subscribers, in September, 1828, which was presided over by the defender Dixon, it was agreed to by the landowners and by the other subscribers, that the proprietors of the lands through which the railway was to pass should “allow to the undertakers the use of the lands and necessary for the railway, and its works and wharfs, free of all claim for damages,” &c. A missive to this effect was simultaneously signed by several landowners, and, amongst others, by Dixon, who was a proprietor of shares to the amount of £2950. In May, 1829, James Steuart and Dixon executed bonds respectively for the performance of their subscriptions, which was required for the passing of the bill through Parliament.

As following, the Act 10 Geo. IV. c. 107 was passed, empower-

March 1, 1837  
2D DIVISION.  
Lord Jeffrey.  
R.

183. ing the pursuers, the Wishaw and Coltness Railway Company, a railway from Chapel, on the estate of Sir Henry Stewart, to Monkland and Kirkintilloch Railway; the capital to be divided into shares of £50 each. It was declared that the committee of the company for the time being should have power to make any call from the shareholders for defraying the expense of, and carrying out any undertaking, provided that no call should exceed 10 per cent of the share subscribed, and that calls should not be made except at the expiration of one month from each other. It was farther enacted, that in any action brought by the said company of proprietors against any one or more owners of any share or shares, to recover any sums of money due or payable to the said company of proprietors, for or by reason of any call made by virtue of this act, it shall be sufficient for the said company of proprietors to declare and allege that the defendant or defendants, being a proprietor or proprietors of such share or shares in the said undertaking, is or are indebted to the said company of proprietors, in such sum or sums of money as the calls in arrears shall amount to, for such or so many call or calls or so many sum or sums of money upon such or so many shares belonging to the said defendant or defendants, defender or defenders, as the case may happen to be, whereby an action has accrued to the said company of proprietors by virtue of this act, without setting forth the matter: And on the trial of such action it shall only be necessary to prove that the defendant or defendants, at the time of making such call, was or were proprietor or proprietors of some share or shares in the said undertaking, and that such call or calls were in fact made, and that such notice thereof was given as directed by this act, without the appointment of the committee who made such call or calls, or any other matter whatsoever: And the said company of proprietors thereupon be entitled to recover what shall appear due, unless it shall appear that any such call exceeded the sum of £10 for every £100, made within the distance of one calendar month from the last previous call, or without notice given as aforesaid."

There was no clause in the act sanctioning the stipulations contained in the proposals above-mentioned. Certain proceedings of the committee, however, subsequent to the passing of the act, recognised them as existing, and showed a mutual understanding that they were to be enforced; and, in particular, an arrangement was made whereby the Bank agreed to grant to the company a cash-credit for £60,000, entitling "to receive payment of the credit at the rate of 10, or, if desired, 7½ per cent per annum on the principal, exclusive of the interest, which must be paid up at the same time."

In consequence of the extent and productiveness of the canal, and the more immediate proximity of Glasgow and the line of the canal, it appeared, in the course of a year or two, that the success of the new

ay would not realize expectations. It was carried through the property No. 183  
 Mr Dixon, but was five or six miles short of reaching the property of  
 r Henry Steuart.

In 1829, 1830, and 1831, four calls were made on the subscribers, March 1, 18  
 d amongst the rest on these gentlemen, the first of 5 per cent, and the Wishaw Ra  
 hers of 10 per cent. Sir Henry Steuart paid £150 to account of the way Compa  
 st; Dixon paid the first call, but neither of them made any farther v. Steuart's  
 yment. representative

Thereafter the Company raised action against Sir Henry and Dixon, unding on the provisions of the act above referred to, setting forth the  
 lls which had been made on them, and concluding for payment of the  
 lance due by them respectively on the amount of the whole.

In support of their action, the Railway Company pleaded, inter  
 ia—

1. That the defenders, at the respective periods when the calls were  
 ade, having been proprietors of the shares of the company stock above  
 entioned, and the formalities of the statute having been complied with,  
 re bound in terms thereof to pay the sums concluded for.

2. That this obligation in the case of Sir Henry Steuart could not be  
 alified by conditions extrinsic of the act; nor met by illiquid counter-  
 ims on the part of Mr Dixon, who must be held to be barred, by the  
 ms of his original agreement, from demanding any price or considera-  
 n for the use of his ground occupied by the railway.

Sir Henry Steuart pleaded in defence—

1. That having become a subscriber to the proposals for the railway,  
 on the express conditions of his subscription being paid in the manner  
 rein set forth, and not until the railway should be opened to his pro-  
 ty, and this agreement having been sanctioned and approved by the  
 mpany both before and after the Act of Parliament was passed, it was  
 ding and effectual, and no demand for payment of the shares in ques-  
 i could be made except under the conditions on which they were sub-  
 ibed for.

. That this agreement, with all its conditions, was binding and effectual,  
 ough not embodied in the Act of Parliament; more especially since  
 effect in the present case must be determined as in a question inter  
 ios, and there was good evidence of the understanding of all parties  
 ing been, that the conditions of the agreement should be binding on

Company, although not engrossed in the act.

Mr Dixon, the other defender, pleaded—

That the agreement contained in the missive referred to had been

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Marshall Bridge Company v. Earl of Spencer and others, April 11, 1821,  
 10th Rep. 1. 64.

185. entered into on the faith of a certain number of parties concurring therein, and was not to be binding upon two or three when the others had refused to concur in the arrangement; and, therefore, the condition of his subscription not having been implemented, that he was not bound to give his land to the Company gratuitously, and was entitled to retention of the sums concluded for in security of the payment due to him on account of the land occupied by the railway.

1837.  
Hull-  
Company  
v. R.  
Sullivan.

The Lord Ordinary, after ordering Cases, pronounced the following interlocutor, with the note subjoined:—"Finds, I mo, That it is suffi-

\* "The case of the pursuers as against Sir Henry Stewart is extravagantly over-pleaded on almost every point of the argument. Their denial of the authenticity of the copy of the proposals in process, and their professions of their ignorance of any document of such a tenor, are, to say the least of them, altogether unaccountable, and, so far as the Lord Ordinary's experience goes, without example in litigation with persons of their condition. That copy is referred to in, and seems to have been produced along with the original defences for Sir Henry Stewart, being marked as No. 8. of Process, while the defences are marked as No. 6. Its tenor is such distinctly recited in the record under the 5th article of Sir Henry's statement of facts, and referred to on the margin by the said number of process, and in the pursuers' answer to that, while it is expressly admitted that proposals of this description were addressed by the promoters of the undertaking to the owners of land on the line. There is no doubt a reference to the pursuers' counter statement, but when that is turned to, the admission only appears to be more distinct and unequivocal. All that is there said being, not that no such particular proposals were made, but that the two first articles of them (embracing those recited in the interlocutor, and thus clearly admitted to have been contained in the original paper), were afterwards withdrawn or abandoned. Of this last allegation there is not the shadow of evidence. On the contrary, when the different subscribers agree to relieve Mr. Grahame (their agent) of the consequences of his subscribing the bond to be laid before Parliament, this obligation is cautiously worded, so as to bind those in the situation of this defender only according to and in terms of the subscriptions respectively made by them, 'and by the instalments and with the securities therein specified.' And after the act is passed, this defender, along with the other leading landowners, after an option had been distinctly given them to restrict or withdraw their subscriptions (which of itself excludes all argument as to their being absolutely bound by the unqualified document they had previously signed), propose to the pursuers 'that an arrangement shall be made by which the advance on their subscriptions should be limited to 7½ per cent per annum, with the security over the minerals, and in terms of their original subscriptions,' and to this proposal, as recorded in the minutes of 5th June, 1829, 'the meeting agree.' The attempt of the pursuers to represent this as a mere consent on their part that the landowners should themselves endeavour to negotiate such a loan, is palpably absurd. They manifestly required no consent from the pursuers to enter into such a negotiation; nor is it conceivable that a suggestion of that nature should have been entered in the minutes as a proposal to the meeting, and one to which, after deliberation, they are stated 'to have agreed.' The meaning obviously was, that the pursuers wanted the money of those subscribers sooner than it was exigible from them under their contract, should, for their own accommodation, endeavour to get it advanced by the banks upon such security as those subscribers were then in a condition to give. If the landowners had been bound, like any other subscribers, to pay down their money when it was called for, the company plainly had nothing to do but getting the banks to advance it for them, and the whole proceeding would have been of no meaning. But it is really needless to dwell on this, for the subject of the company take away all doubt, and demonstrate what was

instructed and admitted by the pursuers in the record, that the No. 188  
 of the Wishaw and Coltness Railway did, at the commence-

March 1, 1831  
 Wishaw Rai-  
 way Compan-  
 v. Steuart's Re-  
 presentatives

of the whole arrangement. Instead of leaving the landowners to nego-  
 tiate on the best terms they could, with the mere *permission* and  
 sanction of the company, the business is immediately delegated to a commit-  
 tee, in which *no one of these landowners* is named, and which proceeds in the task  
 without any reference to a consultation with them. A sub-committee accordingly  
 drew up a draft of a proposal for the banks, which is submitted to the larger body,  
 and approved of, and in that document, prepared  
 at the backs of the landowners, and without the least hint or instigation from  
 them, is very candidly and distinctly set forth as the circumstance which had  
 made an application necessary, 'that it had been stated by the landowners *at the*  
*time* that it would be inconvenient for them to advance any of their £13,000,  
*if the railway was opened*, when they will *conveniently* be enabled to advance  
*instalments, at 7½ per cent annually out of their minerals.*' See minute of  
 the 15th, 1829. This single citation is conclusive against the whole case of the  
 pursuers, and gives a character to their confident and reiterated asseverations, that  
 they had nothing of any original proposals similar to the copy produced, and  
 that they in no way recognised the important stipulations therein contained, as to sus-  
 tainment of the defender's subscriptions, on which the Lord Ordinary is  
 about to enlarge.

Needless to follow out the detail of the subsequent proceedings. The com-  
 mittee of the company proceeded to negotiate with the banks, and to report their  
 proposals to the company, without any reference to or interference by the landowners.  
 The transaction, indeed, was entirely their own. If they succeeded they would obtain  
 the possession of their subscriptions, for the company use. If they failed,  
 they would be contented to wait till the time of payment shall come. It appears  
 that the attempt ultimately failed, and the consequence has been this incompetent attempt  
 on the part of the defender *ante diem*.

It is as extravagant, nor less palpably refuted by the record, is the pursuers'  
 allegation, that their original proposals were framed merely with a view to  
 be embodied in the act of Parliament; and that, when this was found im-  
 possible, they necessarily fell to the ground, and were abandoned. It is abso-  
 lutely certain that *the only provision* ever intended to be inserted in the act, was  
 that which gave such high authority was to be given to the landowners to bind the minerals in  
 security, in security for their subscriptions. But in this it is manifest that the  
 Sir Henry Steuart, never had any interest, such a provision was evidently  
 for *entailed* proprietors alone. But Sir Henry held his estates in fee sim-  
 ply, not requiring any statutory authority to bind them in security, plainly  
 in no way affected by the circumstance of the act having passed without  
 giving such authority.

The pursuers' main argument is, that whatever might have been the origi-  
 nal rights and obligations of the parties, all these were superseded by the passing  
 of the act, by the terms of which alone, the rights and obligations of all con-  
 sist thenceforth be entirely regulated and determined. It is truly needless  
 to show how this might have been if nothing had passed *after* the date of the  
 act, recognising and renewing the antecedent onerous and equitable engage-  
 ments of the parties. But from the transactions last referred to, it is clear enough  
 that the case here, and to maintain that it would be *illegal*, and in viola-  
 tion of a statute to enter into *subsequent arrangements*, varying in some respects  
 from the original provisions, appears to the Lord Ordinary to be the very height of absur-  
 dity. Suppose that Sir Henry Steuart had not at all thought of becoming a sub-  
 scriber *after* the act was passed, that he had then made a written proposal to  
 subscribe £3000, on condition that it should only be payable when  
 the minerals were brought into his lands, and then by annual instalments of 7½ per  
 cent to the company, at a general meeting after the report of a committee,



1837. **183.** ment of their undertaking, and before applying for the Act of Parliament subsequently obtained, address to the original defender, Sir Henry Stewart (in whose place his representatives have now been sisted as defenders), and the other landowners on the line of the said projected railway, certain proposals, containing among other things, a provision that such of the said landowners as might choose to subscribe for the execution of the said projected railway should not be called upon to make payment of

had deliberately agreed to that proposal, and sent a copy of their minutes to Sir Henry; would *this* have been an illegal proceeding, and ineffectual as in violation of the statute? or could Sir Henry, upon that ground, have been called upon to answer calls like an ordinary subscriber, while the railway had come to a stand at a distance of six or seven miles from the nearest part of his property? This plain question disposes at once of the pursuers' whole argument on the statute, for it obviously can make no difference whether such a stipulation was adopted for the first time, after the act was passed, or was plainly recognised and acted upon after that time, though it had been arranged and agreed on before. If it was just and reasonable in itself, it would not be the worse for having been contemplated and mutually admitted from the beginning; and while the fact of its being formally proposed and agreed upon *before* the date of the act might explain why its terms are not so specifically set forth and resumed in detail after that event, it is quite enough if it be clearly referred to and recognised as subsisting at any subsequent period.

"The Lord Ordinary does not rest any thing on the title of the act, or the description in the preamble, as importing that the railway *was to begin* at the lands of Allanton, though even this is material, as showing how essential to the whole undertaking its coming into these lands was considered. But he certainly was not a little surprised at the confidence with which the pursuers have protested and maintained, in their last minute as well as in their case, that it was a matter altogether irrelevant, and immaterial to the merits of their present demand, whether their railway was ever to be brought to the lands of the defenders at all, considering the only objects which such parties could have had in joining such a concern, and the stipulations under which alone it is thought clear that they did join it, it must be confessed this is a strong proposition. The Lord Ordinary has found that the stipulation referred to was just and reasonable, and this is thought to be clear enough. But the injustice of disregarding it cannot but be enormously aggravated, if it appears that this large sum is to be exacted from the defenders, not only without the remotest prospect of benefit to themselves, but for the mere purpose of helping their rivals to a market from which they are still excluded, and thus aggravating the disadvantages of their natural distance. With the pursuers' present means and credit, it seems to the Lord Ordinary plain enough that the railway never can be completed on to the defenders' property within the short period now remaining of the renewed statutory term.

"With regard to Mr Dixon, the same view of the statute which has led the Lord Ordinary to asswizle the other defenders, compels him to repel his defence. Whatever pleas might have been open to him on the express words of the act, if he had uniformly sought to avail himself of them from its date, he is excluded by his own acts and deeds *subsequent* to that period, drawing back and contracting as they do with his voluntary and reasonable undertaking before. His case, indeed, is in this respect precisely the converse of that of Sir Henry Stewart; and, accordingly, it is curious to observe with what composure and apparent unconsciousness the pursuers, in the body of the same paper, set themselves to answer and refute the very arguments which they had advanced in so peremptory a tone against their other opponents in the preceding part of it. They could not well hope to succeed in both of these inconsistent arguments; and having prevailed in one, they must submit to give way in the other."

their subscriptions till the said railway should be brought into their lands respectively, and should then only be liable to pay up their said subscriptions by annual instalments at the rate of seven and a half per cent :  
 inds, 2do, That the subsequent subscription of the said Sir Henry Stewart of the sum of £3000 (instead of £500, originally subscribed by him) must be held to have been made with reference to the said proposals, and on the faith of the special provision herein before mentioned :  
 inds, 3tio, That there is no evidence that the benefit of this provision has ever renounced or abandoned by the said original defender, but, on the contrary, that many of the proceedings and stipulations of the parties subsequent to the passing of the Act of Parliament, as well as previous hereto, did recognise the continued existence of such provision, and their mutual understanding that it was to be implemented and enforced :  
 inds, 4to, That the said provision was in itself reasonable and equitable, and was in no respect a fraud on the legislature or on the other subscribers to the undertaking, having been pressed on the defender's acceptance by the body of such original subscribers, and repeatedly recognised and admitted by the pursuers after they had been erected into company by the Act of Parliament referred to ; and therefore, and in respect that it is fully admitted that the said railway has not yet been brought into the lands of the said defender, nor within five or six miles of the nearest part of the said lands, that no step has been taken to advance it in that direction for the last two years, and that there is good reason to believe that it will not be brought into the said property during the time limited for its completion by the existing statute, sustains the defences originally maintained for the said Sir Henry Stewart, and now assisted in by his representatives, and assoilzies him and them from the whole conclusions of the action, and decerns, reserving to the pursuers to pursue for the amount of the said defender's subscription in any other action they may be advised to bring, in conformity with the said proposals, and to the defenders their defences as accords : Finds the said defenders, the representatives of the said Sir Henry Stewart, entitled to the expenses incurred by him and them in this process ; allows an account thereof to be given in, and remits the same when lodged to the auditor of his taxation and report : And with regard to William Dixon, the only other defender, for whom a case has been lodged, Finds that he is not entitled to any price or consideration for the ground belonging to him that has been occupied by the said railway, but is bound in terms of his original agreement, recognised and acted upon on several occasions after the passing of the said Act of Parliament, to give the said ground for the use of the said railway gratuitously, and without any consideration ; and, before, and in respect of the illiquid nature of his claims of compensation or retention, and of the terms of the said act, repels the defences maintained by him against the conclusions of this action, and decerns in

No. 18

March 1, 18

Wishaw R

way Comp

v. Stewart's

representative

1833. terms of those conclusions in so far as he is concerned: Finds that in expenses."

1837.

1837.

1837.

1837.

1837.

1837.

The Railway Company and Mr Dixon respectively reclaimed.

The note for the Company was first advised.

LORD JUSTICE-CLERK.—This question is in some respects not free from difficulty. When we see an act with specific clauses as to the rights of parties, the general rule is that these rights are to be regulated by the act alone, and we are disposed to look at prior communings or stipulations; just as in the case of a lease, these are held to be all embodied in the lease. In the present case, however, we must look to what took place at and after the passing of the act, and when we see how the real parties forming the company act; if they act in a manner referring to what took place previously, then we are to look at the nature of that transaction. I am much struck by this, that the original proposals were made to the landed proprietors, and to Sir Henry Stewart and the rest, who all trusted to the representation that the railway was to be a market for the coal of their estates. It would require very strong evidence to lead us to suppose that they were to subscribe to provide a market for intervening coal-fields. It is clearly proved that proposals were circulated containing stipulations as to the shares being payable in a certain way, and as to the way being to be carried to their coal-fields, and that on the faith of these Sir Henry Stewart subscribed. It appears from the evidence in the case that these proposals were before and after referred to as binding by the Company themselves; I cannot now be allowed to turn round and get rid of the stipulations therein contained. In the circumstances of the present case, therefore, notwithstanding the general rule above-mentioned, I think the interlocutor ought to be adhered to.

LORD MEADOWBANK.—Had there been no proceedings subsequent to the passing of the act, there might be some difficulty, but all ambiguity has been removed by the proceedings of the company, after their constitution, with reference to the prior conditions and stipulations. I am satisfied that Sir Henry Stewart and the other landowners were only bound according to the terms of the proposals.

LORD MEDWYN.—If I concur, it is with great difficulty. I cannot think that the previous proposals are to regulate the terms of a concern settled by Act of Parliament. Entirely concurring in the decision in the case of the Gas Light Company in 1823,<sup>1</sup> I think we must throw out of view altogether the conditions in the proposals. The only ground upon which I can concur with the rest of the Court is the nature of the arrangement with the Royal Bank in the second year after the passing of the act, whereby, as it is stated in the case for Sir Henry Stewart, the Royal Bank agreed to grant a cash-credit for £60,000, consenting "to the payment of the credit at the rate of 10, or even, if desired, 7½ per cent per annum on the principal, exclusive of the interest which must be paid up at the same time. Looking to this arrangement, therefore, which implies that the partners are intended on being able to pay up the early annual instalments of 10 or 7½ per

<sup>1</sup> Sir Henry Stewart having died, his representatives were cited in his stead.

<sup>2</sup> Reid v. Edinburgh Gas Light Company, May 13, 1823 (ante, II, 29 ed. 257).

the Bank from the calls made on the ordinary subscribers, allowing the postponed instalments to be repaid from the calls payable by the landed proprietors, as soon as the railway was open to their estates," I am for adhering to the interlocutor.

LORD GLENLEE was absent.

No. 183.

March 2, 183  
Bontine v.  
Graham.

THE COURT held the reclaiming note for Dixon to be entirely groundless, and their Lordships accordingly refused both notes.

W. A. G. and R. ELLIS, W.S.—STEWART and SPROT, W.S.—TOD and ROMANES, W.S.—  
Agents.

ROBERT CUNNINGHAM BONTINE, Pursuer.—*Keay—Maitland—Ivory—Speirs.* No. 184.

WILLIAM CUNNINGHAM CUNNINGHAM GRAHAM, Defender.—*D. F. Hope—Sol.-Gen. Rutherford—Sandford—Moir.*

SCOTTISH UNION INSURANCE COMPANY, and TRUSTEES FOR GRAHAM'S CREDITORS, Compearers.—*D. F. Hope—Sol.-Gen. Rutherford—Sandford—Moir.*

*Entail—Title to Pursue—Right in Security.*—1. The resolute clause in an entail declared that heirs contravening "shall, for themselves, ipso facto, forfeit," &c.; and it was made lawful for the next heir, "albeit descended of the contravener's own body, to purge and obtain declarators upon the contravention:" the son of the heir in possession raised a declarator of irritancy, libelling (inter alia) upon an act of contravention, committed by making up titles in fee simple, in place of making them up under the entail:—Held, that the statute 1685, c. 22, has not declared that such a contravention shall forfeit the contravener's descendants, as well as himself, without reference to the terms of each particular entail, as to the effect of contraventions; that, in this instance, such contravention would not forfeit the pursuer's right; and that he accordingly had a good title to pursue. 2. Terms of a clause in a bond of tailzie, under which, held, that the entailor had effectually bound himself and his heirs to possess the lands under no title but the entail. 3. An ancestor of the entailor, being infeft in the dominium directum of lands held of the Crown, onerously acquired the dominium utile of these lands in 1708, under a conveyance containing a procuratory of resignation ad remanentiam, and a precept of sasine, neither of which he executed; his descendants renewed the infeftment under the Crown, and continued to enjoy full possession, and to exercise all acts of property in the lands for more than 40 years, but without executing the procuratory or precept: in 1765, the entailor, who was already infeft under the Crown, took infeftment under the precept, and afterwards executed an entail, in the form of a procuratory of resignation:—Held (1.) that consolidation of the dominium utile with the dominium directum had taken place prior to the execution of the precept of sasine in 1765, and that that was an unmeaning act of the entailor, which did not split these two estates; and, (2.) that the act of a substitute-heir in making up a title in fee-simple to the dominium utile of the lands, and selling them, was an act of contravention, inferring forfeiture of the estate. 4. Circumstances in which various sales of portions of the entailed estate were found to have been made. 5. Decree pronounced in an action directed against the heir in possession, declaring that he had forfeited the entailed estate, that his right was now, and in all time coming, void and extinct; that the whole rents, had devolved on and accresced to the next heir from and date of citation in the declarator, free and disburdened of every act done

and dead granted in contravention of the entail, as fully as if the contravener had never been in possession, but reserving all questions with regard to the validity and effect of heritable securities granted to creditors by the contravener.

1837. WILLIAM CUNNINGHAM CUNNINGHAM GRAHAM possessed the estate of Gartmore under a strict entail, executed in 1767 by his grandfather, Nicol Graham of Gartmore. The prohibitory clause was in these terms:—"Providing also, that it shall not be lawful to, nor in the power of the said William Graham, nor any other of the said heirs of tailzie above specified, to alter, innovate, or change the said tailzie or order of succession hereby prescribed, nor to do any other deed that may import or infer any alteration, innovation, or change of the same, directly or indirectly; nor to sell, annailzie, dispone, either irredeemably or under reversion, nor yet wadset or burden with infestments of annual rents, or any other servitude or burden, the tailzied lands and estate above written, or any part thereof, nor to set tacks nor rentals of the same for any longer space than nineteen years, and without diminution of the rental, or for the setter's lifetime, in case of any diminution of the present rental, through necessity, where a sufficient tenant cannot be found to pay the whole rent, nor to set in tack or rental the house or manor-place, offices, gardens, orchards, parks, or inclosures of Gartmore, longer than the lifetime of the granter of the said tack or rental; nor yet to contract debts, nor to commit treason (as God forbid), nor to do any other fact or deed of omission or commission, civil or criminal, directly or indirectly, in any sort, whereby the said tailzied lands and estates, or any part thereof, may be affected, apprised, adjudged, forfeited, become escheat and confiscate, or in any manner of way evicted from the said heirs of tailzie, or order of succession thereby prejudged, hurt, or changed."

The resolute clause, inter alia, declared that "the person or persons so contravening, or failing to perform the above written conditions and provisions, or any one of them, shall, for themselves, ipso facto amitt, lose and forfeit," &c. : and farther, that "it shall be lawful for the next heir of tailzie who would succeed if the contravener was naturally dead, albeit descended of the contravener's own body, to purge and obtain declarator upon the contravention," &c.

In 1819, Graham effected a loan from the Hope Assurance Company, and he granted a heritable bond of annuity in their favour to the amount of £1311, 10s. 10d., payable termly, during his life, out of the entailed estate. The conveyance was qualified by this clause, "Providing always and declaring, as it is hereby expressly provided and declared, that as by the said William Cunningham Cunningham Graham, possess, hold and enjoy the whole lands and other heritages before mentioned, under settlements of strict entail made by my predecessor, the former proprietor thereof, whereby I am prohibited from alienating, disposing, or

any manner of way encumbering the same, to the prejudice of the No. 184.  
 its of tailzie who may succeed thereto after my decease: Therefore it March 2, 183  
 hereby provided and declared by me, and the said Thomas Cobb, &c. Bontine v.  
 trustees of the Assurance Company), do, by acceptance of these pre- Graham.  
 sents, agree, and bind and oblige themselves, that no adjudication, or  
 any process or diligence to follow or be used upon the personal obliga-  
 tion hereby come under by me, the said William Cunningham Cunning-  
 ham Graham, for payment of the said annuity, penalty, or interest, or  
 upon the right in security hereby granted, and infeftment to follow  
 hereupon, or upon either of these, at the instance of the said Thomas  
 Cobb, &c. assignees or assignee, shall any way affect the lands and  
 other heritages before described, or any part or portion thereof, or the  
 rents, mails and duties of the same, for any longer period than during  
 my life, except the rents, mails and duties which may be due to me  
 at the time of my death; nor shall these presents, or infeftments to  
 follow hereupon, or any process, diligence, or execution to follow  
 hereon, any way affect the lands and other heritages foresaid, or  
 operate so as to infringe in any manner of way the right of any per-  
 son or persons, when they shall succeed, or become entitled to suc-  
 ceed to me, the said William Cunningham Cunningham Graham, as heir  
 of tailzie in the foresaid lands and others, excepting always in so far as  
 such person or persons may otherwise represent me; nor shall my grant-  
 ing hereof be construed in any manner of way as any infringement upon,  
 or irritancy of, the entails upon which I possess, hold and enjoy the said  
 lands and others, or any derogation therefrom, in any manner of way  
 whatever; hereby farther declaring, that these presents, and infeftments  
 to follow hereon, are meant and intended to have effect no farther than is  
 compatible with the said deed of entail, by which I hold the said lands  
 and others; and also, that this present right in security, and infeftment  
 to follow hereupon, and the assignation to the rents, mails and duties  
 herein-after inserted, and all process, diligence and execution of whatever  
 nature, to follow upon the same, or upon the personal obligation herein-  
 before written, shall, immediately upon my death, become ipso facto void  
 and null, as against the lands and other heritages foresaid, and the heirs  
 of tailzie succeeding thereto, and the rents, mails and duties thereof,  
 other than those which may be then due, and which would belong to my  
 executors, if they had not been assigned by me in manner herein-after  
 written; which declarations before written, whereby the effect of these  
 presents, and the infeftments and others to follow thereon, are limited  
 and restricted as said is, shall be verbatim inserted in the said infeftments  
 to follow hereon, and in the whole transmissions, conveyances and inves-  
 tures of the foresaid annuity, or part thereof; declaring, as it is hereby  
 specially provided and declared, that all infeftments, transmissions, con-  
 veyances, or other deeds made or granted in regard to the said annuity,  
 having the redemption of the same, in which the said declarations

shall not be engrossed, as herein-before provided, shall be funditus void and null." At this date Graham's eldest son, Robert Cunningham Bontine of Ardoch, was in minority.

Infestment passed in favour of the trustees of the Hope Assurance Co. who, in 1825, for a price of £12,000, conveyed their right to the Scottish Union Insurance Co., who took infestment under the conveyance in their favour. Afterwards, in 1828, that Company led an adjudication of the lands of Gartmore, for certain debts, and were infest, under a similar qualification in reference to the entail.

In 1828, Robert Cunningham Bontine, the next substitute in the Gartmore entail, raised a declarator of irritancy against him, libelling upon the entail 1767. A son and daughter of R. C. Bontine, both in pupillarity, were co-pursuers. The summons libelled acts of contravention to have been committed in making up complete titles in fee-simple to part of the entailed estate, and in burdening and selling various portions of it. The summons concluded for declarator of the acts of contravention; "and the several acts of contravention above specified, or any one of them, being established to the satisfaction of our said Lords, it ought and should be found and declared, by decree foresaid, that the said William C. G. Graham, defender, has thereby incurred an irritancy of, and amitted, lost, and forfeited all right, title, and interest in the said whole entailed lands and estates above described, contained in the said deed of tailzie, and every part thereof; and that his right, title, and interest in and to the said whole lands and estates, and every part thereof, is now, and shall in all time coming, be void and extinct: And it ought and should be found and declared, by decree foresaid, that the said whole lands, teinds, and others above described, with the rents, maills, and duties of the same, falling due from and after the date of citation to follow hereon, have fallen, devolved, and accresced, and do now belong to the said Robert C. Bontine, pursuer, as the next heir appointed to succeed by the said deed of entail, and that free and disburdened of the foresaid dispositions and infestments thereon, and of all and every other act done and deed granted by the said defender, in relation to the said several lands and others, in contravention of the said tailzie, in the same manner, and as fully and freely in all respects as if the said defender had never been in the possession of the said lands and estates; reserving entire to the pursuers all right of action competent to them and the other heirs of entail, against the defender for the loss and damage which they have sustained, or may sustain, by and through the foresaid sales, and other acts done and deeds granted by the defender in contravention of the foresaid tailzie; as also, reserving all right of challenge competent to the pursuers and the other heirs of entail, for reducing and setting aside the conveyances and other rights to the said lands and others granted by the defender to the purchasers or disponees, and all heritable securities granted over the said lands, or any part thereof, by the defender to creditors or others."



Prior to this, Graham, whose affairs were embarrassed, had executed a trust-disposition in favour of James Brown and Edward M'Millan, for behoof of his creditors. The trustees had also led an adjudication of his right and interest in the lands. Defences against the declarator were lodged, both in name of Graham, and in name of the trustees for the creditors. In the course of the discussion, appearance was made for the Scottish Union Insurance Company, who sisted themselves as defenders, in respect of their interest above specified as heritable creditors.

No. 184  
March 2, 18  
Bontine v.  
Graham.

The defenders pleaded that the entail of 1767 was no longer an effectual and subsisting entail. The grounds of this defence are fully stated in a preceding report.<sup>1</sup> After a discussion on Cases, and a hearing in presence, the Court repelled the defence, and found that "the lands contained in the entail 1767, are effectually secured against the debts and deeds of the defender (Graham); and that the said entail is binding and effectual against him in questions with the substitute heirs of tailzie." Their Lordships at the same time remitted to the Lord Ordinary to proceed with the remaining points of the cause.

Under this remit the following points were discussed:—1st, Whether the pursuers had a title to insist; 2d, Whether acts of contravention had been committed; and, 3d, If committed what was to be their legal consequences.

1. *Objection to the title.* This plea, though of a preliminary nature, had been kept open on the record, without being previously disposed of, apparently because it assumed the subsistence of the entail as its foundation; and that had been hitherto disputed.

One of the acts of contravention libelled was that of making up titles to part of the entailed estate in fee-simple; and the defenders pleaded, that, by the statute 1685, c. 22, such contravention, if proved, involved a forfeiture not only against the contravener, but also his descendants; as the statute enacted "that if the saids provisions and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolute clauses against the person and his heirs, who shall omit to insert the same, whereby the said estate shall ipso facto fall, accresce, and be devolved to the next heir of tailzie." By force of the statute, this inferred forfeiture against the contravener's descendants, and therefore the pursuers had no title to insist in an action, which, if successful, would equally destroy their own rights and that of the defender Graham.

The pursuers answered, that even if the deed of entail had merely refrained from expressly extending the forfeiture, resulting from an act of contravention, to the descendants of the contravener, it was decided

1835.

1835.

1, June 12, 1835 (ante, XIII 905).

184. and settled, that the descendants would not suffer from the contravener's forfeiture.<sup>1</sup> But much more must this rule apply to the present case where the entail only declared that contraveners should forfeit "for themselves;" and expressly gave right to the next heir, "albeit descended of the contravener's own body, to purge and obtain declarators of contravention," &c. And independently of authority, this was the true construction of the statute, even had the question been open.

2. *Acts of contravention.* These related to two properties called respectively (1.) Gartinstarry, and (2.) Garchells.

(1.) Gartinstarry. Nicol Graham, the entailor, was infeft in Gartinstarry as well as Gartmore, &c. at the date of executing the entail in 1767, and the entail was in the form of a bond of tailzie and procuratory of resignation. On the entailor's death his son Robert, made up a feudal title to the entailed lands which held of the Crown, but he possessed the lands of Gartinstarry, which held of a subject-superior, merely on a personal title. After his death, his son, the defender, made up a feudal title under the entail to the Crown lands, but possessed Gartinstarry merely on a personal title. He was heir under the old investiture of those lands anterior to the entail; and, in 1814, he obtained from the superior a precept of clare constat as heir of that investiture, and made up his title to these lands in fee-simple. He then burdened the lands with debt, and finally sold them.

The clause in the entail, binding the heirs of entail to possess under that title, provided that they "shall bruick, enjoy, and possess the said tailzied lands and estate, by virtue of this present right and taillie, and infeftments to follow hereon, or any other right that I have in my person to the foresaid lands and others above written, and by no other right and title whatsoever; and the said William Graham, and the haill other heirs of taillie above specified, shall be obliged timeously to obtain themselves entered, infeft and seised in the said lands and estate, and not to suffer the same to lie in non-entry; and also to cause insert in the instruments of resignation, charters and infeftments to follow hereon, and in the haill procuratories and instruments of resignation, charters, services, retours, precepts of sasine, and instruments of sasine, and haill other conveyances of the said lands and estate, all the provisions, declarations, and irritancies of this present taillie."

In reference to this clause, Graham pleaded that he was merely enjoined to possess the several lands under the entail, "or any other right that I (the entailor) have in my person to the foresaid lands:" that entails were to be strictly construed, and that he was left free by these words to make up a title under the entail, or any other title which was in the entailor; that no title under the entail had ever been made up to

<sup>1</sup> Simpson, Jan. 6, 1697 (15353); Gordon, Nov. 14, 1749 (15384).

tarry, and he had availed himself of the option of making up a No. 184.  
ple title, under which he was at liberty to sell that portion of the

March 2, 1837.

Bontine v.

Graham.

pursuers answered, that though entails were to be strictly construed they were not to be construed in a sense contrary to the true meaning and import of the words actually used; and that these words bore a plain and anxious injunction to possess all the lands contained in the entail, under no title whatsoever except the entail. And the words "or any other right that I have in my person," had no such effect as to defeat that injunction, but merely expressed the entailer's desire that the entail should not be passed over by any heir, so as to avoid representing the entailer. And as this injunction was contained in a bond of tailzie, binding the entailer and his heirs, under which the defender Graham had taken the Gartmore estate, he was bound to have made up titles, as heir of the entailer, to the lands of Gartinstarry; and his either making up a title in the name of the entailer, or selling them, was as much a contravention, as the sale of a portion of lands to which his right was feudalized under the tailzie would have been.

Garchells. The dominium utile of these lands was onerously burdened by Robert Graham, an ancestor of the entailer, from one Hodge, 3. Robert Graham was previously infeft in the dominium directum of the lands holding of the Crown; and Hodge's conveyance in his favour contained a procuratory of resignation ad remanentiam, and also a precept of sasine, neither of which he executed. He and his descendants continued to hold these lands, being infeft in them, under the Crown, and exercising every right of full property and possession in them, but without executing the procuratory or precept till 1765, when the entailer, Robert Graham, took an infeftment under Hodge's precept of sasine. His charter of entail expressly contained "All and Whole the lands of Garchells,"

816, the defender Graham expedite a general service as heir-male in the possession of his grandfather Nicol Graham, the entailer. By means, eventually, of an interposed trustee, a reduction was carried through of the defender's infeftment under Hodge's precept; and Graham then took an infeftment under it and sold the lands. He afterwards reacquired a considerable part of them by executing several excambions of portions of the entailed estate, such as the lands of Mendowie, Colrigrean, and others, 10 Geo. III. c. 51. Part of Garchells was recovered in exchange for several parcels of land, but part was never reacquired to the entailed estate at all.

The defenders pleaded that as the entail was in the form of a procuratory of resignation, it could contain only the dominium directum of all the lands in which the dominium utile was not consolidated with the superior. This was the case with Garchells. When Robert Graham

184. acquired the dominium utile in 1708, he refrained from consolidating with the superiority, which he could easily have done by executing a procuratory ad remanentiam; and in like manner every successor refrained from executing it. And although forty years elapsed before Nicol Graham executed the precept in 1765, that could not operate *facto* consolidation, unless the heirs had actually both possessed and regarded the subjects as one undivided fee. But the contrary was proved to be the case by the conduct of Nicol Graham. His was a better means of judging than any person now enjoyed, whether the two fees, *directum et utile*, had been possessed as one, or had been separate; and, knowing them to be separate fees, he expedited a deed under the precept of Hodge: and though this was done in an irregular manner, and had since been reduced, it proved the non-consolidation of the fees at the date of executing the entail. And separately, even if the two fees had been consolidated, such infestment had, in the circumstances, the effect of separating them. The dominium *directum* of the lands was therefore alone contained in the procuratory of entail; and the sale of the dominium *utile* was no contravention.

The pursuers answered that Robert Graham was infested in the dominium *directum* of these lands, when he onerously acquired the dominium *utile* in 1708; and, as, the full possession and enjoyment of the lands and of every right of property therein, had always been concomitant with a feudal infestment in the dominium *directum* *eminens* for more than forty years thereafter, the two estates were consolidated thereby as effectually as if the procuratory of resignation ad remanentiam had been executed.<sup>1</sup> When, posterior to the year 1765, Nicol Graham executed Hodge's precept of *sasine*, it produced legal effect, and in particular, it did not separate the dominium *utile* from the superiority. But the defender Graham had farther rendered that infestment nugatory as in a question with him, by having the lands reduced, which would have destroyed any effect of its preventing consolidation, if it could otherwise have had such effect. The dominium *utile* of the lands was therefore contained in the entail, equally with the dominium *directum*; and as Graham made up a title to them in a simple, and sold them; and had afterwards only re-acquired a portion of them for the entailed estate, by exchanging other portions of that estate (which was in itself a new act of irritancy), he had committed acts of contravention, which were not and could not be purged.

3. In regard to the effect of the acts of contravention, it was proved to have been committed,

<sup>1</sup> Bruce, Dec. 6, 1770 (10805); Walker, Feb. 27, 1827 (*ante*, V. 466); Elibank, Nov. 21, 1833 (*ante*, XII. 74).

*Pleaded by the defender Graham, and the Compearers—*

No. 184;

The summons concluded for declarator that the lands and whole rents thereof had devolved on, and now belonged to, the pursuer, R. C. Bontine, since the date of citation in this action, free of every act or deed of the defender Graham, as absolutely as if he had never been in possession. The creditors compearers in this action had a right and interest, along with Graham, to resist this sweeping conclusion, which was untenable.

Every heir of entail, in succession, took up a right of fee, and nothing more; and he was entitled to make his own estate of fee the subject of lawful and onerous contract with third parties. In regard to all such lawful contracts, the rights of third parties could not be affected by any subsequent decree of irritancy on account of contravention by the heir; and though such decree might resolve the heir's right, from and after the date of its being pronounced, and might enable the next heir to make up the estate, it could only devolve the estate upon such heir, subject to the effect of all lawful contracts previously made by the heir in possession.<sup>1</sup> Thus, for example, provisions to a wife or child, though not strictly onerous, had been sustained, being within the powers of the entail, although decree of declarator of irritancy was subsequently pronounced against the heir, on account of an act of contravention which was prior in date to the provisions.<sup>2</sup> So also all leases made by an heir in possession, within the powers of the entail, were good, although the heir's right could afterwards be irritated by decree.

The question therefore was reduced to this, whether the act of burdening the entailed estate during Graham's lifetime was in itself a lawful act, or a contravention of the entail. For, if not in itself a contravention, it must remain good, notwithstanding the subsequent forfeiture of Graham. But it had been fixed by the case of Gray,<sup>3</sup> that an heir in possession might effectually constitute a real security during his lifetime. The practice of the country had since followed on this footing; and the right of adjudging the entailed lands, during the lifetime of the heir, was expressly recognised in the case of Graham, which had since been followed universally in practice.<sup>4</sup> And in the case of Gordon,<sup>5</sup> and analogous cases, the right of the heir in possession had been pleaded and sustained to this full effect, in the most unfavourable circumstances. After Gordon had committed an act of contravention, he engaged in the rebellion of 1745, and suffered forfeiture in consequence. The next

<sup>1</sup> 4 Stair, 18, 7; Bontine, Jan. 15, 1823 (ante, II. 115; or new ed. 106).

<sup>2</sup> Lothian, &c. Feb. 13, 1725 (15554).

<sup>3</sup> Feb. 15, 1810 (F.C.)

<sup>4</sup> Graham, Nov. 14, 1828 (ante, VII. 13); Graham, Dec. 3, 1830 (ante, IX. 5).

<sup>5</sup> Nov. 16, 1750 (4728); and 5 Brown's Supp. 782; Kinloch, Jan. 10, 1751 (5500); Lundin, Dec. 13, 1750 (9605); and 2 Elch. voce Forfeiture, No. 16.

184. heir afterwards claimed the estate, in respect that an act of contravention had been committed before rebellion, and was never purged; and that he had a right to declare an irritancy, which must prevail over the posterior right accruing to the Crown under the forfeiture. But the Court pronounced a finding, which was specially affirmed on appeal, that, as the irritancy was not declared, or founded on, prior to forfeiture, the forfeiture could not be affected by it. And as the right acquired by the Crown, under the forfeiture, was uniformly pleaded on the same footing as the right which would be acquired by any party to whom the heir should onerously alienate his estate during his lifetime, this case was direct precedent for the principle that such onerous alienation would remain good, throughout the lifetime of the heir, notwithstanding any subsequent declarator of irritancy.

On the authority of these cases, and on the principle that every heir of entail possessed an estate in fee, which he might lawfully make the subject of onerous contract to its full value, the real securities granted to creditors, by Graham, could not now be affected by any decree of irritancy which might be pronounced against him.

In this case there was the farther reason for repelling the pursuer's demand, that R. C. Bontine had allowed so many years to elapse after the acts of contravention, before bringing his challenge. While he was entitled, in vindication of the entail, and consistently with the policy of the statute, to forfeit the right of the defender Graham, he was not entitled, in the subordinate question which was strictly personal to himself, as to the period of his beginning to reap the full rents, to deprive onerous third parties of the consideration for which they had made advances to Graham while the pursuers chose to allow Graham's title of heir in possession to remain unimpeached.

*Pleaded by Pursuers.—*

The conclusions of the present action were directed solely against the defender Graham; and the pursuers were entitled, as against him, to a decree in terms of the libel in all respects, and particularly devolving the estate on the pursuer, R. C. Bontine, free of every act or deed of Graham, in contravention of the tailzie, "reserving," as specified in the summons, "all right of challenge competent to the pursuers and the other heirs of entail for reducing," &c. all rights granted to creditors or purchasers. But in so far as it was competent in this action to dispose of the pleas of the creditors, they were unfounded. It was true that leases, if within the powers of the entail, and all other lawful acts of administration, would remain good, notwithstanding the subsequent decree irritating the granter's right. And so also would family bonds of provision, granted within the powers of the entail, because, in so far, the granter acted as a fee-simple proprietor. But neither of these cases touched the present. It was true that every heir in possession held a right, not of liferent, but of fee: but it was a qualified and com-

In regard to its duration, it was, by its constitution, liable to be cut No. 184.  
 out by various contingencies besides the heir's death. His succession  
 a peerage, or to a second estate, for example, might bring his right to  
 end, just as effectually as a declarator of irritancy for contravention, March 2, 1837  
Bontine v.  
Graham.  
 the event of his death would do. But in reference to each and all of  
 these contingencies alike, the heir had no right to create a burden on the  
 estate in favour of any third party, which should endure beyond the  
 period when his own right came to an end.

There were no decisions which were opposed to this. The case of  
 Bontine was not a declarator of irritancy, but a competition among credi-  
 tors. The security there, like every other security which was granted  
 to an heir of entail (and like that held here by the Scottish Union In-  
 surance Company), was qualified by the condition that it was only grant-  
 ed in so far as was consistent with the whole provisions of the entail, and  
 to the extent of the right of the heir in possession, and no farther. The  
 effect of such a qualification saved the security from being a contraven-  
 tion, if challenged by any heir of entail: and it was a good real security  
 against all the rest of the world, to whom the entail was *jus tertii*. But  
 the very condition which saved it from being an act of contravention in a  
 competition with heirs of entail, rendered it, in terminis, void, so soon as the  
 heir's right came to an end, whether by decree of irritancy, or by taking  
 a peerage, or by death, or in any other manner.

In regard to adjudications, they were saved from being contraventions  
 by inserting a qualifying clause of the same import as that in the volun-  
 tary securities, restricting the diligence so as to operate only in so far as  
 was consistent with the entail. But until a case could be produced  
 where an adjudication was found to subsist after the right of the heir had  
 fallen, there was no authority whatever for maintaining the pleas of the  
 defender.

The right accruing to the Crown under a forfeiture for high treason,  
 was not analogous to that acquired by a creditor lending money on the  
 security of the entailed estate: nor did the decisions on that subject  
 warrant the inferences drawn by the defenders.

The principles maintained by the pursuers did not prevent an heir of  
 entail from making his qualified right of fee the subject of onerous con-  
 tract: they merely prevented him from conveying to any creditor a higher  
 right than he possessed himself.

If necessary, it would be easy to show that it was directly contrary to  
 the policy of the law of entail, and would militate against the security of  
 the estate in general, if substitute heirs, on forfeiting the right of an heir in  
 possession, were nevertheless to be cut out of the whole rents of the  
 estate during his lifetime. The heir in possession might often be a  
 larger man than the next substitute: the next substitute might himself  
 be obliged to give up an entailed estate, as the condition of taking up  
 the same.



784. that which was forfeited, and might be unable to do this, if he did not receive it free of the debts of the forfeited heir: and many similar cases might be put, showing how much against the policy of the law of entail it would be to sustain the defenders' pleas.

No delay had occurred which could interfere with the right of challenge of the pursuer, R. C. Bontine,<sup>1</sup> who was a minor when the loan to the Hope Assurance Company was effected; and still less could such delay be imputed to his minor children, the next substitutes. By such delay the pursuers were themselves the only losers. The creditors of an heir of entail in possession knew of the existence of the recorded entail, and had no right to complain that, by the public law of the country, the right of their debtor was liable to forfeiture, if he committed acts of contravention.

The Lord Ordinary "repelled the objection to the title of the pursuers to insist in the present action; found that the defender, William Cunningham Cunningham Graham, has incurred the irritancies set forth in the summons, by alienating or putting away the lands of Gartinstarry, with the pertinents thereof, the lands of Garchells, comprehending the Offerance of Cashley and others, or a part of the said lands, and also the lands of Mendowie, Colrigrean, Drum of Arnmanul and others, all portions of the estate contained in the entail executed by Nicol Graham, Esq. of Gartmore, mentioned in the record; and therefore declared accordingly in terms of the libel; and found the pursuers entitled to expenses of process."

<sup>1</sup> Cormack, July 8, 1829 (*ante*, VII. 868).

\* "NOTE.—The interlocutor of the Court, dated 12th June, 1835, having finally disposed of various points of the cause, the defenders now plead,

"1. That the pursuers have no title to insist, because the provisions of the tailzie not being inserted in the rights and conveyances under which Mr W. C. Graham enjoys the estate, the irritancy incurred by this omission extends, *statuti*, to the pursuers, his descendants.

"2. That the defender, Mr C. Graham, did not commit an irritancy by disposing of the lands of Gartinstarry, and the dominium utile of the lands of Garchells and the Offerance of Cashley, because they did not fall under the entail; and if the lands of Garchells had fallen under the entail, that the irritancy has been purged.

"3. That the conclusions of the action cannot affect the creditors of Mr C. Graham, who have sisted themselves in the action as defenders, their debts being made real incumbrances on the estate before his contravention has been declared; and these incumbrances being restricted to his life-interest in the estate.

"With regard to the first defence, when an entail declares that the contravener shall forfeit for himself only, and not for the heirs of his body, the Lord Ordinary considers it to be perfectly clear, that neither a contravention of the prohibitions of the entail, nor of the injunction in the statute to insert all its provisions in the subsequent rights and conveyances of the estate, can operate further than against the contravener himself. The statute 1685 is inaccurately expressed, and has always been strictly construed against the fetters of entails. Thus it enacts that all the conditions of an entail duly recorded shall be effectual, not only against the contravener and his heirs, but against his creditors; and on that ground Mr.

defenders reclaimed, and the Court ordered Cases.

No. 184.

wards, the Cases were laid before the whole Court, and a proceeding took place. As it appeared that it was understood by

March 2, 1837.  
Bontine v. Graham.

writers have held, that unless heirs are expressly exempted, irritancies them. But the reverse was decided in the case of Simpson,<sup>1</sup> and the law so settled ever since. On the same principle, although the statute de- at the omission to insert the provisions in subsequent rights and convey- all import a contravention by the person who omits and his heirs, this signifies a contravention of the same extent and effect with any other tion of that entail, operating against heirs, if the entail expressly forfeits t not otherwise; and this is plainly the opinion of Mr Erskine, as the one species of contravention and the other on exactly the same footing. dature could have had no object in inflicting a penalty in either case an the entailer himself had thought proper to do.

ems equally clear, that the lands of Garchells and those of Gartinstarry effectually entailed. With regard to Garchells, the dominium directum and had been in the family of Gartmore for a long period. In the year bert Graham of Gartmore acquired the dominium utile; and both it and um directum were possessed by him and his successors, for a period of a forty years before the entail was executed by his descendant, Nicol

According to a fundamental and most expedient principle in our law ancing, a consolidation of the superiority and property was thus effect- t is thought that they were not afterwards separated by an unmeaning e entailer, who, long after prescription had run, took investment on the the disposition by which the property had been conveyed to him. But ey were again separated or not, it was manifestly the intention of the o include them both in his entail. Indeed, the precept seems to have uted in majorem cautelam, for that very purpose, and accordingly, the words in the bond of tailzie apply equally to both. With regard to of Gartinstarry, which hold of a subject superior, it is admitted that they sly entailed; but as there is a clause, providing that the heir shall pos- tue of the entail, or by any other right in the entailer's person, it is at the defender having completed his titles, not by executing the procu- he entail, but on a precept of clare constat from the superior, under the ee simple investiture, he was at liberty to possess on that right, inde- of the entail. It is thought that the clause founded on imports only ir should pass by the entailer, and make up a title to the exclusion of the t by possessing on rights which were in the entailer's person, that he ject himself to the obligations in the bond.

defenders plead, that the irritancy as to the lands of Garchells, &c. was cause, after being sold by the defender, Mr C. Graham, they were again y virtue of certain excambions under the 10 Geo. III. It is enough to art of them was not recovered by these excambions; and farther, and ll more material, it is impossible to purge one irritancy by committing a tancy, for the lands excambed under the statute were themselves part of d estate.

is defence upon which Mr C. Graham's creditors mainly rest is, that a irritancy be declared against him, it will not affect their debts made he entailed estate, by conveyances, heritable bonds, or adjudications on hments have followed, before a decree of declarator of irritancy has not him,—these incumbrances being restricted to his life-interest in the principle at one time obtained in our law, that the deed of a proprietor

21 1837.

21 1837.

21 1837.

1841. both parties, or at least by the defenders, that the decree pronounced by the Lord Ordinary would not only cut down the right of the debtors, but also the right of the creditors.

E. 1837.

1841.

infest must affect, ex necessitate juris, the fee of his estate; to obviate which, in the case of entails, irritant and resolutive clauses were devised, by which the estate was held to be forfeited in the person of the contravener, by virtue of the clause, before the right which he had granted was annulled by the resolutive clause. According to this presumption or fiction, every deed of the contravener, in violation of the entail, though not prohibited, or even although permitted by the clause, ought to have been avoided, on the maxim, *resoluto jure dantis, resolutio recipientis*. But the fiction itself was absurd, as has been often demonstrated, if followed out to all its consequences, would have been unjust and mischievous. Accordingly, for more than a century it has been settled law, that every deed of the heir in possession, permitted or not prohibited by the entail, is valid, done after a contravention, but before decree of irritancy; for example, power to wives and children, leases for an ordinary term of endurance, feus under a missive clause, and the like. But it never was pretended that an act of contravention could be effectual, because it was committed before a previous contravention had been declared. The question, therefore, in the present case is not this, Are the debts which have been made real on the estate of Gartmore infestments of the creditors, or their trustees, contraventions of the entail? The creditors maintain the negative, on the ground that their infestments are absolute, but defeasible on the death of Mr C. Graham, and they refer to the case of *Nairn versus Gray*.<sup>1</sup> But the entail of Gartmore prohibits all incumbrances without distinction as to the period of endurance, by the ordinary clause, the contraction of debt. In equity, indeed, it has been held, that if an incumbrance, though prohibited, does not encroach on the rights of the next substitute, they have no interest, and, therefore, no title to challenge it; and on that ground, a trust-deed, an adjudication, or heritable bond, has been thought valid, if its endurance is commensurate with the right of the heir in possession. It is obvious that the right of the heir in possession does not necessarily subsist for his life. It terminates not only by his death, but by a decree of irritancy. It is not, therefore, in equity, therefore, in holding, nor has it ever been held, that any incumbrance not defeasible on either of these events, is not a contravention, and therefore a substitute has both interest and title to challenge it if not so restricted. The case of *Nairn* seems to have been misunderstood. It was not a declarator of irritancy. The question occurred in a competition of creditors, and resolved into this, whether an heritable bond, granted by Mr Gray, the heir of entail in possession of the estate of Carse, to Mr Fletcher, and afterwards assigned to Sir William Nairn, was or was not a real security? The bond declared that it should not be interpreted or extended to infer any infringement upon, or the creation of any of the irritancies contained in the said deed of entail, or any other therefrom in any manner of way whatever. In virtue of that clause, therefore, Sir William Nairn's infestment was clearly defeasible, not only on the death of the heir, but when his right to the estate terminated by a decree of irritancy, or otherwise. But the personal creditors maintained, that as the security was declared by this clause to be such as did not infer an irritancy, and as every security was prohibited, therefore the infestment was not a real security. The Court overruled that plea, on the principle already explained, that while the right subsisted, no substitute was entitled to challenge a security, even although it was real, and falling under the words of the prohibition, because it could not at that time operate to his prejudice.

"In the present case, the trust-deed granted by Mr C. Graham in favour

<sup>1</sup> Fac. Coll. Feb. 15, 1810.

raham, but also the right of the creditors, the Lord Ordinary, before No. 184  
e cause was advised, gave the following explanation to the Court.

March 2, 18  
Boutine v.  
Graham.

**LORD COREHOUSE.**—I think some misunderstanding exists as to the import and effect of my interlocutor, and that it has been construed in a sense which I never meant it to bear, and which I do not conceive it can bear; but if it can, it could be altered and qualified. The action is a declarator of irritancy, directed solely against the heir in possession, concluding to have certain acts of contravention declared against him, and his right to the estate declared to be forfeited. Such an action is often combined with a reduction-improbation setting aside conveyances to purchasers, or securities granted in favour of creditors. But this action contains no such conclusion, and, on the contrary, the summons, in express terms, “reserves all right of challenge competent to the pursuers for reducing and setting aside” such conveyances. By necessary implication the right of creditors and purchasers was also reserved to state their defences against such challenge, when it should be brought. Under this action, though the contravention by the heir was declared, and his right to the estate forfeited, it does not follow that the rights of creditors must be set aside. They may have various defences. The entail may have been defectively recorded; the pursuer may be barred personally excepted from challenging their rights, though not from setting aside the right of the heir in possession; or there may be other defences. It is therefore an erroneous assumption, as it appears to me, that a decree in terms of this libel, which expressly reserved the rights of creditors for future challenge, should be held to have the effect of sweeping away the rights granted to these creditors, or declaring them to have been mala fide possessors since the date of citation in this action. No such decision has yet been pronounced. The judgment, under review, is no such decision. And supposing that a reduction-improbation is still to be sought, for rescinding their securities, it may perhaps be found that their bona fides did not cease until citation, or even until decree in that action. The question of their bona fides, as well as their other defences, is not disposed of, and, as

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creditors, some of whom appear in this action, contains a clause exactly similar to that which occurred in the heritable bond in the case of Nairn, declaring that the debtment should not prejudice the heir of entail succeeding to Mr C. Graham in the estate, nor affect his right to the lands, nor the rents falling due after his death, nor be further binding on him, in regard to said lands and rents, than is consistent with the entail. It does not appear whether all the other securities contain clauses of the same effect. If they do, they are, in terminis, void, when an irritancy is declared. If they do not, they are incumbrances prejudicial to the rights of the substitutes, and, therefore, contraventions which can have no support in equity. It may be added, that the law then laid down, that a substitute has no title to challenge a contravention unless it be prejudicial to his interest, though very expedient in practice, may be questioned on principle. There may be various conditions in an entail, such as, that the heir shall bear the name and arms of the family, shall reside in the kingdom, and the like—which a substitute has no interest to enforce, but that they were the injunctions of the entailer, and on their being violated, his own right to the estate has opened. Be this as it may, it is clear that they can never interpose to support the right of creditors holding real securities expressly prohibited, after the right of the heir who granted them has been extinguished.”

1847. it seems to me, cannot, by the frame of the summons, be disposed of, in the present action. These misapprehensions of the creditors appear to rest on the circumstance that the summons concludes for declarator that the lands, with all rents, have devolved on the pursuer R. C. Bontine, from the date of citation of this action, disburdened of every act and deed of the heir in possession, and as and freely as if he never had enjoyed possession. Now, although these conclusions are in the summons, according to the ordinary style of such a summons, and though I pronounced decree in terms of the summons, it is necessary to consider who is the party, and the only party, against whom decree is pronounced. It is the heir in possession; against whom alone the action was raised, and against whom these conclusions, if contravention was proved, were well founded, and a decree must have been pronounced in these terms against him. It is true that creditors have appeared and been sisted in this action. They had an interest in title to do so, to the limited effect of supporting every defence competent to the heir in possession. If they could defend his right, a fortiori they could defend their own. But they appeared in an action in which his rights, and the plea competent to him alone, could be effectually discussed and decided; leaving other parties to defend their own rights, when challenged in an action directed against themselves. It would even involve an absurdity if the judgment under review was interpreted in any other way. The conclusion as to the devolution of the lands free of every act and deed of the heir in possession, is, of course, broad and sweeping, that if it was not to be construed with reference to him, it would strike not only at every right granted to a creditor, but every lease entered into with a tenant, and at all deeds of the heir though executed under the missive powers of the entail. It appears to me, therefore, to be clear that the decree under review could not possibly receive the general effect ascribed to the defenders; but if there is any room for doubt on this subject, a reserve should be inserted in the interlocutor, saving to the creditors, or trustees of the estate, who had sisted themselves, their defences in every challenge of their title which may hereafter be brought.

On this explanation being made, the

*Dean of Faculty, for Defenders*, moved for leave to withdraw the Creditors from the process.

The Court refused the motion.

The following Opinions were given by the Court:—

LORD JUSTICE-CLERK.—As I understand, from the explanation of the Lord Ordinary, that his interlocutor was intended to decide no question as to the validity, or invalidity, of any securities which may have been granted by the defender Mr Cunningham Graham, to affect the estate of Gartmore, but that it only related to the fact that the defender had incurred the irritancies set forth in the summons, by alienating or putting away the several portions of the entailed estate of Gartmore specified in the interlocutor, I am of opinion that the interlocutor ought to be adhered to. I think the objection which has been taken to the title of the petition to insist in the action is not well founded, in reference either to the terms of the entail itself, or to those of the act 1685, c. 22.

LORD MEADOWBANK.—I am of the same opinion.

**LORD GILLIES.**—I am of the same opinion too. I entirely concur with the Lord Ordinary, and have all along done so. No. 184

**LORD PRESIDENT.**—I entirely concur with the Lord Ordinary also, and with all the views he has expressed in his note. I should have done so, independently of the explanation that has been given by his Lordship. March 2, 18  
Bontine v.  
Graham.

**LORD MEDWYN.**—I concur in the interlocutor as it has been qualified by the explanation of the Lord Ordinary.

**LORD FULLERTON.**—I concur with the Lord Ordinary.

**LORD MONCREIFF.**—After the explanation which has been given by the Lord Ordinary, I have no hesitation in concurring in the interlocutor. But I should have felt great difficulty in concurring with some of the views in his Lordship's note. I only adhere, therefore, on the understanding that the right of the creditors, to try the validity and effect of their securities, remains without prejudice from this judgment.

**LORD JEFFREY.**—I am for adhering to the interlocutor as now explained, and would pronounce decree in terms of the libel, which contains a reservation of the rights of the creditors as the subject of future challenge, in any question with them. In doing so, I consider that some of the defences are repelled, which the creditors could otherwise have maintained. If no judgment had been pronounced declaring that the heir in possession had contravened, and had forfeited his right, in any question with the next substitute, R. C. Bontine, it might have been the first part of the creditors' defences, when an action was brought against them, that no act of contravention had been committed which could have any legal consequences against the right and interest of the individual heir in possession. But that is disposed of in this action; a contravention, and its consequent irritancy, are declared against him in this action; and thus, when the rights of the creditors are afterwards challenged, the outworks of their defences are already removed, and they will be obliged to defend themselves upon grounds peculiar to themselves as onerous third parties, who contend that they possess defences which remain good, notwithstanding that the heir in possession had committed acts of contravention, and that his right had suffered a decree of irritancy.

**LORD COCKBURN.**—I am for adhering to the interlocutor as now explained by the Lord Ordinary.

**LORD CUNINGHAME.**—I am also of opinion that we ought to adhere, subject to the explanation which has been given. Perhaps, however, such an interlocutor does not make much way against the rights of the creditors, as it only cuts down the right of the heir as maintained in this action, and the creditors in their pleadings appear almost to admit that that right cannot be defended.

**Solicitor-General, for Defenders.**—I move your Lordships to insert a reservation of the rights of the creditors in the decree to be pronounced. The pursuers have no right or interest to object to this; and as the cause is likely to be carried to the Court of Appeal, where the Judges are nearly less familiar with the technicalities of our forms of process than your Lordships are, there might be some hazard that an unqualified decree in terms of the libel might receive a larger interpretation than your Lordships give it.

184. LORD GILLIES.—I think a reservation in the interlocutor is quite unnecessary. The summons contains that reservation in gremio, and a decree in terms of the libel is just a decree under that reservation. It is not, and cannot be, more than that.

LORD PRESIDENT.—I think the reservation in the summons is as effectual as any which could be inserted in the decree; and as the decree is pronounced with express relation back to the summons, it is qualified with the same reservation which exists in the summons itself.

LORD CORHOUSE.—The decree certainly did not go beyond the summons in decerning in terms of it. The summons contains expressly the reservation of the rights of the creditors for after challenge. The decree did not, and could not, go farther than the summons.

In regard to expenses, their Lordships were of opinion that those only should be awarded to the pursuers which had been incurred in discussing the question as to the acts of contravention, and the conclusions of irritancy; and that the expenses belonging to the previous branch of the discussion, respecting the validity of the entail, which was disposed of by the interlocutor of June 12, 1835, should not be awarded against the defenders. Their Lordships were not understood to intimate expressly whether they held it, in the circumstances, incompetent to go back as that branch of the expenses; or whether, supposing it competent, it was not according to the justice of the case to do so.

The following was the interlocutor pronounced by the Court:—

“The Lords of both Divisions, and the permanent Lords Ordinary, having heard this cause, adhere to the interlocutor of the Lord Ordinary reclaimed against, with the exception hereinafter mentioned as to the expenses found due, and refuse the desire of the reclaiming note, reserving all questions with regard to the validity and effect of the heritable securities granted to or acquired by the creditors of the said W. C. C. Graham, and to all concerned, their objections, as accords. Find the pursuers entitled only to the expenses incurred in discussing the question of irritancy, and, to that effect, alter the Lord Ordinary's interlocutor; and of new find expenses due to the pursuers relative to that branch of the cause.”

J. KEE and H. G. DICKSON, W.S.—A. HAMILTON, W.S.—Agents.



RICHARD FRITH and MANDATARY, Pursuers.—*D. F. Hope.—Moir.*  
 BUCHANAN, HAMILTON, and COMPANY, Defenders.—*Sol.-Gen. Rutherford—Ivory.*

No. 185.

March 3, 1835  
 Frith v.  
 Buchanan.

*Confirmation—Executor—Arrestment.*—A party died intestate, leaving four next of kin; the creditors of one of the next of kin used arrestments in the hands of a debtor to the deceased, as being now debtor to his (the arrester's) debtor; two of the other next of kin afterwards expedite a confirmation, specially including the whole debt due by the arrestee to the deceased; the arrestee then paid the debt to the confirmed executors, and obtained a discharge from them:—Held (by a majority), that the arrestee was still liable to the arrester, in respect that, by the statute 4 Geo. IV. c. 98, the moveable estate of the deceased vested ipso jure in the surviving next of kin, to the effect of being either assignable or arrestable, though no confirmation had been expedite at the date of such assignation or arrestment.

THE late Robert Hamilton, merchant in Glasgow, died intestate on March 3, 1835 December 26, 1834. He left five brothers and sisters; one brother elected the heritable succession, the other four were entitled, as next of kin, to share amongst them the moveable succession. One of these four was John Hamilton, residing at Partickhill. Robert Hamilton, at his death, had funds to the amount of £4725 in the hands of Buchanan, Hamilton, and Company. On January 13, 1835, Richard Frith, a creditor holding a decree against John Hamilton, used arrestments to the amount of £200 in the hands of Buchanan, Hamilton, and Company, as debtors to John Hamilton. No confirmation of the estate left by the deceased Robert Hamilton had hitherto been expedite by any party. On February 24th, confirmation qua next of kin was expedite by one of the brothers of the deceased, named James, and by one of his sisters: in the inventory, the funds in the hands of Buchanan, Hamilton, and Company were specially contained. On the following day, Buchanan, Hamilton, and Company paid over John Hamilton's share of the sum in their hands to these executors, and obtained a discharge from them. The executors, on the same day, paid over this sum to a private trustee for the creditors of John Hamilton, whose affairs were in embarrassment. The trustee granted a letter to Buchanan, Hamilton, and Company, obliging himself to hold the money "subject to the arrestments used in your hands at the instance of Richard Frith; that is, in so far as these arrestments were sufficient, validly to attach the said money." Frith raised an action against Buchanan, Hamilton, and Company, as liable for the debt, in respect of their having paid away the whole of John Hamilton's share of the intestate succession of his brother Robert, in breach of the arrestment.

Buchanan, Hamilton, and Company pleaded in defence, that, at the date of his arrestment, there was no real right in his debtor John, to any

1st DIVISION  
 Ld. Corehouse  
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185. of the funds which had belonged to the deceased Robert; and that statement was an inhabile diligence.

The question turned chiefly on the following provisions of 4 Geo. 4 c. 94, entitled, "An Act for the better granting of confirmations in Scotland;" (§ 1.) "Whereas it is expedient that provision should be made for the better granting of confirmations in certain cases in Scotland, be it therefore enacted, That from and after the passing of this Act in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedited, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate." It is also provided (§ 3), that after January 1, 1834, "every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath;"—"provided (§ 4), That in the case of confirmation by executors-creditor, such confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath."

In reference to this statute, the defenders pleaded—

1. The evil, intended to be removed by this statute, was that of the next of kin of an intestate defunct dying unconfirmed; in which case, whether such next of kin died testate or not, his representatives, or his creditors, could not have taken up the moveable succession which was in bonis of the first defunct.<sup>1</sup> But so long as the next of kin of the first defunct remained alive, no hardship ever existed, as it was open to him to confirm, qua next of kin, to the intestate; and if he refrained from doing this, the special remedy of 1693, c. 41, was given, by which his creditor could obtain himself decerned executor-dative to the defunct as if he had been creditor of the defunct. The only grievance requiring remedy was, therefore, where the next of kin died without confirming to the intestate defunct. But in the present case, the next of kin, John Hamilton, was still alive, and the statute had no application.

2. The words of the statute, equally with its spirit, showed that the remedy was not meant for a case where the next of kin was still surviving. It was entitled "An Act for the better granting of confirmations;" and it was, on a corresponding narrative, provided, that where any one of the next of kin "shall die before confirmation be expedited, the right shall transmit" so that confirmation may and shall be granted to such representatives in the same manner as confirmations might have been granted to such next of kin." This was a well defined and limited

<sup>1</sup> 3 Etsk. 9, 30.

edy, exactly adapted to the species of grievance to be removed, but together inapplicable to the case where the next of kin remained

No. 185.

March 8, 1887

Frith v.

Buchanan.

The precise effect of the statute was, to make the *jus ad rem*, including the whole succession, transmit to the representatives of any of the next of kin, dying unconfirmed. It was thus analogous, in effect, to a partial confirmation qua next of kin, under the old law, which, though it created no real right in such executor, excepting to the partial extent of effects specially confirmed,<sup>1</sup> yet created a *jus ad rem* to the whole movable estate, and caused that right to transmit to the next of kin of such executor, though he died only partially confirmed. But any creditor of such executor, using arrestment of effects not included within the partial confirmation, would have attached nothing, as these remained in *bonis fidei*, until confirmation of them should be duly expedited. And so also, under this statute, an arrestment, while the next of kin was alive and unconfirmed, must be equally ineffectual.

4. The case of Mann was no precedent to this case, both because the next of kin was there dead, whereas here he remained alive; and also because that case did not decide in what manner the effects of an intestate decedent were to be taken up, but merely that the *jus ad rem* transmitted to the representative of the next of kin, dying unconfirmed, and that the assignee of such next of kin (who was also husband of the next of kin) was a representative in the sense of the act.

5. If the statute was construed so as to vest *ipso jure* in the next of kin, a real right in the moveables of an intestate defunct, so soon as the death happened, it would lead to very anomalous consequences, not only in reference to the other provisions of the statute itself (which enjoined confirmation, and required it to be total, in every case but that of an executor-creditor), but also to the general principles of the law of Scotland which would thereby suffer innovation to an extent altogether unforeseen at the passing of the statute.

*Pleaded by the Pursuer—*

1. The grievance to be remedied was not so limited as the defenders contended; and the intention of the statute was, to vest the succession *ipso jure* in the next of kin surviving an intestate, both to the effect of rendering it assignable by the voluntary deed of the next of kin, and enforceable by the diligence of his creditors. The necessity of confirmation still remained, both for fiscal purposes, and also to complete a title for extracting payment from such debtors as might refuse otherwise to pay. It placed the vesting of moveables in Scotland on the same footing as

<sup>1</sup> Sloane Lawrie, July 27, 1779 (3918); Alison, May 26, 1802 (3922); Atkinson, Jan. 14, 1808 (Dict. voce Service, &c. Appx. No. 3); Henderson's Trusts, May 20, 1831 (ante, IX. 618).

185. in England, where letters of administration were nevertheless required for these purposes. And institutional writers had concurred in taking view of the statute.<sup>1</sup> In regard to the remedy of 1695, c. 41, it could apply to this case now, as the whole executry had been confirmed two of the next of kin.

2. The statute, being remedial, the Court should construe its words liberally, so as to advance the remedy, and prevent the statute from being frustrated. Such construction was the more necessary in reference to the statute, as it was loosely and inaccurately framed, and had been so considered by the Court.

3. The right conferred by the statute was broader than that which existed under the old law from expeding a partial confirmation; and it was in consequence of the whole succession being made to vest *ipso jure*, that partial confirmations *qua* next of kin, were abolished.

4. The case of Mann<sup>2</sup> could not be explained on any principle other than that of a real right vesting *ipso jure*, in the surviving next of kin. In that case, one of the next of kin of the intestate, assigned her share of the succession; and such assignation was found preferable to any posthumous confirmation; which could not have been the case unless there had been a real right in the cedent, to the effects assigned. And though the cedent was dead before the competition arose, that did not weaken the case as a precedent; as it would be altogether anomalous to hold that the death of a cedent should make his assignation carry more than he could have made it carry, while he lived.

5. There might be difficulties experienced at first, in adjusting the operation of this new statute; but these would be found to be great according to the defender's interpretation, than according to that of the pursuer.

The Lord Ordinary "repelled the defences and decerned in terms of the conclusions of the libel; and found expenses due." \*

<sup>1</sup> 1 Bell, 141; Stair (by More), 357, Note II.; Stair (by Brodie), p. 597, Note Robinson on Personal Succession, p. 65; Robertson, Jan. 26, 1828 (ante, p. 446.)

<sup>2</sup> Feb. 9, 1830 (ante, VIII. 468).

\* "NOTE.—The statute, 4 Geo. IV. c. 98, as has often been remarked, is not distinctly or accurately expressed. If it were literally construed it would support the defenders' plea, but being a remedial statute, by a well-known rule of law, it is entitled to, and has in practice received, a very liberal construction. Thus, although it is limited to the case of the next of kin dying unconfirmed, whose right it provides shall transmit to his representative, it has been found to give the same remedy to the assignee of the next of kin, who is a singular successor, and not a representative. But the question here is, what is the nature of the right which is transmitted? Is it merely a *jus ad rem*, or does the property vest *pleno jure* in the representative, confirmation being still required in both cases? In the one case the purpose of placing the subject in bonis of the representative, and in the other merely to give the title to administer for behoof of all concerned. The latter view seems most conformable to the object of the legislature, in so far as it can be put

defenders reclaimed; and the Court ordered cases. On consideration of the cases the following Opinions were given:—

March 3, 1857.  
Frith, J.  
Buchanan.

**GILLIES.**—I think the interlocutor is well-founded and should be adhered to. I conceive that an assignation by John Hamilton would have been valid, and consequently that an arrestment was a *habile diligence*.

**MACKENZIE.**—I feel some difficulty in disposing of this case. It appears that there is a total want of authority in the statute to sanction what the court attempts to do here. He has arrested funds of the intestate defunct, as the defunct is debtor, one of the next of kin, who is still living: and the competing claim is confirmation by another of the next of kin to the intestate defunct. The question then is, what authority is there in the statute for arrestment used in the present circumstances. I can find no warrant for it in the statute. The narrative of the statute purports that its object is to make provision “for the better grant of confirmations in certain cases,” and it proceeds to make an enactment corresponding to this narrative, “That, in all cases of intestate succession, any person or persons who, at the period of the death of the intestate, being

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conjectured. The defects in the law of Scotland with regard to the vesting of moveable succession had been felt in the case of Egerton in 1812, and of Mann in 1817, and the decisions pronounced in both were calculated to get the better of that defect in the case of succession to funds in England, where the hardship was not so apparent. But the soundness of the principle on which they proceeded, ingeniously and ably stated, came to be called in question, particularly in the case of Milligan in February 1826. It therefore became desirable to assimilate the law of Scotland to that of England in this matter, and accordingly the statute 4 Geo. 4, was passed in that year. By the law of England, moveable succession vests in the same manner as the *legitim* and *jus relictæ* vest with us, or the property which the next of kin obtains possession; and it cannot be doubted that, from this point of view, this is the most equitable and expedient rule. The form of the statute is still allowed to remain to give the *jus exigendi*, for various reasons, and in particular to serve fiscal purposes, just as administration is requisite and for similar reasons, although unnecessary for the purpose of vesting the property in those who have the beneficial interest in the succession. Undoubtedly the statute does not bring out this in a clear, or indeed an intelligible manner. The Lord Ordinary would not have ventured to pronounce the interlocutor as done, were it not agreeable to high authority. In the case of Mann, mentioned, it was laid down in the First Division, that ‘the statute was intended to promote, that its purpose was to give to the next of kin, in the case of an intestate defunct, the same right in the moveables which they would have by actually apprehending and taking possession of them.’ Now, it is clear, that, by the apprehension or possession of moveables, the next of kin acquire a *jus ad rem* merely, but that the property so apprehended or possessed no longer remains in *bonis* of the defunct, but vests in them *pleno jure*.

The same view had been previously taken by Mr Bell in the fifth edition of the Commentaries, published in the year in which the statute was passed. Explaining the former state of the law, he proceeds to observe, ‘that, by the statute, this is altered, and the succession is made to vest *ipso jure* without any apprehension.’ It is needless to remark that, if a *jus in re* is transmitted to the next of kin, it will found an effectual arrestment in competition with a subsequent assignation.

While the Lord Ordinary has thought it his duty to follow these authorities, he is fully aware that the question is attended with difficulty.”

185. next of kin, shall die before confirmation be expedé, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate. That is the whole provision of the statute on which the pursuer can found. It is expressly limited to the purpose of granting confirmations as there allowed; and it expressly points out that the cases to which it applies, are those in which "the next of kin shall die before confirmation be expedé." In that express case benefit is conferred on their "representatives." I cannot see how the statute is to be construed so as to apply to cases which are just the reverse of this, in regard to the important fact of the next of kin not being dead, but being still alive: during which period it is premature to speak of his having a representative, he himself being still in existence and able to confirm. I cannot find any thing in this enactment to imply that where the next of kin is still in life, his creditor may do arrestments of the goods or debts left by the defunct, as being *ipso jure* fully vested in the next of kin by his mere survivance. If arrestment be good without confirmation, I suppose it may also be followed by a forthcoming without the intervention of confirmation: and all this under the authority of an act which was passed expressly to facilitate the granting of confirmations. I own that I do not perceive how it possibly can be done. I am of opinion that the statute was not meant to vest the real right in the next of kin without confirmation, but intended that there should be confirmation in order to vest such real right, and, for that purpose, gave certain facilities for expediting confirmation. And accordingly the statute contemplated the continuance of confirmation by executors-creditors, as well as other executors, and made express regulations respecting them. But if the mere force of the statute passes the real right in the effects, out of the defunct's *hereditas jacens*, and vests it in the next of kin, so as to be there attachable by a creditor of the next of kin, it is difficult to see what remains in *bonis defuncti* as to be attachable by the confirmation of any of his own creditors; and yet the statute has expressly sanctioned the proceeding of confirmation by an executor-creditor. The statute has also prohibited any partial confirmation excepting by an executor-creditor, and it is declared (§ 3) that every other person "shall confirm the whole estate of a deceased person known at the time, to which such person shall make oath." But if one or more arrestments by the creditors of any of the next of kin have attached part of the estate in the mean time, I am at a loss to know how a total confirmation can afterwards be expedé; and if it cannot, in what way is this injunction of the statute to be satisfied. Besides this there are other difficulties and apparently inextricable anomalies which seem to me to result from construing the statute upon the principle adopted in the interlocutor, in which therefore I cannot concur. I am aware of the decision in the case of Mann; but that case differed in some essential points from this. The next of kin was dead, in place of being still surviving, as here; and, in other respects, it did not involve all the principles which are involved in this case.

LORD COREHOUSE.—I have before me the notes of the late Lord Belgray upon this cause, when his Lordship had first considered the reclaiming Note: and they are to the import that his Lordship understood the statute to have the effect of causing moveables to vest *pleno jure*, as in England, and that consequently an arrestment must be effectual in competition with a posterior confirmation. were his Lordship's views. I am sensible that this interpretation of the

attended with various difficulties, and I foresaw this at the time of pronouncing my interlocutor. But I thought it the true construction; and, after much consideration, I remain of the same opinion still. I think the object of the statute was, in respect to all but executors-creditors, to abolish partial confirmations, which vested no *jus in re* except to the partial extent contained in the confirmation; and to substitute something else in their stead. I think the object of the statute was to vest a *jus in re*, in the next of kin; a matter which was the subject of much discussion in the cases of *Egerton* and *Craigie*, and which drew from the late Lord Meadowbank an expression of regret that there then prevailed so much difference between the law of England and that of Scotland, in regard to the vesting of the moveable succession of a defunct. In England, moveables vest *ipso jure*, but still letters of administration require to be taken out; and so in Scotland I conceive that they now vest *ipso jure*, but that a confirmation should still be expedite. I consider the case of *Mann* to be an authority to the effect that the moveables actually vest *ipso jure*. The assignation by one of the next of kin was there held to be effectual, without his having confirmed, which showed that he held not a mere *jus ad rem*, but a real right of property. And although an assignee be not properly a representative, yet the Court in that case held the assignee to be a representative *quoad* the subject assigned. The Court held that the statute had the same effect, as to vesting, which the actual apprehension of the moveables themselves would have had; in which case the real right was enjoyed without any confirmation having been expedite. To that extent I regard the case of *Mann* as a precedent. And I find that Professor Bell, in his Commentaries, takes the view that the statute has the effect of producing an *ipso jure* vesting of the moveable succession. I am aware that the case is attended with difficulty, but this appears to me, on the whole, to be the just view of the statute. And I may add, in regard to the question whether the statute requires confirmation to be expedite to the testate defunct, or to the next of kin afterwards dying unconfirmed, that it does not appear to me that there would be much incongruity in confirming to either.

**LORD PRESIDENT.**—I think the interlocutor should be adhered to. I am much struck with an observation of Lord Gillies at advising the case of *Mann*, which was that the statute changed the phraseology from “next of kin,” in reference to the party in right of the intestate defunct, to “representative,” in reference to the party in right of the next of kin. And I consider that an assignee is a representative of the cedent, in whose right he insists.

**THE COURT** adhered, and awarded additional expenses. In regard to the expenses, it was Observed by the Court that the difficulty of the question raised should not have the effect of burdening a competing creditor with the cost of trying whether the defenders had been able to defeat his diligence.

**HENRY CHEYNE, W.S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—Agents.**

No. 185.

March 3, 1837

Perth v.

Buchanan.



186. UNIVERSITY OF GLASGOW, Pursuers, and JOHN M'MILLAN and  
 1837. Charges.—*D. F. Hope—Sandford.*  
 Faculty of Physicians and Surgeons of GLASGOW, Defen  
 Suspenders.—*Sol.-Gen. Rutherford—Penney.*

*Corporation—Penalty—Expenses.*—1. Adherence, on remit, to the  
 ante, XIII. 9, finding the Faculty of Physicians and Surgeons of Glas  
 corporation.—2. The adjection of a penalty for contravention of corpo  
 leges does not preclude the corporation from the benefit of an interdict  
 penses in House of Lords awarded to the respondent under an authority  
 mine the same.

1837. SEQUEL of the case mentioned ante, XIII. 9, which see. An appeal  
 been taken by the pursuers and chargers against the interlocutor  
 Division. reported, the House of Lords (28th August, 1835) pronounced the fi  
 T. judgment: ' It is ordered and adjudged by the Lords, Spiritual or  
 poral, in Parliament assembled, that the said cause be remitted bet  
 Second Division of the Court of Session in Scotland, with direct  
 the Judges of that Division to consider, and to take the opinions  
 whole Judges of the Court of Session, including the Lords of  
 whether the respondents, as the Faculty of Physicians and Surg  
 Glasgow, are a corporation, capable in law of possessing, and,  
 clothed with the rights for which they contend in this action; and  
 consider whether the right of interdict is taken away by the provis  
 penalty made in the grant, or letter of gift, in the pleadings men  
 And it is further ordered, that the said Court do determine the c  
 of the respondents' costs, relating to this appeal, and that they hav  
 to recall or alter the said interlocutors appealed from."

On the cause returning to this Court cases on the points remi  
 consideration were ordered to be laid before the whole Judges  
 opinion, but the pleas maintained in these it is unnecessary se  
 to detail, as they are sufficiently adverted to in the opinion of the  
 ed Judges, which was as follows.

LORDS PRESIDENT, GILLIES, MACKENZIE, CRANSTOWN, FULLERTON  
 CREIFF, JEFFREY, COCKBURN.—We have considered the remit from the  
 Lords, with the cases subsequently lodged for the parties, and the whole  
 and remain of the opinion which we formerly gave, that the respondent  
 appeal are a corporation capable of holding the rights which they now cla

Their title is a letter of gift or charter from King James the Sixth, c  
 29th November 1599, which was ratified by the Scotch Parliament in 167  
 possession of the character of a corporation, and their actings in a corpor  
 city for more than two centuries, are established by documentary evidence

allest and most satisfactory nature ; and their title, as a corporation, has not only been recognised in various judicial proceedings, but specially found and declared by this Court in an appropriate action brought for that purpose.

The case of the appellants, as it appears to us, derives its only support from the principle which they have adopted of laying entirely out of view the law and practice of Scotland with regard to corporations, and substituting in its stead the law and practice of England in that matter, not as to one point alone, but almost every point which they have had occasion to raise. It is true that the corporation law of Scotland has a general resemblance to that of England, as it has to that of many other countries in Europe, for the nature and object of these institutions are the same in all, being originally derived from the civil law, and afterwards modified by feudal rules, to suit the form of government, and state of society and manners when that system sprung up. But, notwithstanding this general resemblance, the law of each country in details and matters of form has its peculiarities, and in none are they more remarkable than in our own law, as contradistinguished from that of England.

Before examining the grant of King James the Sixth, the appellants suggest a doubt, whether the term charter is not improperly applied to it, because it passed under the Privy Seal, and not under the Great Seal. This seems to be of little moment, because there is no question what the document is, to which both parties refer. We may remark, however, that it forms no part of the definition of a Scotch charter, that it is a writ passing under the Great Seal. Taking the term in its most restricted sense, namely, a grant of land, or other heritable right, from a superior to a vassal, nine-tenths of the charters in Scotland not only do not pass under the Great Seal, but they pass under no seal at all. With regard to the more extensive and appropriate use of the term, it is employed as a synonyme for *literæ patentēs*, or patent letters, in contradistinction to *literæ clausæ*, or close letters, under whatever seal they pass, or whether they are sealed or not. If King James's grant had been directed to Messrs Low and Hamilton exclusively, or even to them and their brethren in succession exclusively, the letters would have been close, and could not with propriety have been called a charter. But the letters are patent, for they are addressed by the King, not to those individuals, or to the Faculty of Physicians and Surgeons, but to all provosts, bailies of burghs, sheriffs, &c., within certain bounds, "and all and sundry, otheris our leidges and subjectis whom it effeirs, quhas knowledge thir our letteris sal be," that is, *omnibus probis hominibus totius terræ suæ*, the precise formula of a Scotch charter ever since the days of King David I. Even letters of deaconry, by magistrates and council of a burgh, or a lord of regality, by which corporations are often constituted, by virtue of a delegated power from the Crown, being letters patent, are rightly termed charters ; accordingly, in the documents and pleadings, which the parties in this case have referred, during a period of more than a century, this grant has been indiscriminately termed a gift, a patent, and a charter. We have alluded to this, not because it bears upon the merits of the question, but because it shows how unsafe it is to apply the law or forensic language of England to a Scotch case, even where there is a general analogy or resemblance.

The charter is granted in favour of Mr Low, the King's surgeon, and Mr Hamilton, professor of medicine, that is, physician, "and their successors, indwellers of the city of Glasgow ;" and it gives them power to convene before them all persons practising or using the art of surgery within certain bounds, that is, within the

No. 186.

March 3, 1833  
University of  
Glasgow v.  
Faculty of  
Surgeons.

186. burgh of Glasgow, Lanarkshire, Renfrewshire, Dunbartonshire and Ayrshire, to examine them upon their literature, knowledge, and practice; to admit and authorize them if they are found qualified; to debar them if otherwise, and to fine them if they are contumacious, by a judgment on which letters of horning are directed to pass. Power is given to Messrs Low and Hamilton, or the visitors, with the advice of their brethren, to make statutes for the common weal of the subjects anent the said arts, that is, surgery and medicine, and to punish the breakers of them. And various duties are imposed on the visitors, indwellers of Glasgow, professors of the said arts, and their brethren, present and to come. Lastly, the magistrates, sheriffs, and other ministers of justice, to whom the letters are addressed, are ordained to assist and defend the visitors and their posterity professors of the said arts, and to put the grant into execution.

The appellants maintain that there is no corporation constituted by this charter, and therefore that the respondents have no *persona standi in judicio*, that is, to sue or be sued as a body. This plea is rested on various grounds.

First, It is said, that a special denomination is one of the essentialia of a corporation; that where it is erected a name must be given to it; that the king must baptize it; and that the name thus given is indispensable to its existence. In support of this doctrine, passages from Coke, Blackstone, and Kid, are quoted, excellent authorities undoubtedly as to the law of England, but not one of these learned authors says that is also the law of Scotland. Whatever may be the form by which a corporation is baptized in England, nothing is requisite with us, but a grant from a competent authority, bestowing corporation privileges on a set of persons in existence, and their successors of a certain description. It will throw light on this point, and indeed on every point which the appellants have raised in this branch of the cause, to consider the way in which corporations anciently came to be erected in the royal burghs of Scotland, and the style of the writ issued for that purpose.

It appears to have been an early practice for the various trades within burgh to form voluntary societies for regulating their business, and for raising a fund by the contribution of their members. Those societies laid down rules respecting the trial and admission of masters, the number and fees of apprentices, the mode in which the trade was to be carried on, and the like. Further, they were in use to appoint officers to collect their funds, which, before the Reformation, were for the most part applied to defray the expense of an altar dedicated to the patron saint of the craft, and to pay the priest who officiated there. Thus the surgeons of Edinburgh had an altar dedicated to St Mungo: the tailors to St Anne; the weavers to St Soverane: the waukers to the Saints Mark, Philip, and Jacob, and so forth. The officer who had the charge of the altar was called *kirkmaster* or *church-con* (an ecclesiastical term); if he collected the contributions, he was called *quartermaster*, because they were paid quarterly; and *visitor* if he was appointed to examine the qualifications of the tradesmen, or the goodness of their work. As those were voluntary associations only, they could not enforce their rules, or levy the duties which they imposed, not only in the case of a person who had never joined the society, or who had abandoned it, but even in the case of a *reluctant* member, because they had no *persona standi* as a body. To remedy this, it became the practice for the trade to present a petition to the magistrates and council, the great corporation of the burgh, who have in every case an assumed authority delegated to them from the crown, on behalf of the

termaster or visitor of the craft, and of some or all of the members, either No. 186.  
 red or described in the petition, praying the council to interpose their authority  
 he laws, statutes and ordinances of the craft, by a grant in favour of the peti-  
 ers and their successors, that is, all who exercised, and should exercise the  
 le within the limits of the grant. If this petition was complied with, a writ in  
 form of a charter to that effect was issued under the burgh seal, which writ is  
 nically called a seal of cause; and there is no point in the law of Scotland  
 re clearly settled than that a seal of cause so issued, erects the grantees into a  
 poration, and gives them power to sue and be sued, with every other privilege  
 ecessarily incident to a corporate body, whether expressed in the grant or not—  
 h as the power of electing officers, imposing fines, making bye-laws, and the  
 b.

March 3, 1837.  
 University of  
 Glasgow v.  
 Faculty of  
 Surgeons.

The same form was adopted by lords of regality and barons who had power in  
 ir rights from the crown, to erect corporations within their burghs of regality  
 l barony; and it is evident from the present charter that the same style, *mutatis*  
*standis*, was adopted in the erection of corporations by the crown itself.

When it is objected, therefore, that the Faculty of Physicians and Surgeons in  
 agow had no special denomination given to them in King James's letter in  
 1609, or as it is quaintly said, that they were not baptized, the obvious answer is,  
 the grant is made to them as the members of a specified calling in a specified  
 re, that is, as physicians and surgeons being indwellers in Glasgow. They are  
 ized just as the corporation of surgeons and barbers in Edinburgh were a cen-  
 t before in their seal of cause, dated in 1505. The petition in that case was  
 ented by the kirkmaster and brethren of the surgeons and barbers within the  
 gh of Edinburgh, and the grant is to them and to their successors. Thus also,  
 he case of the tailors of Edinburgh, the petition was presented by John Steill,  
 master; George Bell, William Hockburne, and seven others named, "and the  
 of the tailors' craft within this burgh," and the charter confirms the rules of the  
 ety "to the said masters and their successors of the said craft." Thus also, in  
 case of the butchers of Edinburgh, the petition is given in by "Richard Furde,  
 kin of the fleshoris for the tyme, Robert Gray and others, principall masters of  
 said fleshoris craft;" and the council ratify the regulations exhibited to them  
 out even naming the craft. Thus also, the petition of candlemakers is pre-  
 ed by Robert Taffintoun, Andrew Galloway, and others, craftsmen of the can-  
 akers of the burgh of Edinburgh, and the seal of cause merely ratifies the  
 tations. In the case of the weavers or websters, the petition is presented in  
 name of "the best and worthiest personis of the haill craft of wobetaris within  
 said burgh." And the council find the statutes exhibited "lovable to God and  
 kirk, honourable for all the realme, profitable and worship for the craftsmen,  
 therefore we admitt the samyn."

A multitude of other instances might be given of the erection of corporations,  
 in Edinburgh and in the other royal burghs of Scotland, in which the same  
 form adopted at, and previous to, that period, and it does not appear to have  
 changed till a considerable time after the union of the crowns, when a more  
 system of conveyancing in this department was gradually introduced.

It is evident that the charter in question was framed on the same model with  
 the seal of cause then in use. It does not, indeed, narrate a petition presented  
 by the surgeons, and Mr Hamilton, professor of medicine, and the other sur-  
 geons in Glasgow, probably because there was no voluntary asso-

186. ciation of the practitioners of those arts in Glasgow, and perhaps no petition  
 1837. presented by Messrs Low and Hamilton. But the grant is to those indivi-  
 body of designed or described by the arts which they practised, and their successors  
 of dwellers of the city of Glasgow. No kirkmaster is mentioned, because it was  
 of sequent to the Reformation; but Low and Hamilton are appointed visitors  
 term which, after that event, was often applied to the principal officers of  
 of corporations.

The second objection taken by the appellants is, that there are no "incorporating words" in King James's Letter of Gift, or words which evince any intention on the part of the Crown to create a corporate body. This is another attempt to substitute the law of England for that of Scotland. It is quite sufficient in law, that privileges are conferred in the grant, which can only be exercised by a corporate body; and there is not one privilege conferred by King James's Letter of Gift which is not of this description. Thus power is given to Low and Hamilton, and their successors, to summon and convene before them all persons professing the art of surgery within the bounds, to pronounce decrees against the contumacious, on which diligence by horning and caption is to follow; to make statutes for the common well of the King's subjects anent the said arts, and to enforce thereof faithfully, that is, the King's subjects dwelling within the bounds; to regulate physicians practising their arts, not being graduates, or licensed by the King and Queen's physicians; and various privileges are granted to the visitors, indwellers of Glasgow, professors of the said arts, and their successors present and to come, analogous to other corporations erected by seal of cause. That there is no necessity for express words of incorporation, is evident from the seal of the burgh granted 31st January, 1475, by the Town-Council of Edinburgh, to the weaver's craft, in which there are no such words. The same is the case in the seals of burghs granted to the hammermen, to the tailors, to the cordiness, to the goldsmiths, as to the surgeons and barbers of Edinburgh, and instances to the same effect may be found, it is believed, in every royal burgh in Scotland. It was not the style of a royal writ in and before the reign of James VI., to declare the grantees to be a corporation in express terms, yet all the trades or faculties having grants from the King's reign, or from councils of burghs during that period, exist at present as corporations, and have always acted and been recognised as such.

Then it is said by the appellants, that perpetual existence by succession is the essence of a corporate character, and that this grant does not express the mode of electing or continuing the corporate body. We conceive that the provision for continuing the corporate body is clearly expressed, and expressed in the usual and appropriate style of the period. The grant is to Mr Peter Low, surgeon, and to Robert Hamilton, physician, and their successors, indwellers in the city of Glasgow, that is, all surgeons and physicians legally practising those arts, and residing in that city. No person under the exceptions in the grant was entitled to practise surgery without a license from the grantees or their successors; or medicine, without a license from a University or the Royal Physicians; a provision, therefore, made for the subsistence of the corporation as long as there are surgeons and physicians legally qualified to practise and practising their respective arts in Glasgow, and actually residing there. When Messrs Steill, Bell, &c., and the rest of the master tailors of Edinburgh, petitioned the magistrates and council to confirm the rules which they had made for the practice of the tailor craft, there was no provision in their rules for the election of kirkmasters or visitors, no

the nomination of future corporations, neither was the council prayed to grant a power of making other bye-laws. On that petition the council confirm the rules presented to them "in all poynts and articles to the said masters, and their successors of the said craft, in perpetual memorial in time to come." That was the usual form of a seal of cause in 1500, by which a succession of corporators was provided for. So in 1517, when Robert Taffintoun, Andrew Galloway, and the rest of the candlemakers presented a similar petition to have their rules confirmed, the prayer was granted in favour of the said craftsmen and their successors, without any farther provision as to the mode of succession.

In the case of Wallace v. Calder, referred to in the pleadings, the same objection was taken by the suspender, Calder, to the ambiguity of the term "successors" in this grant. It was said the grant might be construed as personal to Peter Low and Robert Hamilton, and their families, provided the successors in their families were of the profession of the original patentees, and a great deal of discussion followed on that plea. But the Court, although they diminished the amount of the fine imposed on Calder, sustained the privileges of the corporation in all respects. More than seventy years have elapsed since it was settled by a decree of this Court, in fore contentious, who the successors of the grantees are; and surely it is too late now to stir the question again.

The appellants argue, that no power is conferred by the grant of making bye-laws to regulate the proceedings of the body, but that a power is given, and unlawfully given, to make general laws for surgical practice. The clause is in these terms:—"That it sall be leisum to the saidis visitouris, with the advice of their bretheren, to make statutis for the commonn well of oure subjects anent the saidis airts, and using thair of faithfullie, and the braikeris thair of to be punishit and unawit be the visitouris, according to their falt." It is the common style in the old seals of cause to represent the rules recited in them, for regulating corporate proceedings and the practice of the craft, as statutes made for the glory of God, the honour of the realm, the worship of the town, and the profit of our Sovereign Lord's lieges, and therefore this power of making statutes "for the commonn well of the subjects" anent the arts in question, clearly includes a power of making bye-laws for regulating the corporation; and so it was construed at the time; for the very first acts of the Faculty, as appears from the extracts from their minute-book, consist in making a series of bye-laws for regulating their corporate proceedings. This expositio contemporanea of the grant is certainly more authoritative than any speculation with regard to its meaning now. Whether it empowered the Faculty not only to examine and admit practitioners within their bounds, that is, within the four counties named, but also to lay down rules for their surgical practice after being admitted, may well be doubted, and we are not aware whether such a right was ever claimed. If it had, however unlawful according to English ideas, it would have been no novelty in the law of Scotland; for by King James the Sixth's charter of the 3d of January, 1586, to the Goldsmiths of Edinburgh, the corporation is "invested with a power to inspect, try and regulate all golden and silver wares, not only in Edinburgh, but in all other parts of Scotland, with a right to punish offenders concerned in making adulterated gold or silver."

It is plain, that as neither Mr Low nor Mr Hamilton, the visitors of the corporation, were royal physicians, they and their brethren had no right by the grant to examine and admit physicians, or to grant licenses for the practice of physic. From a university, or a license from the royal physicians, was sufficient

No. 186

March 3, 18  
University of  
Glasgow v.  
Faculty of  
Surgeons

1836. for that purpose. But in the ratification in Parliament in 1672, which  
 1837. recite the grant of the 29th November, 1599, the words quoted are,—“  
 it shall not be leisum to any manner of persones within the foresaidie be  
 exercise medicine without the testimoniell of one famous Universitie wh  
 cine is taught, or at leist the persones above-mentioned, and their successors  
 the pains contained in the said gift.” Now it is plain that the grant is to  
 here, for nothing is said in it as to the grantees having a power to give test  
 for the exercise of medicine. That was reserved for the universities and  
 physicians. Mr Low was only a royal surgeon. But it has been suggeste  
 House of Lords, that the Court of Session were not entitled to say, that t  
 misrecital in the ratification 1672; that if the grant had been to A, and  
 liamentary ratification had been in favour of B, the Court had no right to  
 the legislature meant A and not B, and that this act, if it is good for a  
 gives the power to the persons whoever it names, and not to those whom t  
 of 1599 names. The appellants have made this suggestion to the House  
 apparently under a misconception, and a very natural one in England, of th  
 of a ratification by the Parliament of Scotland, supposing it to be similar  
 vate act of the British Parliament, or analogous to it.<sup>1</sup> But in Scotland  
 mentary ratification was not a proper law—it carried no new right—no po  
 held to be a party to it—it was carried through periculo petentis, and was  
 to reduction by the Court of Session. This was settled by an act of the  
 ture as early as the reign of Queen Mary. See statute 1567, cap. 18,  
 George Mackenzie's observations upon it. If any act of this description  
 fore, bears to ratify a preceding grant, and misrecites it, to that extent it  
 null, and not only has the Court of Session a right to notice this misrecit  
 is pars judicis to do so. Perhaps a court of law at Westminster might be  
 find and declare that an English act of Parliament, even though a private  
 from the beginning, is now, and will be in all time coming, void, null an  
 effect in judgment, or outwith the same. But there is no doubt that the C  
 Session can so deal with a Scotch ratification. If the grant is in favour of  
 the ratification in favour of B, A will take nothing by the ratification, but a  
 neither will B; for, except in so far as it corresponds with the grant, it is  
 ing, unless perhaps when followed by possession it may be held a pro  
 title.

Doubts have been entertained whether the ratification, being in favour  
 surgeons, apothecaries, and barbers alone, can be of any effect, now that  
 bers have withdrawn from the corporation. But it never was held, in Scot  
 least, that the existence of a corporation was affected, because part of the c  
 tors dissolved their connexion with it. The surgeons of Edinburgh remain  
 corporation though the barbers withdrew from it in 1722, and so also the w  
 though the bonnetmakers, who were incorporated with them at the date o  
 charter, are now a separate craft.

Leaving the construction of the grant, we have next to observe, that fe  
 have occurred, if indeed any one, in which the possession of corporation pr  
 for nearly two centuries and a half has been proved by such overwhelmi

<sup>1</sup> Erskine, i. 1, 39.



ence. It is unnecessary to recapitulate the proof, for it is distinctly stated in the No. 186  
 use for the respondents. The Faculty of Physicians and Surgeons are found March 3, 18  
 making bye-laws, and enforcing them, as early as 1602. They appear in the University, o  
 course of that century to insist in actions as a corporation, and their title is sus- Glasgow v.  
 ined; a list is produced of more than 80 bonds of desistance taken between Faculty, of  
 1559 and 1701, by parties who attempted to violate their privileges, and that not Surgeons.  
 only where the parties practised in the city of Glasgow, but in every other district  
 which the grant extends. At least fifteen of these bonds are from individuals  
 actising in the county of Ayr, to which a doubt is now expressed whether their  
 privileges ever did extend. Where bonds of desistance were not granted extraja-  
 cially, the Faculty cited the offenders before their own court, and pronounced  
 decrees against them, upon which diligence by horning and caption was raised. A  
 set of 17 of these decrees is produced between 1725 and 1759, on most of which  
 diligence appears to have followed.

The appellants attempt to get rid of all this evidence of possession by referring  
 to a letter of deaconry, which the surgeons and barbers obtained from the Magis-  
 trates and Town-Council of Glasgow in 1656; and they say that this proves the  
 faculty not to have been a corporation before that year. It proves that they were  
 not a burghal corporation, that is, they had not the privileges with regard to the  
 government of the town, and other rights which it was in the power of the Magis-  
 trates and Town-Council to confer. But the Town-Council of Glasgow could  
 not give the Faculty a corporate jurisdiction over four counties, or warrant all the  
 corporate acts which were performed within that extensive district, at any period,  
 and still less during a period of more than 50 years before the date of the letter of  
 deaconry. It is insinuated that, with the exception of what appears in the minutes  
 to have taken place in 1602, there is no evidence of the Faculty acting as a corpo-  
 ration before the date of the letter of deaconry. But this is a mistake. It is  
 proved that the Faculty sued as a corporation in 1635, founding exclusively on  
 King James's gift as their title, for the letter of deaconry had not then been grant-  
 ed; and in that action they obtained a decree against all persons within their dis-  
 trict practising surgery or medicine contrary to the terms of the grants, and against  
 all judges and magistrates within these bounds to concur in enforcing the grant.  
 And upon this decree general letters of horning were raised at the instance of the  
 Faculty. If there was not another document in process, we are of opinion that  
 these signet letters would be decisive with regard to the point of possession. But  
 there is a great mass of proof to the same effect, particularly with regard to cor-  
 porate acts performed after the letter of deaconry was resigned.

In addition to the title which the respondents have produced, and the continu-  
 ous possession satisfactorily shown to have followed upon it, the question now  
 under consideration has been repeatedly decided in this Court, and that not only  
 in cases where the rights of the Faculty were indirectly recognised, but where the  
 point was distinctly raised and brought before the Court for judgment. It was  
 tried and decided in an action of declarator raised by the Faculty in 1691, in  
 which the summons libels upon the gift of James VI., and concludes that the pri-  
 vileges granted by it shall be declared. It was again tried and decided in the  
 suspension at the instance of Calder v. Wallace, in 1761, in which almost all the  
 arguments now advanced against the title of the Faculty were resorted to. And  
 these were not undefended cases, but judgment was pronounced in foro conten-  
 tione. A series of cases followed, in which the rights of the Faculty, thus esta-

186. blished, were judicially recognised. So clear was the point considered, that even the appellants themselves did not venture to stir it in the Court below previous to the present appeal. We do not think that they were in consequence precluded from recurring to it in the House of Lords, but we are of opinion that the decisions to which we have referred are to be held as precedents settling the law upon the point.

With regard to what fell from Lord Gifford, in the case of the Writers to the Signet v. Graham, it is enough to say, that his Lordship did not decide the question, whether the Writers to the Signet are a corporation or not. He held that he had no materials before him for that purpose. His judgment went on a separate ground altogether, namely, that whether they were a corporation or not, they had not sued in that character, and therefore that their action could not be supported. Whether Mr Erskine was wrong in laying it down, as established law, in his time, that the Writers to the Signet are a corporation (for that is necessarily implied in his observations on the College of Justice), remains yet to be tried.

The only other point which we are directed to consider by the remit is, "Whether the right of interdict is taken away by the provision of a penalty made in the grant or letter of gift mentioned in the pleadings?" We are clearly of opinion, that the right of interdict is not taken away. When a penalty is imposed to enforce an obligation, no option is given to the party against whom it is directed, to get out of his obligation by paying the penalty. In the language of the law of Scotland, the penalty is by and attain performance. It is one mode of enforcing the obligation added to every other mode which would otherwise have been competent. This is so clearly proved by the authorities cited in the respondent's case, that we think it unnecessary to enlarge upon the subject.\*

The Judges of the Second Division concurred in this Opinion, and accordingly

Adhered to the former judgment; and, further, found the defenders entitled to their expenses in the House of Lords, as well as in this Court.

*Pursuers' Authorities.*—1 Kyd Inc. 13, 41; 1 Blackstone, I. 467, 472-4; Conservators of R. Tone v. Ash, 10 B. and C. 319; Writers to the Signet v. Graham, in H. of L. June 21, 1825 (1 W. and S. 538).

*Defenders' Authorities.*—1 Kyd, 1, 62—9, 226, 254, and 2, 50; Surgeons of Glasgow v. Magistrates, 1691 (Appx. p. 54 of printed papers); Surgeons of Glasgow v. Calder, 1761 (ibid. p. 64); Surgeons of Glasgow v. Dunlop, 1791 (ibid. p. 77); Surgeons of Glasgow v. Magistrates of Glasgow, 1791 (ibid. p. 74); Magistrates of Glasgow v. Steel, Feb. 26, 1819 (ibid. p. 82); Skirving v. Smellie, Jan. 17, 1803 (10921); Fleshers of Canongate v. Wight, Dec. 11, 1835 (ante, XIV. 135); Blankley v. Winstanley, 3 T. R. 279; Magistrates of Dunfermline v. The Heritors, April 10, 1835 (1 S. and M.L. 195).

W. A. G. and R. ELLIS, W. S.—HOPKINS and IMBACH, W. S.—Agents.

\* The following note was added by Lord Moncreiff:—"Though retaining the opinion, or the doubt at least, formerly expressed by me on the general merits of this case, I entirely concur in this opinion on the points embraced by it."

SIR WILLIAM MILLIKEN NAPIER, Petitioner.—*H. J. Robertson.*

No. 187.

*Entail—Statute.*—Certain substitute-heirs of entail, in India, executed a power of attorney, for giving their consent to a bill for selling part of the entailed estate; March 4, 1831  
Milliken  
Napier. by authorized their mandatary “to appear before the Lords’ committees, to whom any bill may be referred, and also before the committee of the House of Commons, and then and there to signify and give the consent:” the power of attorney did not reach this country until after the bill had passed into an act, containing a clause that none of its provisions should take effect until the consent of the heirs of this act “shall be declared “before the Court of Session” by a deed executed to be executed:—Held that the consent authorized by the power of attorney, being in a different form from that required by the act, the requirements of the act were not satisfied, and that the Court could not interpose their authority until consents were obtained in precise conformity with the act.

SIR WILLIAM MILLIKEN NAPIER, Baronet, of Napier and Milliken, March 4, 1831  
1st Division presented a petition, stating that he had obtained a private Act of Parliament for selling a portion of the entailed estate of Milliken and paying certain debts; that the act contained a clause providing that none of its provisions should take effect until four of the heirs of entail therein specified, who were abroad, should, by written deed, “executed or to be executed, declare their consent to this act, before the Court of Session in either of the Divisions thereof, which consents the said Court is hereby authorized and required to receive;” and that powers of attorney had been received from the requisite number of heirs in India, to execute deeds of consent. He prayed for warrant to record the powers of attorney, and the deeds of consent, to be executed by the mandataries and attornies, in the Court Books, and that the Court should interpose their authority by finding that the provisions of the act regarding consents had been complied with, and the consents duly given.

Under a remit to a man of business to examine into the facts and report, it appeared that the powers of attorney had been granted in the expectation of their reaching this country before the bill had passed through Parliament, and that the mandataries and attornies were authorized “to appear before the Lords’ Committees to whom any bill for the purposes aforesaid may be referred, and also before the Committee of the House of Commons, to whom the same may be referred, and then and there to signify and give the consent that a bill for the purposes foresaid may pass into a law.” As this power of attorney was, in its terms, applicable only to a consent to a bill before Parliament, and the consent now required was a consent in the Court of Session, after the bill had passed, the Reporter pointed out this discrepancy to the Lord Ordinary, who stated it to the Court.

**LORD PRESIDENT.**—The least deviation from what is required by the act under which these sales are intended to be made, might have the effect of invalidating

187. the sales. The powers of attorney limit the consent to be given in one form only, and the act requires it to be given in a different form. I think the Court must <sup>4/1837.</sup> supersede consideration of the petition; and I may add, I have no doubt it is for the interest of the petitioner himself, in reference to all the ulterior procedure which may take place under the act, that the petition should be suspended, and that he should rather suffer the comparatively small inconvenience of waiting till a new power of attorney can arrive from India, than run the risk of deviating only in the smallest point from the act.

The other Judges concurred, and

The petition was superseded.

PRINSON and ROBERTSON, W.S.—Agents.

188.

JAMES OGILVIE and COMPANY, Petitioners.—*Patton.*

JAMES SIMPSON and JOHN TODD, Respondents.—*H. J. Robertson.*

*Bankruptcy—Sequestration.*—A party was engaged in a trading concern which was wound up in 1819, all the debts being then paid up; in order to pay them, the party borrowed money from his friends; he ceased to be a trader after 1819, but a considerable part of the borrowed money was not paid up, when a creditor, holding a bill dated in 1836, presented a petition for sequestration.—Held that the party was not liable to sequestration as a trader.

March 4, 1837. JAMES OGILVIE and COMPANY petitioned for a sequestration of the 1st Division. estates of James Simpson, town-clerk at Pittenweem, under the Bankrupt Act. They were creditors under a bill for £100, which was dated June 9, 1836, and in which Simpson was a co-acceptor with one Bruce, a draper in St Andrews. Simpson lodged answers, stating that he had not been engaged in trade since 1819, and did not fall within the act; and that he had obtained a decree of cessio in January, 1837, and had executed a disposition in favour of John Todd, as trustee for his creditors, which rendered the sequestration inexpedient as well as incompetent. Todd sisted himself as a respondent along with Simpson.

The facts as to the trading were these. In 1819 Simpson was a partner in a distillery which proved unprosperous, and which the partners, therefore, resolved to wind up. Each partner raised his own proportion of the funds required for that purpose; the debts were paid, and the concern was brought to an end. In 1821, Simpson became town-clerk of Pittenweem, and continued to hold that office without being engaged in any mercantile concern. At the date of winding up the distillery, he possessed heritage which, if sold, would have sufficed to pay his share of the debts; but, in place of selling his heritage, he borrowed the requisite amount from his friends. He was afterwards proceeding slowly to pay

of these loans, when, in consequence of being involved in a cautionary No. 188  
 obligation, subsequently contracted, for £600, he was thrown into prison,

December, 1836, and took the benefit of a cessio. Under his examination on oath, in the cessio, he deponed, "that his difficulties first commenced by being a partner of a distillery company in Dundee, and had to contract debts in consequence of that company not being successful, and these continued to press upon him, until he stopped payment." A sum amounting to near £400 remained due, which had been contracted to pay off the debts of the distillery.

March 4, 18  
 Ogilvie v.  
 Simpson.

In reference to these facts, the petitioners pleaded, that, if any debt still subsisted which was coeval with the period of trading, or anterior hereto, such debt would found a petition for sequestration, notwithstanding the lapse of any intermediate interval of years, as had been expressly decided in the case of Baillie,<sup>1</sup> affirmed on appeal. But the same result must follow, if any of these debts was merely paid by contracting other debts, which still subsisted, and this was confessedly the case in point of fact; the new creditors, whose funds were applied to pay the trading debt, were entitled to the same remedy which the original creditors possessed; and any other creditor of Simpson was entitled, equally, to apply for sequestration.<sup>2</sup>

The respondents answered, that so soon as the affairs of the distillery were wound up, and all its debts paid, so that Simpson was no longer engaged in trade, and was not liable for any debts except those which had been contracted subsequently to giving up trade, he was not subject to sequestration, although these new debts might have been contracted for the purpose of paying off his obligations in the trading concern which was given up.<sup>3</sup> In the case of Baillie, the debt founded on had existed at the date of trading, and had never been paid up, which formed an essential distinction between it and the present case.

LORD PRESIDENT.—I think this question is attended with some difficulty. If any debt still subsisted which was coeval with the period of trading, it is clear that the precedent of Baillie would have applied, and that sequestration must have been awarded. And if such a debt had subsisted until a short time prior to this petition, say a month ago, for example, but had then been paid by the contraction of a new debt, and applying the funds to pay off the first, I feel much doubt in holding that the liability to sequestration was thereby brought to an end. So long as a debt exists which is substantially a continuation of the debts contracted in trade, I incline to think the debtor liable to sequestration. And in this instance he expressly admitted that debts contracted for paying off the debts of the distillery have continued to press on the respondent ever since.

<sup>1</sup> May 20, 1830 (ante, VIII. 778).

<sup>2</sup> Dick, Jan. 28, 1815, F.C.; Cook, Feb. 21, 1829 (ante, VII. 452).

<sup>3</sup> Wetherpoon, July 9, 1823 (ante, II. 463; or new ed. 414).

188. LORD GILLIES.—I do not consider that the sequestration can competently awarded; unless, indeed, the character of a trader is to be held by us, as a priest was once held, on a memorable occasion, elsewhere, to be indelible. 1837. respondent has had no connexion with trade for nearly 20 years; at retiring it, every debt contracted in trade was paid up; and I can see no ground for holding him still to be liable to sequestration. If he were so, it would follow that any who has engaged in trade for a few years, or perhaps a few months, and withdrawn from it, paying all the debts contracted in it, and going to the church, would remain liable to sequestration for all his life, if he had not paid off his trading-debts with borrowed money, the whole of which was paid up when sequestration was applied for. I cannot assent to that doctrine.

LORD MACKENZIE.—I think sequestration cannot be awarded. If a man himself engaged in an unprofitable trade, and has a friend willing to lend him a sum of money to pay off all his trading-debts, and if he gives up trade, and pays all the trading-debts, with that money, I think he ceases to be liable to sequestration. His trade is at an end; his debts incurred in trade are at an end; the only debt remaining is that which he contracted towards his friend, and which he has ceased to carry on trade. I rather think that where there is no debt existing which was of an early date as to be coeval with the period of carrying on trade, there is no room for sequestrating the debtor as a trader.

LORD COREHOUSE.—I am of the same opinion. Had the debt of the petitioners been coeval with the period when the respondent carried on trade, and that debt still subsisted till now; or, had it been a debt incurred by the respondent in his trade; then the case of *Baillie* would have applied, and the respondent would have remained liable to sequestration, notwithstanding the lapse of time since his trade ceased. But it is a totally different case where all the debts contracted in trade have been paid up, and it can merely be alleged that this was done by borrowed money, which borrowed money itself has never yet been well cleared off. If in this latter case sequestration was held competent, it would lead to the result alluded to by Lord Gillies, and then when any man, of any profession, was owing a sum of money under a bond or bill of which the history could be traced back, through a series of varying obligations, until its origin was shown to be a debt incurred in trade at any period short of 40 years, the result would be that the debtor was sequestrable under the statute. I do not think that doctrine well founded which leads to this result.

THE COURT refused the petition, with expenses.\*

P. RAE, S.S.C.—A. STEVENSON, W.S.—Agents.

\* *Expenses—Advocate*.—A cause was gained, with expenses; the agent received from the losing party payment of fees to counsel, exceeding 100 guineas which he withheld from the counsel, who thereon presented a petition and the complaint to the Court. In consequence of this the fees were paid, and the complaint was no longer insisted in; but the Court intimated that the conduct of the agent was highly reprehensible, and that it was not without hesitation that they allowed it to pass without any other animadversion besides an expression of censure.

of CAITHNESS, Petitioner.—*Sol.-Gen. Rutherford—Robertson—  
Penney.*

No. 11

HAMMOND and SON, and MANDATARY, Respondents.—*Keay—  
Wood.*

March 4, 1  
Earl of  
Caithness  
Eaton.

*ion—Transaction.*—A petition for recal of inhibition used on the depen-  
in action was refused of consent, a simultaneous arrangement being enter-  
whereby the one party granted a discharge of the inhibition, while the  
nd caution for a certain sum; a judgment on the merits was thereafter  
ed by the Lord Ordinary in favour of the party using the diligence, against  
eclaiming note was presented; about six months subsequent to the dis-  
ove-mentioned, new letters of inhibition were raised on the same depen-  
Held that the use of the last diligence was a departure from the good  
e previous transaction, and also that there was no change of circumstances  
the use thereof; and the same accordingly recalled.

EL of proceedings mentioned ante, XIV., 1091,<sup>1</sup> which see. The  
of the Earl of Caithness there mentioned for recal of the inhibi-  
l at the instance of the respondents, Eaton, Hammond and Son,  
een refused of consent (July, 1836), an arrangement was at the  
e entered into under the eye of the Court, whereby a discharge  
diligence was executed by these parties, and, on the part of the  
ond of caution granted to them by four cautioners for the sum  
0. In November following, the Lord Ordinary pronounced an  
tor on the merits of the action, on the dependence of which the  
a had been used, unfavourable to Lord Caithness; against which  
tor a reclaiming note was presented.

March 4, 1  
2D DIVISION  
F.

uary, 1837, Eaton, Hammond and Son raised new letters of  
a to the same effect with the former letters, retaining, at the  
e, the bond of caution. Lord Caithness thereupon presented a  
for recal of this new diligence, on the ground that the use of it  
rary to the faith of the transaction, whereby the last inhibition  
arged, in room of and as a substitute for which the respondents  
ed to take, and had actually obtained, the security above-men-

ir answers to this petition, Eaton, Hammond and Son alleged  
petitioner was negotiating for a large loan to be secured over his  
operty, and contended that their acceptance of caution could not  
effect of barring them from the use of future diligence, more  
as a change of circumstances had occurred in consequence, 1st,  
cession of interest and law expenses to the amount of the debt

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report referred to, it is erroneously stated, at the end of the report, that  
was offered. Caution was found by the petitioner to the extent of



1837. sued for, and 2dly, of the judgment which had in the interim been pronounced by the Lord Ordinary.

When the case was first put out for advising, the allegation as to the proposed loan was explicitly denied. This denial was thereafter formally embodied in a minute, in their answer to which Eaton, Hammond and Son, while they departed from the statement thereanent, alleged that they had recently discovered the cautioners to be insufficient.

The case was this day again put out for advising.

The majority of the Court were of opinion that the raising of the second inhibition was a departure from the bona fides of the transaction by which the former diligence had been discharged, on security for £1500 being granted, and that there was no change of circumstances such as to justify the proceeding. Lord Medwyn held that the respondents were not precluded, by the previous transaction, from using fresh diligence, but that there was no change of circumstances to justify their doing so.

Their Lordships accordingly recalled the inhibition, and found expenses due.

ROY and WOOD, W.S.—SANG and ADAM, S.S.C.—Agents.

No. 190. LORD DOUGLAS GORDON HALLYBURTON, Advocate.—*Sol.-Gen.*  
*Rutherford—Coventry.*  
ANDREW BLAIR, Respondent. —*D. F. Hope—Neaves.*

*Lease—Proof—Presumed Payment.*—The tenant of a farm under a lease for 21 years, became entitled, by the terms of his lease, to claim deduction of rent on account of the landlord's resuming possession of a considerable part of the farm, at an early period of the lease, and also to make a claim on account of meliorations made by him (the tenant): he continued to pay the full original rent without deduction, during the whole lease, and, at leaving the farm, granted a bill for the balance of the last year's rent on that footing; he made no claim for about three years afterwards, at which date his whole claim and interest amounted to nearly £900:—Held, on the special circumstances, that, though there was strong ground for supposing that his claim had been satisfied, during the currency of the lease, as the landlord alleged, yet, as there was no legal evidence of this, it must be sustained.

Arch 7, 1837. SEQUEL of the case reported ante, XIV. p. 859, which see. The question now disposed of was of a special nature, whether, in the circumstances, it was to be presumed that a tenant, under a lease for 21 years, had discharged his landlord of a claim amounting, with interest, to nearly £900, which chiefly arose from the landlord's having resumed possession of a considerable portion of the farm at an early period of the lease, and farther from meliorations made by the tenant on the farm, in buildings, dykes, &c. The lease contained a clause providing that the landlord should have power so to resume possession, on giving a corresponding deduction from the rent.

at Division.

A. Fullerton.

B.

ing for any damage occasioned ; and also that an allowance should be made to the tenant for meliorations, as the same should be valued by mutually chosen. The tenant had continued to pay his full original rent without abatement, and, at leaving the farm, had granted a bill for the sum of rent calculated, on that footing, as due at the end of the term. There was no proof of his having ever claimed any deduction during the term of the lease ; and it was not until about three years after that he made his claim, at a period when the landlord was on the point of bringing out a sequestration against him for arrears of rent under a writ, and in reference to a different farm belonging to the same landlord, which he had entered on quitting the first. The landlord the Hon. Gordon Hallyburton, afterwards Lord Douglas Gordon Hallyburton, stated that the tenant had never claimed deduction because he had received compensation in various forms during his possession, and his claim was waived, otherwise such compensation would not have been due to him : but this statement was not proved.

The case proceeded before the Sheriff, including the conjunctive process at the tenant's instance for constituting his claims, with a writ of sequestration at the landlord's instance, the Sheriff decreed for £287, 4s. 6d., being the balance due by the tenant, after satisfying his claims ; but allowed expenses to neither party, as the tenant maintained several unfounded pleas. The landlord reclaimed, and the Lord Ordinary, after the point of form was raised, by a judgment already reported,<sup>1</sup> pronounced a judgment in merits, remitting simpliciter to the sheriff, and finding the landlord liable for the expenses incurred in this Court. His Lordship added the following note containing the material facts of the case.\*

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<sup>1</sup>, 1836 (ante, XIV. 859).

**NOTE.**—By the lease of North Ballo and Peattie, granted by the advocate respondent Blair, in 1804, for nineteen years, the landlord was entitled to use for planting, such 'ground as he chose ; the value of the ground so taken to be ascertained, and the deduction to be allowed therefor to the tenant, to be made by men mutually chosen.' He was also entitled to open quarries upon the tenant's damages, 'to be ascertained in manner foresaid.' In virtue of this lease, the Hill of Peattie, which is ground of considerable extent, was taken by the landlord in 1811, and a piece of ground called the Glacklees, was taken by the landlord from the farm of North Ballo at the same time. Eleven acres were taken in 1816, and a quarry was opened in 1819, but no deduction of rent nor was ascertained at the time. On the contrary, the tenant continued to pay full rent stipulated by the lease until its expiry in 1823. The lease was then extended for two years longer by separate missives, the whole rent to be paid ; and at its close in 1825, a settlement took place, apparently settling the full rent being due ; a bill for a certain amount having been given by the tenant, being the balance of the rent, without any reservation of deduction, either in the bill or in the discharges which he took from the

In the year 1828, three years after the possession under the above-mentioned lease expired, and, upon a sequestration being threatened by the advocate, for the rent due by the respondent Blair, under a new lease, the respondent

190.

The advocator reclaimed, and the Court ordered minutes of debate, after which their Lordships, though considering that there was strong

*Macdonald v.*

applied by summary petition to the sheriff, for the appointment of persons to inspect the pieces of ground taken off during the currency of the former lease, and concluding for decree against the advocator, for the sums to be fixed by their valuation. This process having been conjoined with the process of sequestration, at the advocator's instance, the sheriff sustained the respondent's claims, to the amount fixed by the valuers under the summary application, and giving him credit for those sums, and various others in the accounting, ultimately doctored against the respondent in the conjoined actions, for the sum of £287, 4s. 6d., being the balance of the rents due by the tenant under his current lease, after giving him credit for the deductions claimed in his counter-action against the advocator.

"The only point really in dispute in this advocacy, is the claim sustained by the sheriff in that counter-action, and considering the whole circumstances of the case, the question is not free from difficulty. The claim of damage, in the proper sense of the term, being that for opening quarries, &c. is very trifling, being only £4, 10s. The bulk of the claim sustained in that action, amounting to nearly £900, is composed of the value of the pieces of ground taking off for planting; each successive year's value being calculated with interest; against this demand the advocator maintained that the tenant's claims for deduction were waived—that no demand had ever been made by the tenant during the currency of the lease, for any valuation of the pieces of ground so taken off;—and that any such claim was understood to have been compensated, by counter-claims which the landlord had against him, for miscropping and other breaches of the lease. On the other hand, the tenant denied these statements, and averred that repeated applications were made by him, to the landlord, during the currency of the former lease, for the appointment of valuers; and that the delay arose entirely from the advocator's evasion or refusal of those applications; no proof on those points, however, has been offered on either side, so that the question depends entirely upon the presumption arising from the facts which are undisputed, viz. the tenant's delay in making the application, and the successive payments by the tenant, of the rent without deduction, until the termination of the lease.

"Considering all things, it is impossible to deny the force of the presumption. The tenant's claim was properly not a claim of damage, but a claim of deduction of rent, from the time when the ground was taken off. The point truly to be ascertained by valuation was, not what the tenant was to receive for the ground taken off, but what the landlord was to receive, as rent for that, of which the tenant still retained possession. And the continuance on the part of the tenant to pay for what remained of the farm, the full rent originally stipulated, and his final settlement at the close of the lease on the same footing, are circumstances very nearly approaching to an admission of such rent continuing still due for the farm, though diminished, and consequently to an implied waiver of his claim of deduction. Very slight evidence indeed, in addition, of any understanding between him and the landlord on the subject, or of any existing counter-claims on the part of the landlord, would have been quite sufficient in the opinion of the Lord Ordinary to support the case of the advocator. But in the absence of any such proof, and considering that by the terms of the written contract between the parties, the extinction of a gratuitous surrender of any part of the farm is excluded, the Lord Ordinary does not consider himself warranted by mere inferences, amounting at best to a strong probability, in holding the tenant to have abandoned a pecuniary benefit, proved to be of very considerable amount, and that without any consideration whatever. He therefore sees no sufficient reason to alter the interlocutor of the sheriff on this point, and he also agrees with the sheriff in thinking that if the claim is sustained, interest must follow as a matter of course. —16. The landlord took from the tenant each year, successively, the full amount of the n

for believing that the claims of the tenant had been waived or  
yet, as there was no legal evidence of this, adhered to the  
of the Lord Ordinary, and awarded additional expenses against  
timer.

No. 190.

March 7, 1833  
Taylor v. His  
Creditors.

J. F. GORDON, W.S.—M'INTOSH and DUCAT, W.S.—Agents.

Watson v.  
Glass.

— TAYLOR, Pursuer.— *Whigham—Smythe.*  
HIS CREDITORS, Defenders.— *Thomson.*

No. 191.

—The Court, on making a remit to the sheriff for examining  
affairs of the pursuer of a cessio, in terms of 6 and 7 W. IV.,  
anted warrant, notwithstanding the incarcerator's opposition, for  
g the pursuer on his finding caution de judicio sisti, to the amount  
, the debt of the incarcerating creditor being £250.

March 7, 1833  
1ST DIVISION

DER WATSON, Pursuer.— *D. F. Hope—Robertson—A. M'Neill.* No. 192.  
WATSON OF GLASS, and ISOBEL WATSON or M'CASH, and  
BAND, Defenders.— *Sol.-Gen. Rutherford—M'Neill—Pyper.*

—*Jury Trial—Witness—Interest—Public Record.*—1. A party, in re-  
n, expedite a general service as heir-at-law, which was unopposed; the  
as afterwards brought under reduction by a competitor who had expedite  
service sometime before the other; an issue was sent to a jury to try the  
opinquity; at the trial, the party tendered the deposition of a witness who  
examined at the service and was now dead; the competitor objected to  
ibility in respect that the deposition was emitted post litem motam, his  
etitor's) service being previously expedite; and also in respect that it was  
obtained under an ex parte proceeding; the presiding judge rejected the  
—Held, under a bill of exceptions, that the deposition ought to have  
itted, in respect that the service was regular, and the witness had died  
a jury trial. 2. Terms of a remit from the House of Lords, and of an  
ch, held, not to affect the general rule, that, in defending a service against  
it is competent to found on the deposition of any competent witness  
at the service, who has since died. 3. Where, according to the pedigree  
mant, at a service, his aunt is the executor of the deceased—Held (under  
xceptions, affirming the judgment given at the trial) that she is inadmis-

, in the knowledge that that was an over-payment, and that a deduction  
made, of which the amount remained to be ascertained, it appears to the  
inary that such over-payment must be held to have been received, under  
standing, that when the deduction was ascertained, he was to account for  
it as well as the principal.

ward to the objection taken in the additional plea for the advocator, that  
Blair, whose name appears in the lease of 1804, as a joint tenant, is not  
the summary application, it is to be observed that no such objection  
made in the inferior court; and the Lord Ordinary does not think that  
steps of the procedure it can be listened to, particularly when the ad-  
moderated perfectly safe by Thomas Blair's renunciation of all interest in

192. sible, on the ground of interest. Observed that such relationship affected the credibility, but not the admissibility, of a witness, in a question of pedigree. 4. 7, 1889. In the reduction of a service, the deposition of an aged witness was taken to lie in retentio, both parties attending, and the witness being cross-examined; after a judgment by the Court of Session on the proof, including this deposition, the cause was taken to appeal, the judgment was recalled, and a remit was made directing a trial of the propinquity of the competitors: the witness was still alive, and his faculties were entire, but he was unable, through age and infirmity, to attend at the trial;—Held that the deposition could not be laid before the jury, in respect that a new examination of the witness, with a view to the jury trial, should have taken place on commission, and under written interrogatories, as prescribed by A. S. 29th November, 1825, § 28. 5. An extract from a register of burials of an entry made in 1800, which stated "eighty years" as the age of a person then buried, was founded on in a reduction of a service; that age was a circumstance vitally affecting the service; the defender offered to prove that the register was loosely and inaccurately kept, particularly in and about the year 1800, and that the person who then kept the register was since dead; the presiding judge refused to admit the evidence, Observing that it was at best immaterial, as the extract was not good evidence of the age, but merely of the burial of the party; and his Lordship repeated the observation in charging the jury:—Held, under a bill of exceptions, that the evidence ought to have gone to the jury, as it could not be known what effect the extract had on their minds, or how far that effect was successfully counteracted by the observations of the judge.

*Expenses.*—Circumstances in which the House of Lords ordered the expenses of two parties, each of whom had been served heir to a person deceased, to be paid out of the estate of the deceased, and at the same time made a remit "to of the propinquity of the parties respectively to the deceased."

March 7, 1837. **1st Division.** On the death of Alexander Watson, town-clerk of Port-Glasgow, who left a considerable amount of property, a general service as nearest and lawful heir to him was expedited in 1827, by Alexander Watson, weaver in Houston, Renfrewshire. Afterwards, in 1829, Ann Watson or Glass, and Isobel Watson or McCash, who were married to persons residing in Perth, expedited a general service as heirs-portioners of the deceased. According to their pedigree they were nearer heirs than Alexander Watson, weaver, whether his propinquity was correctly stated by him or not. They gave no notice of this proceeding to Alexander Watson, but the edict was published in common form, and the service was regularly carried through. No party appeared to oppose it. The estate of the deceased was in the meantime under the care of a judicial factor. Ann and Isobel Watsons then raised a reduction of the service of Alexander Watson, who raised a counter-reduction of their service. Their action of reduction was afterwards sisted; and in the reduction at Alexander Watson's instance, they were allowed, by interlocutor, to adduce "oral and supplementary evidence" in supporting "the proof of their propinquity as set forth in their claim in the service under reduction," and conjunct probation was allowed to Alexander Watson. Both parties brought a proof on commission, and the Court, proceeding upon the proof which had been led before the inquest, and the supplementary proof taken at the reduction, considered the propinquity of Ann and Isobel Watson sufficiently established, and assoilzied them from the reduction.

**Watson.** He took the judgment to appeal, and the House of **No. 192.**  
 dered and adjudged that the said cause be remitted back to the **March 7, 185**  
 Session in Scotland, with instructions to recal the interlocutor **Watson v.**  
 l of, and to direct one or more issue or issues to be framed to **Glasg.**  
 propinquity of the parties respectively to the deceased Alexander  
 own-clerk of Port-Glasgow, and that such issue or issues be  
 dingly. And it is farther ordered, that the costs of both par-  
 appeal, as the same shall be taxed and certified by the proper  
 his House, be paid out of the fund under charge of the judicial  
 he estate of the said Alexander Watson deceased, and that the  
 of Session do grant warrant accordingly, for payment of the  
 taxed and certified as aforesaid, to the solicitors of the parties  
 y. And it is farther ordered, that the said Court of Session do  
 rther in the said cause, as shall be just and consistent with this

this remit, the following issues were sent to trial:—"1st,  
 the defenders, Ann and Isobel Watsons, are related, and in  
 ee of propinquity they are related, to the deceased Alexander  
 ometime town-clerk of Port-Glasgow?" "2d, Whether the  
 alexander Watson, weaver in Houston, is related, and in what  
 propinquity he is related to Alexander Watson, town-clerk of  
 row aforesaid?"

irected that Ann and Isobel Watsons should stand as pursuers  
 st issue, and Alexander Watson as pursuer of the second

close of the trial, under the first issue, the jury found a verdict  
 der Watson, defender in the issue. Ann and Isobel Watsons  
 a bill of exceptions on the ground that evidence tendered by  
 been unduly rejected by the Lord President, before whom the  
 tried. The bill set forth five exceptions.

ption. Ann and Isobel Watsons proposed to give in evidence  
 tions which had been emitted at their service before the inquest,  
 set Miln, and Margaret Gardiner, respectively, both of whom  
 died.

part of Alexander Watson, an objection to the admissibility of  
 tions was stated on the following grounds. By the terms of  
 from the House of Lords, and the issues, the cause was placed  
 ew footing, which was in so far anomalous that the question  
 e the jury was no longer the simple point whether the pedigree,  
 at the service, was true or not, but whether Ann and Isobel  
 ed at all, and if so, in what degree, to the deceased. In regard  
 if under such an issue, no part of it was entitled to be received,  
 none of its having been before the jury at the service; but the  
 en tendered, was to be tried by the ordinary rules of evidence,  
 ad or rejected accordingly. But by these rules, the depositions

190. in question must be rejected. Before Ann and Isobel Watsons had purchased the briefs under which they were to expedite their competing service, Alexander Watson had been regularly served. They ought to have given notice to him of their service, but failed to do so, and thus obtained an unopposed service. The depositions procured at such a service, were thus to be viewed in the same light as mere *ex parte* proceedings, and were therefore inadmissible. It was true that the hearsay of a person deceased was admissible; but then it must be hearsay of what flowed spontaneously and impartially from the untutored mind of the speaker; and accordingly in England where, by an exception to their general rule, the hearsay of dead relations was admitted in questions of propinquity, it was always rejected when the words were spoken *post litem motam*.<sup>1</sup> In this case the *ex parte* deposition was not the unbiased effusion of the mind of the speaker, but was just the rehearsal of what the deponent had been put in training to state at the precognition previous to the service; and as there was no cross-examination, it was merely a selected statement of so much of the deponent's evidence as suited the examiner's purpose.<sup>2</sup>

Ann and Isobel Watsons answered.

They were not under any obligation to notify their service to Alexander Watson excepting according to the regular form of publication required by law to be given to all the lieges. They had given such public notice, and the service was in all respects regularly obtained. Every deposition which was competently taken at that service, might be competently tendered in defending against a reduction of it, if the witness had died in the interim. There was much stronger reason for receiving it, than for receiving the mere hearsay of the conversation of a deceased party; which, though not spoken by the deceased under the sanction of an oath,<sup>3</sup> was undoubtedly admissible. And if this deposition was to be rejected, all services throughout Scotland would be exposed to imminent danger of being brought under reduction at any time short of the vicennial prescription, after the principal witnesses might be dead, when the services could easily be overturned if the depositions of deceased witnesses were inadmissible.

There was nothing in the remit from the House of Lords, or the terms of the issues, which did or could take this case out of the common rule. Although the issue sent to trial put the question whether Ann and Isobel Watsons were related in any, and what, degree, yet this was done in an action of reduction of their service, and in reference to a record in which the pedigree as proved at their service was alone founded on by them. In

<sup>1</sup> Starkie's Law of Evid. I. 44, and II. 605.

<sup>2</sup> Smith, Oct. 6, 1824 (3 Murr. 429); Mackellar, May 28, 1828 (4 Murr. 345); Carleton, March 13, 1816 (1 Murr. 28).

<sup>3</sup> *Talk on Evidence*, 410 and 430, third edition.



instance, therefore, they were obliged to prove that pedigree, as much No. 192  
 ter, as they were, before the case went to the House of Lords. But, <sup>March 7, 18</sup>  
 before the appeal, the Court of Session, in judging of the reduction, had <sup>Watson v.</sup>  
 looked at the evidence of this very witness along with the rest of the proof <sup>Glass.</sup>  
 the service; and the jury should also have been allowed to consider it.

The analogy of the English law was no safe guide in ours; the admission of the hearsay of a dead witness, was, with them, an exception from their general rule, and it might the more readily be narrowed by them;

Scotland, such admission was the general rule, and was not on slight grounds to be subjected to new and confined limits.

**LORD GILLIES.\***—I cannot help regretting, that, by our forms, which in this respect I believe coincide with those of England, the effect of sustaining any one of the exceptions must be to set aside the verdict, and occasion a new trial. But whatever are to be the consequences, the only question before us, is whether the law of exceptions be well or ill-founded. In regard to the first exception I think it must be sustained. The evidence tendered, consisted of the depositions of two witnesses who had been examined before the jury at the service of Ann and Isobel Watsons, but who had died before the Jury trial came on, under the remit from the House of Lords. After their death, no alternative remained, except that of either admitting the depositions just as they were emitted, leaving to the parties to observe their credibility, or to reject them absolutely. It is said that the English law would have so rejected them, being emitted post litem motam. Even if that was only instructed, I think this Court should pause before it follows any rule drawn from that law in a question like this. The general rule of the law of England is that when a witness dies, his whole evidence is absolutely lost; our general rule is just the opposite, for, whenever a witness is dead, so that the best evidence cannot be had, the words which he may have been heard to speak, are admissible reserving to parties to observe on the weight due to them, which may vary extremely according to circumstances. But when I recollect that the general rules of the two countries are thus opposed, and that the admissibility of hearsay of dead witnesses in a question of pedigree, is an exception to the general rule of the English law, and is opposed to the genius of that law, I am not prepared to hold that every limit by which that exception is confined and guarded in England, is equally to be applied here, where the subject of the limitation would not be an exception from our general rule, but our general rule itself. I lay aside, therefore, the English rule as a precedent. But it is next maintained that these depositions were no better than an ex parte proceeding, and are not so good as if they had been the hearsay of spontaneous and unbiassed conversation in which the deceased had taken a share. I do not think this observation is well founded. There are, on general principles, two objections to hearsay: 1st, That there is no opportunity for cross-examination: 2d, That the statement which is proved to have been made, was not made on oath. The first objection does not apply here at all. The first, would be more serious if the service had been no better than a common ex parte proceeding. But it was made with perfect regularity; after all the intimation had been given which the

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\* The opinions of the Judges, in reference to each several exception, are given immediately after the pleadings of the parties for and against the exception.

1837. law requires, and under which intimation any of the lieges might have been put at the service. The evidence was competently led under a public judicial process, well-known to the law, and having most important public ends in view. It distinguishes the evidence taken before an inquest, from that which was taken in the case of Carleton.<sup>1</sup> The depositions emitted in proof of a pedigree, before an inquest, in a legitimate and formal proceeding, are on an entirely different footing from voluntary affidavits, or from a deposition taken, in the circumstances of the case of Carleton, and it would be highly dangerous to disregard the distinction between them. In trying the merits of the service when brought under reduction, we never hesitated, before the cause went to appeal, to look at these depositions and to found on them. But it is said that the special terms of the remit from the House of Lords, made this a different cause from what it was before. I cannot adopt that view. It is still the same action of reduction of the same service. We pronounced decree in that action; it was taken to appeal, and in that action the House of Lords made the remit under which the Jury trial took place. The House of Lords had no other cause before them, and could not travel out of it. They could not direct an abstract point to be tried, without reference to its bearing on the cause in which the trial was to take place; and it was, of necessity, with reference to the reduction of the service that the issue was sent to be tried by the Jury. That issue tries "whether Ann and Isobel Watsons are related, and in what degree of propinquity they are related to the deceased?" But suppose that they had attempted to prove any other degree from that which was set forth in the service, the objection of surprise would have been fatal. It would have been an attempt to get up a new case before the Jury, a pedigree different from that which Alexander Watson was attacking and which they were defending. I look on the remit of the House of Lords, as being just to try the truth of the pedigree maintained by either party in their respective services. But be that as it may, the remit and the issue must be viewed in reference to the cause before the Court; that was the reduction of a service, and I think that all the evidence which would have been competent and important, in trying the reduction of the service, independently of the special terms of the remit from the House of Lords, and of the issues, was equally competent and important at this trial. And I can have no doubt that the mere death of a witness, who had been competently examined at a regular service before an inquest, is not to cause the loss of the deposition emitted by that witness, when the verdict of the jury is challenged in a reduction, and the challenge is brought before a jury in the form of an issue for trial.

LORD MACKENZIE.—I am of the same opinion. In the reduction of the service of Ann and Isobel Watsons, all the evidence which had been competently taken before the jury, at the service, was competent to be again founded on in defending the service. The witnesses competently adduced at the service, and who remained alive, might be again adduced in the reduction; and where they were dead, their depositions might be produced. And I may advert to two statutes which contain regulations as to the mode in which this Court is to deal with cases brought from an inferior court, in which a proof has been taken in that court. The first of these is 59 Geo. III. c. 35, which (§ 14.) directs this Court, where such proof appears inadequate, to direct farther proof to be taken according to the forms of this Court

<sup>1</sup> March 13, 1836; 1 Murr. 28.

No: 196

March 7, 18  
Watson v.  
Glass.

unless the parties consent to cancel the depositions of such witnesses as are alive & within Scotland ;" this provision shows that no consent was required as to the positions of witnesses deceased, and implies, I conceive, that these depositions should be used before the jury, just as the witnesses who emitted them, could have been adduced before the jury, if still alive. The second statute is the Judicature Act, 6 Geo. IV. c. 120, § 40, which repeals the former, in so far as the consent of parties was requisite to enable this Court to cancel the depositions taken in the inferior court, at sending a cause before a jury ; and gives us power "to give such directions with regard to the proof already taken, or with regard to any part or parts thereof as to us shall seem just." Had this been an action from any of the ordinary inferior courts, we should certainly not have held it to be within our discretionary power, to reject the deposition of a witness because he had died since the proof was led in the Court below. And although the present case is not identical with these, yet it comes very near it.

The only rule, according to which, evidence which has been led before the inquest, can be directed to be laid aside in the event of a trial by jury, is that the best evidence alone is to be laid before the jury. That rule will exclude the deposition of any witness who is still alive and who can be adduced and examined in the presence of the jury. But the rule altogether fails of application in the case where the witness is dead. It is quite impossible to reject such a deposition on the general abstract ground that it was taken in an unopposed service. If the witness was admissible at the service, his deposition, after his decease, must be admissible in defence against a reduction of the service. It is then the best evidence which can be had. And if any other rule were adopted, it would necessarily follow that whenever an unopposed service was brought under reduction, and the cause was sent to a jury, the whole evidence on which the service had proceeded must vanish ; not only the depositions of the witnesses who survive would require to be laid aside, because they themselves could still be examined, but the depositions of the witnesses since dead would also be laid aside, upon the grounds pleaded by the defender in this issue. But it would lead to very perilous consequences indeed, if it was in the power of a party, who did not oppose a service, to cause all the evidence taken under it to vanish, by merely instituting a reduction at any period within the vicennial prescription ; which period might even extend beyond the 20 years wherever a plea of non valentia agere could be stated. The effect of this might be to overturn the best services, in the most unjust manner ; as a competitor would just wait quietly, until the death of the principal witnesses on whose testimony the service rested, and then he would bring his reduction, and say that the depositions of these witnesses could not be read. In the same way, when reductions were brought of decrees in absence, the proof which might have been taken and put on record by the pursuer would be liable to be set aside. And every cognition would be exposed to the same danger ; the evidence on which a party had been cognosed as fatuous for example ; and so, in similar cases. In all these the verdict of the inquest would be liable to be overturned by having the whole original evidence before the inquest thrown aside, if the depositions of Miln and Garraway were to be rejected here. I think it impossible to adopt a rule in regard to depositions, which is so pregnant with dangerous consequences as this.

It has been pleaded, however, that this issue is to be severed from the cause in which it has been taken, and is to be viewed as a mere independent abstraction. We are satisfied that the remit from the House of Lords does not warrant any such

192/ remarkable interpretation being put upon it. That House did not intend the issue to be taken at all, or to any effect, except that of trying the case between the parties. The issue is no extraneous abstraction, but merely a means of trying whether the service of Ann and Isobel Watsons is reducible, or is valid. But even if it could have been held that the issue was to be regarded as an abstraction, I think the depositions were admissible. The objection of their being taken post litem motam might have been good if the service had not been regularly expede; but where the service was regular, I do not think the depositions could be rejected. But I do not rest my judgment on this ground, as I think the issue was truly taken in the reduction of the service, and must be viewed as part of the process of reduction, and nothing else.

LORD CORNHURST, after shortly stating the history of the case, read the terms of the remit from the House of Lords, "to try the propinquity of the parties respectively to the deceased;" his Lordship then proceeded as follows:—That remit undoubtedly meant that the propinquity was to be so tried, in so far as it was competent and relevant to try it in this action of reduction. The remit must be so read and so construed. And what, then, was it, which could thus be tried in the reduction of the service of Ann and Isobel Watsons? They could not defend that service by proving any degree of propinquity whatever, different from that which the inquest had found to be proved at the service. Had they even proved themselves to possess a nearer degree of propinquity; had they even proved themselves the lawful daughters of the deceased; that would not have defended their service. They must have proved their degree of propinquity the same as that which was stated in their service, or their service was gone. And so also Alexander Watson must have proved his pedigree to be consistent with his service, or his service was gone. I have adverted to these things for the purpose of recalling the attention of the Court to the fact, that, in this reduction of the service of Ann and Isobel Watsons, the Court were merely reviewing the verdict of the inquest who served them heirs; and neither the House of Lords, nor this Court, could try any point excepting in the reduction of that service. As the validity of that service was the question at issue, and was the only question which could completely be tried under that issue which went to trial, it remains to be decided, what evidence was competent in thus trying, and reviewing, the service under reduction. And I have no hesitation in thinking that all evidence competently tendered in the Court below, at obtaining the service, might again be competently tendered in defending it; and, as a part of the application of this rule, that, wherever any competent witness who had deposed in the Court below, had died in the interval, the deposition of that witness might be tendered in evidence, subject only to such remarks on the weight and credibility of the testimony as were warranted by the circumstances. In reviewing the verdict of the inquest, it was competent for this Court, and it was competent for the House of Lords, if not satisfied with the evidence laid before the jury at the service, to say there ought to be farther evidence adduced, and that this should be done before a jury. But in doing so, the general principle of the law of Scotland applies, that the deposition of a person deceased is admissible. And if we failed to apply this principle, I think very dangerous consequences indeed would result. Wherever there were competitors to an estate, and the proof of the pedigree of one of them chiefly rested on the testimony of aged witnesses, as Robert Simpson, his competitor might just lie by, and allow an unopposed service to be expedite, and, after waiting for any period short of the vicennial prescription, a

his reduction; and insist that the deposition of every witness before the in- **No. 192.**  
 who had since died, must be absolutely thrown aside. Or the disponee un-  
 leath-bed deed, might suffer the heir-at-law to take a decree of reduction in **March 7, 185**  
 e, and, after a lapse of 39 years, might bring a reduction, and insist that all **Watson v.**  
 idence which the heir had taken and recorded before obtaining his decree, **Glass.**  
 ow good for nothing; and that the heir must defend himself upon the evi-  
 of any witnesses still surviving, or lose his estate.

as been urged that the law of England would have ruled this point in a dif-  
 manner. Perhaps it might have done so, for any thing that I know; but I  
 t going out of the law of Scotland, in order to determine what evidence is  
 tent in the reduction of a service; I am not going into the law of England

I do not know what that law may be in such a case as this; I am a Scot-  
 idge, and am not bound to know it. Laying it therefore aside, I hold that,  
 ing to the law of Scotland, where a service has been regularly obtained, and  
 rwards brought under reduction, and any competent witness who deponed  
 the inquest, has died in the interim, it is competent for the defender in the  
 ion to put in evidence the deposition emitted by that witness before the in-

**RD PRESIDENT.**—After all that I have heard, I certainly feel that my origi-  
 inion in this case has been considerably shaken; but the grounds of it are  
 mpletely removed, and I still retain it, though with less confidence than for-

It is certain that the statement which a person deceased has been heard  
 ke, is, by our general rule, admissible evidence. But such hearsay is proved  
 sence of the jury by the oath of the person who heard the deceased make  
 atement; and this person is liable to the check of cross-examination as to all  
 cumstances under which the statement was made, which is a check of great  
 tance in testing the degree of weight or credibility which is to be attached  
 statement, and the statement of the deceased is also the unprompted, and  
 meous effusion of his own mind. But the depositions tendered in this cause,  
 in truth, ex parte evidence. The deponents had never been subjected to  
 examination. And although the brieve of service was published in common  
 and all the lieges might have appeared at the service, still I think there was  
 portant omission made in respect to fairness of procedure. No intimation  
 pecially given to the competitor Alexander Watson, although his service was  
 e a considerable time before this. The evidence led at such a service stands  
 ss favourable position than that which is led in an ordinary decree in ab-  
 as the defender in that process has always received a citation, and it is his  
 ult if he does not attend, but allows decree to go in absence. And as I  
 er that these depositions should be viewed in the circumstances as taken ex  
 merely, I think they were not admissible, and that the observations of the  
**CHIEF COMMISSIONER** and **LORD PITMILLY**, in the case of Carleton,<sup>1</sup> relative  
 inadmissibility of ex parte depositions, have a strong bearing upon such a  
 this.

**and 4th Exceptions.**—In leading the evidence before the inquest,  
 stants of Ann and Isobel Watsons were examined. According to  
 pedigree, these aunts, being their father's sisters, were a degree

<sup>1</sup> 17112 (1816).

<sup>2</sup> 17112 (1816).

<sup>1</sup> March 13, 1816, (1 Murr. 28.)

1892. nearer in kin to the deceased than Ann and Isobel Watsons themselves  
 1837. and were executors of the deceased, if the nieces were his heirs.  
 1837. aunts died before the jury trial in the reduction, and Alexander Watson  
 took an objection to the admissibility of their depositions, which was  
 sustained by two successive deliverances; the first of which applied to  
 the deposition of one of the aunts, and the last, to those of the other.  
 The 2d and 4th exceptions, in the bill of exceptions, applied to these  
 deliverances. Besides the objection, which was common to these deliv-  
 erances, and to those of Miln, and Gardiner, already considered, Alex-  
 ander Watson pleaded that the aunts were inadmissible both on the ground  
 of relationship, and also on that of interest. In reference to interest,  
 he alleged that the deceased had left a moveable succession, and as the  
 pedigree which proved Ann and Isobel to be heirs, also proved them  
 to be executors, they had a manifest interest to support it. By doing  
 this they would throw Alexander Watson out of the field, and, in after  
 claiming the executry, would only have to deal with their own and  
 whose right as heirs was identified with theirs as executors, and who  
 not resist their claim as executors. They had thus an interest, &c.  
 The verdict under the issue, which rendered them inadmissible.<sup>1</sup>

Ann and Isobel Watsons answered, that, in a question of pedigree,  
 the relationship of an aunt was no objection;<sup>2</sup> there was a penuria of  
 evidence inherent in the subject of inquiry, and the evidence of near relation  
 was essential to get at the truth, especially where the parties were in  
 the lower classes of society, so that none but relations knew their private  
 history or descent. In regard to interest, as it had the effect, when  
 qualified, of absolutely excluding a witness, however high his character  
 and important his testimony, it was indispensable that a positive interest  
 in a legal, and not a merely popular sense, should be qualified. No  
 interest could do this, but an actual interest in the issue of the cause;  
 in particular, no mere belief of interest<sup>3</sup> in it, could do so. But the  
 aunts had no such interest; Ann and Isobel Watsons did not claim them;  
 the verdict of the inquest did not establish that they were ex-  
 ecutors of the deceased, nor could they afterwards have used it for estab-  
 lishing this. The service was merely to take up heritance, as to which  
 the executors were strangers. There was therefore no legal interest affect-  
 ing these witnesses; and the popular interest arising from their connection  
 with the cause, was only a subject for animadversion as to their credi-  
 tibility, and did not occasion total inadmissibility.

LORD GILLIES.—The first objection stated against these witnesses, being  
 the same with that which applied to the depositions previously rejected, ought  
 to have been repelled. So also ought the objection on relationship, &c.

<sup>1</sup> Angus, &c., July 23, 1827 (4 Murr. 343).

<sup>2</sup> Boyd, Jan. 20, 1770 (16770 and 3989).

<sup>3</sup> Ralston, Feb. 27, 1833 (ante, XI. 451); Nightingale, 1830, 1 Barn.  
 Adolph. 439; Wood, 1826, 5 Barn. and Cress. 335; 1 Starkie, Law of Evid.

g that this was a question of pedigree. But the third objection, interest, applied to me to apply to these witnesses, and therefore their testimony was proper-  
 erted. I do not go more minutely into this, as the interest appears to me to be  
 ident, and as I concur in the judgment which was given in at the trial.

No. 192.

March 7, 1835

Watson v.

Glass.

RD MACKENZIE intimated that he concurred with LORD GILLIES in this  
 on.

RD COREHOUSE.—I think there was a distinct interest affecting these wit-  
 s so as to disqualify them. It is said, that by the law of England the hearsay  
 ceased relations, if the words were spoken post litem motam, is not recei-  
 . I should feel the greatest doubt in regard to the reception of that principle  
 ur law, and it is altogether new to me. I think it would lead to very un-  
 ate results if it were received. These were persons in a low rank of life, as  
 ose pedigree there is probably no evidence to be had excepting among their  
 ons. None of the public records are likely to exhibit the links of their suc-  
 e descents. In such a case as that, if the effect of lis mota was to exclude  
 bsequent statements of the relations of a competitor, the party who first pur-  
 d a brievé and published it, would gain a most unjust advantage. But I do  
 nter into that point, as I rest my opinion upon the ground of interest. There  
 ainly an interest in the witnesses. I think it inaccurate to say that this ser-  
 vas res inter alios, as to them, and that they took no benefit by it. The ser-  
 vas duly published, all the lieges were made cognisant parties, and they were  
 ed to appear at the service. If, in this reduction of their service, Ann and  
 l Watsons be assoilzied, I think that their aunts might, if alive, have founded  
 e decree of absolvitor, in any after question between Alexander Watson and  
 . The objection of interest appears to me to be irresistible.

*Exception.*—At an early stage of the reduction, the deposition of  
 beth Gardiner or Black, an aged witness, had been taken by Ann  
 Isobel Watsons, to lie in retentis. Both parties had attended when  
 leposition was taken, and she had been cross-examined by Alexan-  
 Watson. The deposition had afterwards been opened up, and con-  
 ed along with the rest of the proof, when the Court of Session  
 ounced their judgment of Feb. 25, 1835. The witness was still alive,  
 e date of the jury trial, and her mental faculties were entire, but she  
 unable to attend at the trial on account of age and personal infirmity.  
 deposition was tendered in evidence by Ann and Isobel Watsons, to  
 h it was objected, that, after the remit was made, with a view to trial  
 ry, she should have been examined on written interrogatories, ac-  
 ng to the form prescribed by the Act of Sederunt,<sup>1</sup> for examining  
 eses whose depositions are to be laid before a jury; and that the  
 l deposition taken, was inadmissible at a jury trial. This objection  
 unstained, and Ann and Isobel Watsons took an exception to the de-  
 nce sustaining it.

regard to this exception, Alexander Watson pleaded, that, in all  
 the best evidence must be laid before the jury. The form of taking

<sup>1</sup> Nov. 29, 1825, § 28.



1497. that evidence, on commission, when it was to be laid before a jury, enjoined by the Act of Sederunt (§ 28), 20th Nov. 1825, to be containing answers to written interrogatories previously adjusted. <sup>1498</sup> Without the consent of parties, there was no warrant, even in the case of rated jury trials, for laying before a second jury, the evidence which thus been obtained and used for the first jury trial; or any depositions which had not been obtained expressly for the second trial itself. there was no doubt of the competency of examining this witness on interrogatories, if it had been applied for.

Ann and Isobel Watsons answered, that as the deposition had been regularly taken, at an early stage of the cause, subject to the cross-examination of Alexander Watson, it was probably better testimony than now he had, after the witness had necessarily heard the cause so canvassed by all parties. There was no obligation on them to re-examine the witness, and, in general, the Court granted a re-examination with much reluctance, that it was doubtful whether they would have granted it at all, even if it had been applied for.<sup>1</sup> But it was open to Alexander Watson himself, to have had farther examination of the witness on applying to the Court; and, as he failed to do so, he could not object to the deposition tendered.

<sup>1499</sup> LORD GILLIES.—I think the deposition of Elizabeth Gardiner was rightly rejected. That witness still remains alive. The examination on written interrogatories, as prescribed by the Act of Sederunt, in reference to jury trial, is a mere form, but it is of substantial importance; and I think that Alexander Watson was entitled to object to any deposition of this witness, not obtained according to that prescribed form. I have formed a clear opinion on this point.

LORD MACKENZIE.—I am of the same opinion.

LORD COREHOUSE.—I concur in thinking that the judgment given at the trial was right. When a trial by jury was ordered, the evidence to be laid before jury, in so far as it consisted of the depositions of living witnesses who could attend at the trial, should have consisted of depositions taken under written interrogatories according to the forms which were prescribed by the jury court. It is only such depositions which could be looked upon as the best evidence of that in reference to trial before a jury.

*5th Exception.*—Robert Watson, the grandfather of Ann and Isobel Watsons, was buried at Perth in 1800. An extract from the parish gister of burials had been made by Alexander Watson, and founded in the previous stages of the cause, which bore that Robert Watson, aged 80 years, when buried. If this was his true age, it was a fact which destroyed the pedigree maintained by Ann and Isobel Watsons. The extract had been considered by the Court of Session at deciding the case on 25th February, 1835, and in particular one of the Judges, the Lord President, had stated that he had felt considerable difficulty in then

<sup>1</sup> Paul, March 10, 1832 (ante, X. 469).

the pedigree of Ann and Isobel Watsons, because of this extract; No. 192.  
 it he had finally done so, in consequence of disregarding the regis- March 7, 1831  
 together as a register of ages, and merely looking on it as authentic Watson v.  
 available for establishing its proper subject of registration, which was Glass.  
 be of burial alone.

the trial before the jury, Ann and Isobel Watsons tendered wit-  
 to prove "that any entry of the age of Robert Watson, was not  
 relied upon, as evidence of the age, inasmuch as such entry of age  
 no proper part of the register of burials:—That the entries of age  
 appeared in the said register were made from no authentic infor-  
 , but were generally made from mere report, and frequently from  
 port of persons who had no proper means or cause of knowledge,  
 equently upon mere guess or conjecture of the person making the  
 or of some person equally uninformed:—That such entries were  
 y instances quite erroneous, and that this was particularly the case  
 e practice in and about the year 1800, being the year of the burial  
 said Robert Watson:—That the said register of burials, even in  
 to those matters which properly form part of such a register, was,  
 about the said year, kept in a very careless and inaccurate manner,  
 is, in many instances, quite erroneous:—And that the person or  
 s who then kept the register of burials, and made the entry in re-  
 o Robert Watson, were now dead."

was objected for Alexander Watson, "that any inquiry into the  
 of keeping the register of burials, in regard to the entry of ages  
 generally, is incompetent, in respect that no evidence is tendered  
 he mode of entering the age of Robert Watson."

s objection was sustained, the Lord President observing at the same  
 hat the register was not good evidence of any thing but the date of  
 ; which observation his Lordship repeated in charging the jury,  
 he effect due to the extract which had been laid before them. An  
 tion was taken against the deliverance rejecting the evidence offered  
 peach the register. On this point it was pleaded for Alexander  
 on, that, as no evidence was offered to prove the individual entry of  
 t Watson's age to have been inaccurately made, it was not compe-  
 o go into general evidence as to the system according to which the  
 er was kept, which last evidence could not be let in, until the first  
 een adduced. And as the age was not a proper part of the register,  
 e registration of it could make no faith, and the presiding Judge  
 itimated this at the trial, there was no just ground of exception

and Isobel Watsons answered that the extract from the register,  
 inter alia, the entry of Robert Watson's age, had been used  
 them, and that it was of no value to the other party as a docu-  
 of evidence, excepting in reference to the question of age. The  
 ling Judge had, indeed, expressed an opinion that the register was

1892. entitled to little faith in respect to the question of age; but the  
 1897. was to be returned by the jury, and it was impossible to say how  
 their minds might have been impressed with the terms of the ex-  
 how far that impression remained unremoved by the terms of the  
 by the Judge. And they had a right to prove the general inaccu-  
 the system of keeping the register at the time, although, at this  
 of time, and after the intervening death of the parties, they could  
 prove the manner in which the individual entry as to Robert  
 was made.<sup>1</sup>

LORD GILLIES.—I think the evidence tendered as to the general and  
 inaccuracy of the mode of keeping the register should have been received.  
 extract was used on the part of Alexander Watson, against the competing  
 which bore not only the date of Robert Watson's burial, but also  
 An offer was made by them to prove, that, besides the circumstance of  
 being an extraneous and gratuitous addition to the proper subject of the re-  
 cord itself was kept so loosely as to be of no validity or authenticity.  
 I think such a proof should have been allowed to go to the jury. It was  
 known what effect the extract would have on the jury, in reference to  
 question of age. It may be true that the jury were directed by the presiding  
 judge to pay no regard to the extract as a proof of age, and it may be very prob-  
 able that the jury paid no attention to it; but we cannot rely that they totally dis-  
 regarded it. We have no means of knowing that they did so; and I think the  
 verdict taken against the judgment refusing to allow the evidence to be tendered,  
 should be sustained.

LORD MACKENZIE.—I entirely concur.

LORD COREHOUSE.—I incline to think that the evidence tendered in  
 support of the accuracy of the register ought to have been received. Not to  
 allow a proof of the inaccuracy of this or that individual entry; but  
 the system on which it was kept was loose and incorrect. If it could have been  
 proved that the keeper of the record was in the habit of making entries just as he  
 casually pick up his information, without confining himself to such entries  
 as were warranted to make by the parties best authorized, then I think such  
 evidence was relevant to go before the jury. And I do not consider that the charge  
 of the Judge, though directing the jury to pay no attention to the extract as to  
 age, is enough to do away with the effect of having excluded competent evi-  
 dence which was tendered to impeach the extract. Such evidence might have had  
 weight with the jury, than the charge itself; and the party was entitled  
 to the benefit of both the one and the other.

LORD PRESIDENT.—In reference to the 2d, 3d, and 4th exceptions, as to  
 your Lordships concur with me in the view I took at the trial, I shall not make  
 any observations. And in regard to the 5th exception, I would only remark  
 that I refused to admit evidence to impeach the accuracy of the register as to  
 merely because I regarded such an entry in a register of burials to be of no  
 validity and entitled to no weight. Suppose the entry, besides stating the bur-  
 ial, also stated that the deceased had had a son named Thomas lawfully born

<sup>1</sup> Tait on Evid. 51 and 52; Miller, July 21, 1826, 4 Mart. 122.

sars before ; or had married one Jane Thomsom 30 years before ; the gratuitous statements as to these particulars would have been of no authority whatever, [ I should have considered that any evidence offered in impeachment of the register on these points was at best purely superfluous and supererogatory. It was on these grounds alone that I refused to admit the evidence as to the mode of entering the register. ]

No. 192.

March 7, 1833

Wright v.

Wright's

Trustees.

THE COURT then sustained the first and fifth exceptions ; disallowed the others ; and directed a new trial to take place.

C. F. DAVIDSON, W.S.—MACKENZIE and MACFARLANE, W.S.—Agents.

S ELISABETH WRIGHT or WEBSTER and SPOUSE, Pursuers.—*D. F.* No. 193.

*Hope—Wilson.*

WRIGHT'S TRUSTEES, Defenders.—*Robertson—Cowan.*

*Marriage—Process—Parties to a Suit—Proof.*—In a declarator of legitimacy by a child born of a connexion in Scotland, against the representatives of her father deceased, who subsequently contracted a regular marriage in England, and after having had children by this marriage, became domiciled, and died in Scotland, his wife continuing to live in England ;—Held, 1st, That the English marriage was no bar to an action proceeding on the allegation of a marriage effectually, though irregularly, constituted by the law of Scotland, and might be put an end to by proof of such Scotch marriage ; 2d, That it was not incumbent on the pursuer to call the English wife as a party to the process ; 3d, That in the circumstances of the case, the pursuer had failed to establish a marriage between her parents.

ABOUT the year 1804 or 1805, the late Douglas Wright and Janet Kirkwood, while fellow-servants together in Glasgow, formed a connexion in which the pursuer Elisabeth Wright or Webster, was born in January, 1806. An entry of her baptism of that date, as the lawful child of Wright and Kirkwood, appeared in the register of baptisms of the kirk-session of Glasgow. Wright and Kirkwood never cohabited continuously together as man and wife, and shortly after the birth of the child, the former went to England, and served for some years with various masters there and on the Continent. During this time Janet Kirkwood assumed the name of Wright, which was also borne by the child. In 1815, Wright was regularly married by banns in London to Ann Evans, by whom he had two children. In 1816, he came to Scotland, and while there was joined by a woman, who lived with him, and had a third child, after which she went to England and never returned to him. He then resumed his intimacy with Kirkwood, who had another child to him in Glasgow in 1819. This child, which died soon afterwards, was named after the father, and bore the surname, and the baptism was entered as before in the kirk-session register. Kirkwood had no other children but those already mentioned, and was not of dissolute habits. She died in 1833 in the Edinburgh In-

March 7, 1833

2d Division

Ld. Moncreif

F.

193. firmary, into which she had been received as Janet Kirkwood or Wright  
 1837. a married woman.

Wright had in the mean time been carrying on business as a postman in Edinburgh, and acquired property to a considerable amount. He received the pursuer to live with him, and showed an interest in her welfare, but did not openly acknowledge her as his lawful child: and he did not treat Kirkwood as his wife. He died shortly after her decease.

Thereafter the pursuer, who was now married to Webster, a stable-keeper, brought an action of declarator of legitimacy against her father's trustees. In her condescendence she undertook to prove a marriage between her parents, 1st, by celebration, 2d, at least by acknowledgment in presence of witnesses, and 3d, by cohabitation as man and wife.

The defence was that there was no legal and sufficient evidence of the marriage.

A record having been closed, the Lord Ordinary remitted to the Commissaries to take a proof, from which and from the admissions in the record, the state of the fact appeared to be in substance as above set forth. His Lordship appointed intimation of the existence of the process to be made in England to Ann Evans or Wright, that she might appear if she thought proper, but no appearance was made for her. He thereafter pronounced the following interlocutor:—"Finds that the pursuer has failed to establish, by legal or sufficient evidence, that the late Douglas or Douglass Wright, and the late Janet Kirkwood, her parents, were lawfully married persons, according to the law of Scotland: Therefore, sustains the defences, assolvies the defenders, and decerns; but in respect that it appears from the evidence, that the said Douglas or Douglass Wright did so act and conduct himself as to create a reasonable belief in the pursuer that her said parents had been married persons, or at least a reasonable doubt as to her status, finds no expenses due."

The pursuers reclaimed.

\* His Lordship's note referred particularly to the evidence of the witnesses, which his interlocutor was grounded; and in regard to the effect of the English marriage on the present action, it proceeded as follows:—"The Lord Ordinary is not of opinion that the marriage in London would bar the present declarator of legitimacy, upon good and sufficient evidence of a marriage constituted in Scotland by celebration in 1805, or by clear cohabitation as man and wife, before the date of that marriage in London; or that it would be at all incumbent on the pursuer to call Ann Evans as a party to this declarator. He appointed notice to be given to her of the existence of the process, that she might appear if she thought fit. But he has no idea that a declarator of legitimacy cannot proceed, founded on the allegation of a marriage effectually, though irregularly, constituted by the law of Scotland, merely because one of the parents may have committed bigamy, by entering into another marriage. He thinks that with that the pursuer has no concern. If her case were clear otherwise. But he nevertheless thinks that the English marriage is a fact of very great importance in the cause, as bearing upon the reality of the proof, and affording presumptions both of fact and of law, against any equivocal, doubtful, or suspicious state of the evidence."

**THE COURT**, with the exception of Lord Meadowbank, (who rested **No. 193.** mainly on the insertion in the register of baptisms,) were of opinion that the interlocutor was well-founded, and accordingly adhered, finding expenses due since the date of the Lord Ordinary's interlocutor.\* **March 9, 1837**  
**Dalrymple.**

**JOHN RONALD, S.S.C.—CUNNINGHAM and WALKER, W.S.—Agents.**

**WILLIAM DALRYMPLE, Petitioner.—Marshall.**

**No. 194.**

*Curator bonis—Lunatic.*—A fatuous person, whose family resided in America, possessed of property which was partly situated there, and partly consisted of realty, under the charge of a curator bonis in this country; the family sent a mandate to the curator to transmit the funds in his hands, after which there should have been no fund left within Scotland for the provision of the fatuous person:—petition for authority to transmit the funds, and for recall of the curatory, granted by the Court.

**WILLIAM DALRYMPLE, S.S.C.**, was appointed curator bonis to Mrs Kennedy, a widow who was labouring under mental imbecility. He realized a sum of about £600, belonging to her, which formed the whole curatorial fund. Mrs Kennedy's family resided in America, where part of her property was situated, and they executed a power of attorney authorizing Dalrymple to remit this fund to David S. Kennedy her eldest son, a merchant in New York, who was said to be a person of high respectability, and who would duly provide for her maintenance. Dalrymple presented a petition to have his accounts audited, and power given him "to transmit to the said David S. Kennedy, or to pay to his order for transmission, such balances as may appear to be due by the petitioner on his accounts, on receiving a valid discharge for the same; and, his being done, to recall the foresaid act of curatory," &c. **March 9, 1837**  
**1st Division.**

The Lord Ordinary, to whom this petition was remitted, on reporting to the Court, called their special attention to the circumstances of the case, as his Lordship considered it extremely doubtful whether the Court should grant the prayer of the petition; and it was explained at the same time that the petitioner had no desire to be rid of the curatory if the Court did not empower him to pay over the curatorial fund.

**LORD GILLIES.**—If this money was sent out of the country, is there any other provision left here for the maintenance of the lunatic?

**LORD CUNNINGHAME.**—None.

**LORD GILLIES.**—It is altogether out of the question to authorize the curator to take away the money.

Other Judges concurred, and their Lordships refused the prayer of the petition.

**W. DALRYMPLE, S.S.C.—Agent.**

On the point above referred to in his Lordship's note, Lord Glenlee observed, that it is no means impossible to make out a marriage by repute, and cohabitation with a wife in Scotland, which will put an end to an English marriage taking place afterwards, but there must be very pregnant circumstances.

195. **MRS ELIZABETH SINCLAIR OF M'DONALD and HUSBAND and OTHERS,**  
 Pursuers.—*Sol.-Gen. Rutherford—Deas.*  
 1837. **ROBERT BROWN and OTHERS (Campbell's Trustees), Defenders.**—  
*D. F. Hope—Mackenzie.*

*Prescription—Pupil—Process—Mora.*—A decree of certification and reduction *contra non producta*, was pronounced in 1786 rescinding a disposition and sale of certain lands, which was followed by a decree of reduction-improbation of the same titles, in 1788, pronounced after the production had been satisfied; but decrees were taken, in absence, against an undefended pupil; after more than 50 years had elapsed, during which time the pursuers of these decrees, and their various disponees, possessed the lands, the representatives of the pupil, now deceased, raised a reduction of the decrees, and of all the subsequent conveyances of the lands: the defenders produced the decrees, and pleaded that they formed a title to exclude: Held, by the whole Court, (1.) that as the decrees affected the title of a heritable estate, minorities were to be deducted in computing the years of prescription against the pursuers; and (2.) that if, after deducting minorities, the lapse of prescription had not run upon the decrees in absence, these decrees did not technically form a title to exclude; and Observed that nevertheless, this did "not necessarily imply the instant recall of the decrees, or place the defenders exactly in the same situation as if they had never been pronounced;" but that the lapse of time, combined with other circumstances, might form a plea of personal exception against the pursuers, or might "have a most important effect in determining that general question of which the pursuers necessarily undertook to make out the affirmative, viz. whether, in the whole circumstances, the decree ought or ought not to be reduced; and that "the lapse of time might affect the question of *onus probandi*, in regard to the facts, on the ascertainment of which, the ultimate reduction of the decrees might depend."

March 9, 1837. **SEQUEL** of the case reported ante, March 3, 1835, (XIII. 594), which the Whole Court see. The facts are there stated, as well as the judgment then pronounced by the Court. The defenders took that judgment to appeal, and the House of Lords remitted the cause, "with an instruction, to order the matters of law, in question in this cause, to be heard before the whole judges, including the Lords Ordinary, and to pronounce judgment according to the opinions of the majority of such whole judges."

Under this remit a hearing in presence took place, after which

**LORDS JUSTICE-CLERK, GLENLEE, MEADOWBANK, MEDWYN, CORNHILL, FULLERTON, JEFFREY, and COCKBURN** concurred in delivering the following opinions:—

"This is an action brought by the representatives of Henry Sinclair the elder and of Henry Sinclair his son, for setting aside two decreets, the one dated July, 1786, and the other the 27th of February, 1788, obtained against Henry Sinclair the younger as the heir of his father: It also concludes for setting aside various titles dependent on those decreets. The object and effect of the decrees was, to reduce a conveyance of the lands of Auchenstarry, granted by Henry the proprietor, to Henry Sinclair the elder.

"Of the preliminary defences given in against the present action, the third and fourth stated a title to exclude, founded on the decreets 1786 and 1788:



of the years of prescription. By the interlocutor of the 7th of July, 1832, No. 195. the Lord Ordinary 'repels the preliminary defences pleaded, in so far as they are stated as grounds of objection to the defender satisfying the production in regard the two decrees of reduction called for, reserving all questions on the merits of the said decreets of reduction, and the effect of them in regard to the other writs called for, and the other conclusions of the summons; and the defenders declaring that they are to acquiesce in this interlocutor, allows them till the first box-day in the ensuing vacation to satisfy the production as to the said two decreets of reduction.' And on the 27th of November, 1832, the following interlocutor was pronounced:—

March 9, 1833.  
Sinclair v.  
Brown.

'The Lord Ordinary, in respect the production has been satisfied so far as regards the two decreets of reduction, and that the defences already lodged maintain the defences upon the merits of these two decreets—Appoints the pursuers to give in a condescendence of the circumstances they aver and offer to instruct in support of the reasons of reduction as applicable to these decreets, and that within ten days from this date, and appoints the defender to give in answers within ten days thereafter.'

"In the record prepared in compliance with this interlocutor, the parties appear to be at issue on various points of fact, which might affect the reasons of reduction and the defences, if there were no title to exclude, or other insuperable bar to such enquiry. Accordingly, the pleas in law subjoined to the defender's answers to the condescendence, contain various grounds of objection to the admissibility of the challenge of those decreets, and, inter alia, the following:—'4th. After the lapse of long prescription of forty years, the decreets now sought to be reduced form a title to exclude, and the pursuers cannot found either upon their minorities or the minorities of their authors, for the purpose of interrupting that prescription.' 5th. The benefit of deducting minorities is not applied to a mere right of action, which might have been pursued by the parties long prior to the lapse of the period of prescription, and their right of action is cut off by the negative prescription.'

'The Lord Ordinary, by his interlocutor of the 13th of May, 1834, 'sustains the title to exclude founded by the defenders on the decree of certification dated 16th July, 1786, and the decree of reduction-improbation and declarator William Brown against Henry Sinclair and others, dated 27th February, 1788, produced, together with the several conveyances executed, the titles made up posterior thereon and prior to the execution of the summons in the present action, of the 8th of February, 1832, as set forth and produced in this process: 'Therefore sustains the defences, assoilzies the defender, and decerns: Finds expenses due,' &c. And afterwards, by the interlocutor of 3d March, 1835, the First Division of the Court called the interlocutor of the Lord Ordinary, and found that 'there is no title to exclude; and remit to the Junior Lord Ordinary to proceed further as shall be reserved, reserving all question of expenses.' This judgment having been appealed from, the case has been remitted by the House of Lords for reconsideration.

It appears to us that the title to exclude, according to the technical statement in the pleas in law for the defenders, cannot be sustained. The decrees sought to be reduced being obtained against a pupil without tutors, though not absolutely invalid, in the most favourable point of view for the defenders, be considered as valid in absence. Indeed that seems to be now admitted. Again, it will be found, that in urging those decreets as forming a title to exclude, the defenders maintain the decrees with the alleged lapse of the years of prescription; maintaining, in order to take off the effect of the specialty in this case, that in esti-



inconvenient, but irreconcilable with the usual forms, to decide upon such imperfect views, when many other circumstances, having a most important bearing on the merits, are left undetermined. On looking at the condescence and answers, it will be seen that the parties are at issue on many most important matters of fact. Nay, farther, it will be seen, as indeed might be anticipated from the imitation of the interlocutors of the Lord Ordinary, under which the record was prepared, that some of the most important circumstances on which the defenders now rest their case, do not enter into the record at all. For instance, an important branch of their argument is founded on the various successive transmissions of the property, and the silence of the pursuer's author on those occasions, though then arrived at majority; yet neither those transmissions, nor the circumstances under which they took place, are even averred in the statement of facts for the defenders.

"In this situation, it does appear to us that the case is not yet so prepared as to be ready for a decision on those matters which principally engaged the attention of the parties in the argument which we have heard. If by the term, 'title to exclude,' is meant the plea as urged by the respondent in the record, viz. that the decreets are protected by prescription, we concur in the former interlocutor of the court, that there is here no title to exclude. But as a different and more comprehensive sense appears to have been attached to the term, both in the note and interlocutor of the Lord Ordinary, and in the subsequent arguments of the parties, may be advisable to guard against the consequences of such misapprehension; and we rather think this might be done by recalling the former interlocutor of the court, by finding that in respect of the minorities, the pursuers are not barred by prescription from challenging the decreets of 1786 and 1788 as decreets in absence, and remitting to the Lord Ordinary to proceed in the preparation and disposal of the whole cause, reserving the effect of all the other pleas of the parties.

"This suggestion proceeds on the supposition that the minorities are admitted by the defenders. If they are not, the finding must of course be omitted, and the reservation left applicable in general to all the pleas of the parties."

**LORD MONCREIFF** subjoined the following Opinion:—

"Though I am unable to concur in all the statements in the above opinion of Lord Fullerton, &c., I see no objection to the interlocutor proposed to be pronounced. But I think it right to observe, that it was not on the fourth plea in law for the defenders, which no doubt involves the point of prescription, but upon a first plea, combined with the sixth and seventh, that, as Lord Ordinary, I thought that the decrees produced were sufficient to exclude the demand for production of the warrants of those decrees, and the title-deeds of the property, to be discussed on their merits.

"I am of opinion, 1. That the decrees are to be considered as decrees in absence; and, 2. That prescription has not run on them, in respect of the minorities. But I still remain of opinion, that it is not a matter of course, or of universal competency, that a decree, more especially in an inprobation, must of necessity be opened up, to the effect of compelling production, under the usual intimation, of the title-deeds or writs which formed the warrants or the subjects of a decree, and requiring the party who by himself or his author obtained it to state his grounds of action, on the single ground that it was a decree in ab-

No. 195.

March 9, 183

Sinclair v.

Brown..

185. sent, and that the long prescription of forty years has not run on it. It may in many cases be a mere impossibility for a man to support in such a manner a decree which his author may have obtained fifty years before he is called upon to do so, or even to produce the essential writs which formed the grounds of it, in which case they must all fall by certification. It was in this sense that I was of opinion, that the decrees in this case, with the great lapse of time which took place before they were challenged, and the acquiescence of the parties successively interested in the public titles completed in virtue of them and the sales following thereon, did form a title to exclude the pursuers of this reduction from calling for production of the other writs enumerated in the summons to be redressed. But I certainly was looking much more to the substance of the thing than to the mere form; and I still think, that the principle was directly sanctioned by the judgment in the case of Campbell against the Representatives of Graham, December 5, 1782.

"As the other Judges, however, seem to be of opinion, that the pleas to which I refer should rather be considered as grounds of defence against the conclusions of the action on the merits, than as forming a title to exclude, I am inclined to acquiesce in that view. Only, I must still hold, that the force of them must be duly weighed, equally in regard to any decree of certification which may be demanded, in case any of the writs called for cannot be produced as in reference to any other point affecting the merits of the decrees, and the titles of the property."

The cause was then resumed, along with these Opinions, by the Lordships of the First Division.

LORD GILLIES.—I concur in the opinion expressed by the consulted Judges.

LORD PRESIDENT.—I concur with them also.

LORD MACKENZIE.—My opinion is the same; and I would only observe, that I never meant to hold, that all the proceedings which have taken place since the date of these two decrees, are to go for nothing, or are to have no effect in regard to the onus probandi, as between these parties. But nothing of that sort is implied in the interlocutor now to be pronounced.

THE COURT pronounced this interlocutor:—"The Lords, having resumed the consideration of this case, and the opinion of the consulted Judges, recall the interlocutor of 3d March, 1835, and find, that, if the minor claims shall be competently established, the pursuers cannot be held as barred from challenging the decrees of 1766 and 1788, as decrees in absence, and remit to the Lord Ordinary to have the cause prepared, and to proceed farther as shall be just, reserving the effect of all the pleas of the parties, and all questions of expenses, with power to the Lord Ordinary to dispose thereof, including the expenses in the Inner-House."

G. GORLON, S.S.C.—T. GRAMME, W.S.—Agents.

HIBALD SWINTON (Secretary of Edinburgh Academy) and OTHERS, No. 19

Suspenders.—*Sol.-Gen. Rutherford—Swinton.*

JAMES PEDIE, Respondent.—*D. F. Hope—H. J. Robertson.*

March 9, 18

Swinton v.

Pedie.

**Nuisance—Property.**—Held that the erection of a great slaughter-house in the suburbs and immediate neighbourhood of a city would be a nuisance, notwithstanding an offer to make very great precautions for preventing any thing offensive to the sight, smell, or cleanliness: and that the experiment, whether the slaughter-house could be erected and conducted without committing a nuisance, was not to be permitted, in respect that such experiment could not be thoroughly justified without great, and perhaps irreparable, injury, to neighbouring property.

JAMES PEDIE, W.S., was proprietor of ground at Silver Mills, in the northern suburbs of Edinburgh. The ground was within the bounds of the police, and, though not included within the royalty, it was nearly approached by it on several sides. There were various private dwelling-houses in the neighbourhood.

1st Division  
Ld. Fuller  
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The Edinburgh Academy, a large seminary for classical education, was in 140 yards of this ground; and much capital had been invested in establishing this institution, which was numerously attended by scholars. A large building for the Deaf and Dumb Institution stood adjoining the Academy grounds. There was a public road or street which bounded both these grounds on the south; and the grounds of Pedie lay to the south of this road. In the same neighbourhood there was a tan-work of old building, situated on ground adjoining Pedie's on the west. Pedie proposed to erect extensive premises upon his ground, to be used for slaughter-houses; and a bill of suspension and interdict was presented by the professors of the Academy, the trustees of the Deaf and Dumb Institution, the proprietors of some of the dwelling-houses in the neighbourhood, and the ground of nuisance. The garden of one of the suspenders approached within about 30 yards of the spot where the shambles were to be erected.

In the Bill-Chamber, Pedie lodged a minute, consenting to pass the bill to try the question of nuisance, but praying that the interim interdict should be recalled "in so far as relates to the erection of the houses and buildings at present in progress, or any other buildings, and ought not to be confined to the letting, using, or occupying all or any part of his property, and the buildings erected or to be erected thereon, as slaughter-houses or shambles for the purposes aforesaid. The respondent is perfectly aware that the erection of these buildings must now, in consequence of this judicial challenge, be at his own risk. But he is confident that he will be able, in the course of the process to follow thereon, to give to the satisfaction of the Court, that his projected operations,

106. in their new and improved form, will constitute no nuisance such as to entitle the respondents to interfere."

1837. The Lord Ordinary on the Bills (Corehouse) "having considered the bill and answers, with the minute for Mr Pedie, and having heard counsel for the parties, and inspected the premises in question, passed the bill; but in respect that Mr Pedie desired to go on with the erection of the buildings at his own risk, and agreed that his doing so shall not be considered as affording him any plea of favour when the question of nuisance shall be determined, recalled the interdict in as far as it prohibited the erection of the buildings, but quoad ultra continued the interdict."

From the extent of building contemplated by the respondent, there would have been premises for above 20 separate shambles, or killing-places. On the record, the respondent did not explain how he was to prevent nuisance from these shambles, except by stating that they were to be constructed upon a new and improved plan, preventing any thing offensive to sight or smell; the whole enclosed within a wall of 20 feet in height; and the interior arrangement being so planned that each killing-place should be used only by a single flesher, who alone should have the key to it, and who should prevent any other flesher from using it. The respondent alleged that this arrangement would have the effect of limiting the extent of slaughtering which could otherwise be performed, and would also produce greater cleanliness in the details of it.

The Lord Ordinary, after visiting the ground, "found that the erection of shambles or slaughter-houses on the situation proposed by the respondent would be a public nuisance, and therefore sustained the reasons of suspension, and continued the interdict, and decreed; and found the respondent liable in expenses."

The respondent reclaimed, and before the note was advised, he lodged a minute, stating that, under the partial recall of the interdict in the Bill-Chamber, he had erected two killing-places, and was proceeding with a third, and craving leave to make use of them for such period as the

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\* "NOTE.—It has been repeatedly decided that the slaughtering of cattle in the suburbs of a town, or in the immediate neighbourhood of inhabited houses, is a common nuisance. Whether or not it be possible to devise means by which the various offensive consequences of such operations may be mitigated, or entirely avoided, it is not for the Lord Ordinary to determine. *Prima facie*, it does not seem likely. But, at any rate, if there be such a possibility, it was incumbent on the respondent to show how it was to be accomplished. But the respondent, though perfectly apprised, by the proceedings in the Bill-Chamber, of what would be expected of him, gave no explanation, but merely avers in general 'that the shambles are to be erected on a new and improved plan, by which there will be nothing offensive to the sight or smell, &c.' In those circumstances the Lord Ordinary thinks the interdict must be continued."

art might think proper for the purpose of trying, by actual experiment, whether the process of slaughtering could be carried on in them, without creating a nuisance to the neighbourhood. No. 196.

The Court, on advising the reclaiming note and this minute, directed the respondent to produce plans of the buildings which he proposed to erect, and also to lodge "a special condescendence of the precautions he wanted to adopt in order to satisfy the Court that his shambles will not be a public nuisance."

He lodged a plan of the buildings and a wooden model of part of them. The condescendence, in addition to what has been already noticed, stated that the shambles were not to extend to the northern boundary of the respondent's ground; that between the northern court-wall surrounding them, and the highway, there were to be interposed, first a range of byres and stables, and second a range of dwelling-houses; that the entrance to the shambles was not to be direct from the highway, but from a lane between the row of byres and the north court-wall of the shambles; that this lane, running parallel to the highway, was to open, at either end, into cross lanes or roads, leading into the public highway; and that the cattle were to be brought into the killing-places not later than 5 o'clock in the morning. He farther stated, that each killing-place was to occupy an area of 140 feet square; to be strongly paved with stone, and the walls, especially next the pavement, to be perfectly tight; the pavement to be an inclined plane, from which all the blood, &c. was to be carried into a cess-pool or dung-pit, sunk under ground, and situated between every pair of killing-places; this pit to be perfectly tight above, and to communicate by lateral openings, with the killing-places, which openings should admit of being shut close with a lid; and these cess-pools to be emptied every second morning before 5 o'clock, and their contents removed in carts for manure.

The suspenders contended that a public shambles was a nuisance<sup>1</sup> in the suburbs of a city, and that it lay with the respondent to take his case out of the general rule. They denied that any adequate means existed for enforcing the rules requisite for keeping the premises clean, in terms of this condescendence, and contended that they should not be exposed to the hardship of being obliged to see them enforced. For example, the driving of cattle through the streets, often in an excited state, could not be prevented from occurring at all hours of the day, if the shambles were opened. But, independent of this, even all the precautions specified, if literally enforced, would not prevent nuisance. The persons who killed the cattle, and, generally, the whole servants employed about the shambles, and their associates, would form an aggregate population, having the most deteriorating effect upon the condition of the neighbourhood. It would

March 9, 1833  
Swinton v.  
Pedic.

<sup>1</sup> Keltic, July, 1814, F.C.



196. not only injure the comfort of the dwelling-houses, but lower their value in the market, and the suspenders were ready to prove that some tenants in these houses had given notice of their intention to remove, in case the shambles were allowed to go on. And, in particular, as to the Edinburgh Academy, the consequences would be in the highest degree injurious, as parents would not send their children to a place where they were not only exposed to danger from the number of cattle driven along the highway in the neighbourhood, but had their moral habits and feelings exposed to contamination by the contact of the shambles. In regard to the respondent's proposal to make an experiment, it could not be fairly done, unless upon the full scale after the whole shambles were erected, as there might be no nuisance arising from one or two killing places, and yet a great nuisance from an assemblage of 20 of them. And any such experiment would occasion so much actual injury, and perhaps of an irremediable kind, to the interests of the suspenders, that it should not be allowed to be made.

The respondent answered, that, many operations which formerly amounted to a nuisance, were now, by an improved process, rendered perfectly harmless; and even the boiling of whale-blubber had been found so, in a recent case, after the party was allowed to try experimentally a new process. It was quite possible so to regulate the whole details connected with the slaughtering of cattle, as to prevent any thing offensive to sight or smell, or otherwise. In regard to the driving of the cattle, that was to be done at so early an hour as would prevent them from being on the streets during the day: but, as the street was a public thoroughfare, along which cattle might be driven, as lawfully as horses or carriages, there was no just ground of objection to their being driven along at any hour. And if the use of the property for erecting shambles was a lawful use, the respondent could not be excluded from it by the allegation that the exercise of the trade would probably have the consequential effect of bringing a number of inferior persons to the neighbourhood; a plea which was entitled to the less favour as a tan-work was in full operation in the vicinity, and had been so from an early date. And, in any view, the respondent was entitled to be allowed, at the risk of losing his outlay if he failed of success, to go on and build the whole shambles, and try the experiment whether, if conducted on his proposed plan, they would be a nuisance or not.

LORD GILLIES.—It seems at first sight to be a hardship not to allow the respondent fairly to make the experiment whether he can apply his property to the proposed use without committing a nuisance. But in order to make that experiment fairly, it would be necessary that the whole of the shambles should be erected, and in operation. It would afford no just data, for determining that twenty or thirty shambles would be no nuisance, although an experiment, to the extent of one or two, had been made without creating a nuisance. But i

very great expense to the respondent to build all the shambles merely for  
 of an experiment: and I feel satisfied that an aggregate of so many  
 must be a nuisance in the neighbourhood of a town. The respondent  
 t the public road or street may lawfully be used for driving cattle, and  
 a driving therefore can be no nuisance to the neighbouring academy, or to  
 neighbouring proprietors. I think this argument is ill-founded, as a nuisance  
 on its own circumstances; and although Pall Mall, or Grosvenor Square,  
 ly open for the driving of cattle, as the roads in the vicinity of Smithfield  
 it is very evident that the establishment of a great slaughter-house, how-  
 might be arranged internally, would be a nuisance in either of the former  
 places, though not in the last.

PRESIDENT.—As the respondent offers to be at the whole expense of  
 the entire number of shambles, and to run the risk, with his eyes open,  
 prevented from using them, if he cannot do so without committing a  
 I think we should allow him to make the experiment. I regret that he  
 take upon himself so very great a risk, as I fear it would result in nothing  
 But I am quite satisfied that the experiment cannot be fairly made  
 the entire number of shambles be erected.

COREHOUSE.—This case came first before me as Lord Ordinary in the  
 chamber, and I met the parties upon the ground, for the purpose of personal  
 on. I then ascertained that there were to be eighteen or nineteen separate  
 places for cattle. When I saw their proximity to the academy, I thought  
 precautions which could be used could prevent the erection from being a  
 and one of the most intolerable to which the academy could be exposed.  
 it allude merely to the smell which may be occasioned by the slaughter-  
 though even the smell of blood alone, where every thing putrid or filthy  
 removed, has frequently the effect of scaring horses passing in the street:  
 llude to nuisance of another kind. The academy, a large institution, is  
 within 150 yards of the spot where it is proposed to erect the shambles.  
 academy was not brought to their vicinity, but it is proposed to bring them  
 vicinity of the academy. And I think the effect would be, that no parent  
 suffer his children to attend a school, close by a great slaughtering-house,  
 here would always be an assemblage of the lowest of the population, in-  
 butchers' boys, and servants, and their associates. In addition to this, I  
 satisfied that there are any adequate means provided for having all the  
 of the cattle at an end by an early hour in the morning. I do not see who  
 force that regulation in case the butchers neglect it; and I think the result  
 be that cattle would be driven thither, at all hours, to the obvious personal  
 of the boys attending the academy. And it is only the dictate of common  
 hat so great a slaughtering-house, in such a situation, is, and must be, a  
 e. When I visited the premises, one of the suspenders, who is proprietor  
 ouse and garden, showed me how near the garden approached to the sham-  
 berving that every blow which felled a beast in the shambles, would be  
 a his garden. He appeared to feel keenly on the subject, and I thought it  
 without reason that he did so. On the whole, I consider that it would be  
 precedent to sanction the setting down of premises like these where they  
 founded by a town population. I do not think the condescendence is suffi-  
 to show that no just cause of offence to the sight or smell would remain;  
 independently of this, I think there are concomitant circumstances connected

No. 196

March 9, 181  
Swinton v.

Pedic.

- No. 196.** with the erection of a great slaughter-house which are altogether beyond control or check, and which would render it a nuisance beyond the power of remedy. I think the proposed experiment should not be allowed.

**LORD MACKENZIE.**—I concur. There is an important distinction between a case like this and that as to the boiling of whale-blubber, which has been referred to. If the experiment there had not succeeded, the process could have been stopped on the instant, and, in the meantime, no permanent injury could have been done to the neighbourhood by allowing the experiment to be made. But here it is proposed to set up a great establishment, and make an experiment whether slaughtering can be carried on without nuisance. I think this experiment cannot be made without exposing the whole neighbourhood, in the interim, to great and substantial injury. In regard to the academy, I claim no more for it than that it is a lawful institution; but that is enough; for I consider that the proposed experiment, if permitted, would be productive of the utmost injury to it, an injury which might perhaps destroy it altogether. I think, therefore, that we should not be justified in allowing the proposed experiment to be made.

THE COURT adhered and awarded additional expenses against the respondent.

J. RUSSELL, W.S.—J. PEARIE, W.S.—Agents.

- No. 197.** **MRS CATHARINE MUNRO OF ROSS, and HUSBAND, Pursuers.**—  
*H. J. Robertson.*

**WILLIAM PAUL (McLeod's Trustee), Defender.**—*D. F. Hope—  
Sol.-Gen. Rutherford—G. G. Bell.*

*Title to Pursue—Process.*—A party raised a reduction of a sale and feudal investiture of lands, libelling the title of heir of entail under a certain deed; the action concluded for declarator that the lands still formed part of a trust-estate, left by the maker of the entail, under a separate deed of trust, and also for accounting to the trust-estate; an objection being taken to the title, the pursuer proposed to insist, not as heir of entail, but as beneficiary under the trust-deed, and alleged that enough appeared *ex facie* of the summons to show that the heir of entail was also the beneficiary under the trust-deed. Action dismissed, in respect there was no sufficient title libelled, and motion refused for leave to amend the libel.

- arch 9, 1837.** **ON** December 9, 1783, the late George Ross of Cromarty executed an entail of that estate in favour of his nephew, Alexander Gray of **ST DUNVON,** Ross, and a series of heirs. On the same day he executed a conveyance of certain other lands, including Pitkerrie and others, to trustees, with power to sell the lands and apply the price in payment of his debts, in the first place, and the residue in purchasing land to be added to the Cromarty entail. He died in 1786, and the trustees entered on the management of the trust-property. They sold the trust lands, by public **1. CORKBURN.** *soup*, in 1795, and that part of them called Pitkerrie and others, was bought for £3500 by Donald McLeod of Geanies, who was a

George Ross's trustees. The minutes of roup and of sale in M'Leod's No. 197  
 favour, were subscribed in November, 1795. The trustees granted a dis-  
 position to M'Leod on May 30, 1796, which was followed by infeftment <sup>March 9, 18</sup>  
 on September, 1796. In 1827, M'Leod disposed his estate, including <sup>Ross v. Pau</sup>  
 these lands, to William Paul, accountant in Edinburgh, as trustee for  
 his creditors, and for the other purposes specified in the trust-deed.  
 William Paul was infeft under this disposition. On May 26, 1836, a  
 reduction of the disposition of Pitkerrie and others, to M'Leod, and of  
 all the subsequent rights and infeftments, was raised by Mrs Catharine  
 Munro or Ross, of Glastullich, and her husband, against William Paul,  
 the trustee, and also against the grandson and heir-at-law of Geanies,  
 who was now deceased. The summons called these parties "to answer  
 at the instance of Mrs Catharine Munro or Ross, daughter of the de-  
 ceased Duncan Munro of Culcairn (with her husband's concurrence), the  
 said Mrs Catharine Munro or Ross, being the heiress of tailie and pro-  
 vision, entitled to succeed to the lands and barony of Cromarty and  
 others, under a deed of entail made and executed by the now deceased  
 George Ross, Esq. of Cromarty, dated the 9th day of December, 1783,  
 registered in the books of Council and Session the 15th day of May,  
 1786, and in the register of tailies at Edinburgh, the 27th day of May,  
 1803, and as such, and otherwise, having good and undoubted right,  
 along with her said husband, to prosecute and follow furth the action of  
 reduction underwritten." Among the reasons of reduction, it was stated  
 that George Ross had executed a trust-disposition on 9th December,  
 1783, directing certain lands, including Pitkerrie and others, to be sold,  
 and the residue, after paying his debts, to be applied in the purchase of  
 lands, which the trustees should be bound to settle and entail "to and  
 upon such persons, and to and for such uses, intents, and purposes, and  
 subject to the other charges, conditions, and restrictions as were con-  
 tained and declared, in and by the entail and disposition of his said estate  
 of Cromarty, executed by him as aforesaid." The summons stated  
 various alleged irregularities in selling the lands of Pitkerrie to Geanies,  
 particularly as he was himself one of the trustees; and it concluded for  
 reduction of the sale, and for declarator that these lands "remain still a  
 part of the trust-estate of the said George Ross, subject to the uses and  
 purposes pointed out by him in his deed before narrated." The sum-  
 mons concluded also for count and reckoning, and payment of the rents  
 of the lands, from the commencement of the possession of Geanies, to be  
 made "to the pursuer on behalf of the trust-estate of the said George  
 Ross, or to Thomas M'Kenzie, W.S., the judicial factor now in the  
 management of the said trust-estate."

Paul lodged preliminary defences, in the narrative of which he ad-  
 mitted that the pursuer was "next heir-substitute of Mr George Ross's  
 failing heirs-male of the body of Alexander Gray or Ross:" and  
 that "the right of succession to the entailed estate of Cromarty opened

1897. to the pursuer, Mrs Rose or Ross, by the death of Alexander Gray Ross about the year 1820." The defences, besides founding on prescription and alleged acquiescence, pleaded that the pursuer had not set forth on her libel a sufficient title to insist. She had libelled no title but that of "heiress of tailie and provision" under the Cromarty entail. The object of the action was to reduce a sale of lands, followed by feudal investiture. But as the pursuer had never expedie any service as heir of entail, she was not entitled to insist in such a reduction. And although the defences contained an admission that the right of succession, under the Cromarty entail, had opened to her after the death of Alexander Gray or Ross, which happened in 1820, that was not enough, as the defender was entitled to have such a party in the field as would enable him to obtain a decree which would be a good *res judicata* against the whole substitute heirs. But that could not be obtained, unless the pursuer had duly taken up the character and rights of heir of entail by service. Farther, the sole conclusions of the action were for reduction, declarator, and accounting for behoof of the trust-estate of George Ross, under the trust-deed of 1783. But no title was libelled for insisting in these conclusions, and in particular, the title of being beneficiary under that trust-deed was not libelled. And if the title was thus defective, it could not be supplied by substituting any statement from the reasons of reduction, or any other part of the summons in place of it.

The pursuer answered that the defender could not object to the want of a service as he had expressly admitted in his defences that she was the next heir-substitute after the death of Alexander Ross or Gray, and that the right of succession to the estate of Cromarty opened to her by his death in 1820. But farther, there was no occasion for any service to enable her to pursue this action, as she did not insist in it as heiress of entail, but as beneficiary under the trust-deed of George Ross. No service could be of any aid in support of that title, which was sufficiently established in the pursuer by the defender's admission of her being heir under the Cromarty entail, coupled with the fact, which was duly libelled in the reasons of reduction, that the residue of the trust-estate was to be invested for behoof of the heirs of entail. The heiress of entail was therefore identical with the beneficiary under the trust, and, on the face of the summons, a sufficient title was set forth.

The Lord Ordinary "repelled the first dilatory defence of want of title, reserved the two remaining defences to be discussed along with the merits, and decerned."\*

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\* "NOTE.—The Lord Ordinary repels the first defence because he thinks that it is sufficiently met by the fact that the possession of the character in which the pursuer sues, is not only set forth in the summons, but is admitted in the defences to belong to her, and after this the defender cannot urge an objection which in substance amounts to a denial, or at least to a doubt of what they themselves af-

The defender reclaimed.

No. 197

**LORD GILLIES.**—The question is whether a sufficient title be set forth in the summons. The only title there stated, is that the pursuer is heiress of taillie and provision under the Cromarty entail. But she now states that it is not as heiress entail, but as beneficiary under the trust-deed, that she means to insist, and that, upon looking at the reasons of reduction, enough of matter will be found to be libelled to sustain her instance in that character. I feel the greatest doubt whether it is possible to eik out a title in this manner. In the appropriate place in the summons for stating the title it is not duly libelled; and I am not prepared to allow the proper title to be gathered out of other parts of the summons.

March 9, 18  
Ross v. Pau

**LORD MACKENZIE.**—I should feel much difficulty in adhering to this interlocutor. I think a new summons is necessary. The only title libelled is that of 'heiress of taillie and provision' under the Cromarty entail, "and as such, and otherwise, having good and undoubted right to prosecute" the reduction. If the two words "and otherwise" be thrown out of view, there is no title libelled, except that of heiress of entail, on which title the pursuer does not now propose to insist, but on that of beneficiary under the trust-deed of George Ross. I think the words "and otherwise" must be thrown out of view; and then there is no title left to insist in the action.

**LORD PRESIDENT.**—I am clearly of opinion that as the only title libelled is that of heiress of taillie and provision under the Cromarty entail, and as it is a different title in which the pursuer now means to insist, this action must be dismissed. As to the two words "and otherwise," if they were to allow a shifting of the title, such as is now proposed, they would equally permit the pursuer to adopt any other title which she chose.

**LORD COREHOUSE.**—I think the interlocutor must be altered. The only title libelled is that of heiress of taillie under the Cromarty entail. No title is libelled as beneficiary under the trust-deed. I think there is no sufficient title libelled, and that the action must be dismissed.

The pursuer moved for leave to amend the libel, which the Court refused.

This interlocutor was pronounced:—"Alter and recal the interlocutor submitted to review, and, in respect the summons libels only on the pursuer's character as heir of entail of Cromarty, sustain the first dilatory defence, and dismiss the action; and find the pursuer liable in the defender's expenses."

SANG and ADAM, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

mit; and he reserves the other two defences, because, although it be possible that they may ultimately supersede the necessity of considering the merits, it is possible they may not; and on the whole, the case will be put into the most convenient and an equally safe shape by being kept all together."

198. JAMES KERR (Taylor's Trustee), Pursuer.—*D. P. Hope—Russell*  
 2, 1837. SIR DAVID HUNTER BLAIR and OTHERS, (Earl of Eglinton's Trustees),  
 Blair. Defenders.—*Keay—Moir*.  
 JOHN MARSHALL and OTHERS, Defenders.—*Sol.-Gen. Rutherford—Anderson*.

*Jury Trial—Process—Jurisdiction.*—Held, that in the causes which are enumerated as appropriate to Jury trial, by 59 G. III. c. 35, and the other statutes regulating such mode of trial, where the action concludes for damages only, the Court have no power to take proof, by commission, on remit, or in presentis, but must remit all such causes to be tried by jury.

2, 1837. A LEASE of the coal-field of Bartonholm, formed part of the sequestered estate of Taylor, on which James Kerr, accountant in Glasgow, was trustee. Kerr raised an action of damages against the tenants of adjoining coal-pits, by whose improper workings he alleged that an irruption of a river into the Bartonholm coal-pit had been occasioned, which had drowned it. The action contained no conclusion except for damages which were laid at £7000. The action was directed against the trustees of the late Earl of Eglinton, and against John Marshall and others.

After a record was made up, the defenders moved the Lord Ordinary to grant commission to persons of skill to take a proof, and report: alleging that the investigation which was requisite, involved technical and scientific details which were unfit for the tribunal of a jury, and also required an acquaintance with the peculiar terms and phraseology of colliers, with which a jury were unacquainted, and which could not be made familiarly intelligible to them during the diet of a trial. The pursuer resisted the motion, and contended that the action was one of those enumerated, by the statutes regulating jury trial, as appropriate thereto, and concluding for damages only, must be sent by the Court, for trial, to a jury.

The Lord Ordinary reported the question, and the Court ordered a hearing in presence.

*Pleaded by the Defenders—*

An analysis of part of the statutes regulating Jury trial, was necessary for determining this question. By 59 Geo. III. c. 35, § 1, a class of actions was enumerated, as to which the Court were required "after defences are lodged, to remit the whole process and productions forthwith to the Jury Court." By the next sections (2 and 3) provision was made for disposing of questions of law or relevancy, such as should either be decided, or specially reserved, before remit to the Jury Court. By § 4, power was given as to "all cases, other than the actions for damages hereinbefore enumerated, when matters of fact are to be proved, to order



the whole process to be remitted to the Jury Court." By § 5, 6, and 7, No. 198 further regulations were made as to the power of the several Lords Ordinary, or the respective Divisions of the Court, to send the non-enumerated actions to the Jury Court for trial. By § 8, 9, 10, and 11, which do last referred to admiralty causes, provisions were made which did not bear on this question. By § 12 it was provided "that it shall be competent and lawful for the Jury Court, when it appears to the said Court, in the course of settling an issue or issues, or at any time before trial, in the cases remitted to them as aforesaid, that there be a question or questions of law or relevancy which ought to be previously decided, to remit back the whole process and productions to the Division of the Court of Session, the Lord Ordinary, or Judge Admiral who remitted the same to the Jury Court, that the question, or questions, of law or relevancy, may be considered and determined there: Provided always, that it shall be lawful to the said Division, Lord Ordinary, or Judge Admiral, when matters of fact shall, after such consideration or determination, remain to be proved, again to remit the whole process and all the productions, to the Jury Court, in order that an issue or issues may be prepared and tried as aforesaid: Provided farther, that it shall be competent, to the said Division and Lords Ordinary to prepare and settle an issue or issues in manner foresaid, for the purpose aforesaid; and it shall be competent for the Jury Court, when it appears to the said Court, in the course of settling an issue or issues, that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the whole process and productions as aforesaid, with their report thereon, in order that the Division, Lord Ordinary, or Judge Admiral, may proceed with the same, in such manner as shall appear to be most expedient for the administration of justice."

Prior to this section, the statute had separately treated, first, of enumerated, and second of non-enumerated actions; all which, alike, in far as they could come before the Jury Court, were cases falling under the general description of § 12, having been "remitted to the Jury Court, as aforesaid;" and to all cases so remitted, the discretionary power of retransmitting to the Court of Session, was extended, if the cause "turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable." Actions in the enumerated class, might frequently be liable to either, or both, of these objections; and accordingly this discretionary power of retransmission was necessarily given in reference to them, as well as the other actions, so as to prevent a practical denial of justice to such cases, which would be produced by simply subjecting them to a mode of trial to which they were not fitted. This discretionary power was more peculiarly applicable to one of the two previous classes of actions than to the other, it was to the enumerated

1837. actions, which were generally remitted by the Lord Ordinary *de plano*, as soon as defences were lodged; and in the after preparation of which, it might frequently appear that they were unfit for trial by jury. Whereas in regard to the non-enumerated actions, which were not remitted until a Judge, or a Division of the Court of Session, saw it expedient in point of discretion to make the remit, it was less likely that any occasion to exercise a discretionary power of retransmitting the cause as unfit for jury trial, should emerge.

There was nothing in § 13 of the act, inconsistent with this construction. That section merely reserved the old power of the Court to order a proof by commission, or otherwise, in the non-enumerated actions, as they should see cause.

There was a reason, at the date of this statute, for rendering it imperative to send the enumerated actions to the Jury Court in the first instance, and for entrusting the Jury Court alone with the discretionary power of retransmitting them, because there then existed a jealousy as to the system of civil trial by jury, which might have too much narrowed the application of the system, if the Court of Session had possessed the absolute discretion, in all cases, of determining whether they should ever go into the Jury Court.

By subsequent statutes, the class of enumerated actions had been enlarged; but the discretionary power of retransmission, by the Jury Court, had never been limited, or altered; and by 11 Geo. IV. and 1 Wil. IV. c. 69, the whole powers in the Jury Court, were transferred to the Court of Session, so that the discretionary power, as to enumerated actions, if it previously existed in the Jury Court; was now lodged in the Court of Session.

There were precedents (the defenders alleged) of cases, in which the Jury Court had exercised a discretionary power in retransmitting actions of the enumerated class, to the Court of Session; and in that of *Leslie*, such power had been assumed to exist, by both parties, and by the whole of the Lords Commissioners of the Jury Court, in disposing of the cause.

*Pleaded by the Pursuer—*

Trial by jury was useful, not only as the best mode of examining witnesses, and eliciting evidence, but also, in respect that a jury was the best tribunal for forming an opinion on all disputed matters of fact, and pre-eminently the best, for assessing the amount of damages in actions of reparation claiming pecuniary damages. The present was such an action, and the pursuer had, therefore, in common with the pursuers of the other enumerated actions, a strong interest to insist on a trial by jury. His

it was established by the statutes which had taken away all discretion No. 198.  
 in the Court, in reference to the enumerated actions.

The statute 59 Geo. III. c. 35, in its first section, not only required Mar. 10, 1837  
 Kerr v. Blair,  
 enumerated actions to be remitted to the Jury Court, but by it, the  
 Jury Court was imperatively "required to settle an issue and to try the  
 cause by a jury." The next sections, 2d and 3d, related to the same class  
 of actions, after which the statute proceeded to an entirely different class,  
 non-enumerated actions, and prescribed a code of regulations as to the  
 mode in which the discretionary power, in trying them by a jury or other-  
 wise, should be exercised. The provisions of § 12 were just a part of this  
 series of regulations, applying to the non-enumerated actions only; and,  
 if it not been so, there would truly have been no distinction between  
 the enumerated and the non-enumerated causes; for, if the plea of the defenders was  
 allowed, then there was an absolute discretion as to all causes whatever, to  
 exclude them from jury trial.

But the provision of § 13 rendered it evident that the power of avoid-  
 trial by jury, was limited to the non-enumerated actions, as that sec-  
 tion declared "that nothing in this act contained shall extend to prevent  
 the Court of Session in either of its Divisions, or the Lords Ordinary  
 and except in the cases concluding for damages hereinbefore enu-  
 merated), or the Judge Admiral, unless otherwise instructed as aforesaid  
 the Court of Session, to take proof on commission, by remit, or in  
 absentia, &c." This provision could have had no meaning unless the  
 enumerated actions were to be held as conclusively set aside for trial by  
 jury alone.

Even cases involving scientific detail, such as the infringement of a  
 patent; or cases requiring the production of extensive documentary evi-  
 dence, were tried frequently in England before a jury, without inconve-  
 nience; and, the legislature proceeded on that experience in taking away  
 discretion as to the mode of trying the enumerated actions.

The provisions of several subsequent statutes confirmed this construc-  
 tion of 59 Geo. III. c. 35. Thus it was declared by 6 Geo. IV. c. 120,  
 1828, that the actions there enumerated "shall be held as causes appro-  
 priate to the Jury Court, and shall, for the purpose of being discussed and  
 determined in that Court, be remitted at once to that Court, in manner  
 hereinafter to be directed." These actions were, by § 29, to be remitted  
 to the Jury Court, as soon as appearance was made for the defender; and  
 there to be prepared in the same manner as other causes were pre-  
 pared in the Court of Session. Two new judges were added to the Jury  
 Court at the same time, for the purpose of preparing as well as trying the  
 additional causes thereby devolved on it. And in 11 Geo. IV. and 1  
 Geo. IV. c. 69, which gave the jurisdiction for trial by jury, to the Court  
 of Session, as part of its ordinary administration of justice, it was assumed  
 that there was a class of causes which were necessarily to be tried

N. 198. by jury; as that section directed that "all causes and issues, which they had occurred before the passing of this act, must by law have been tried by jury in the Jury Court, shall be tried by jury in the Court of Session."

There were no precedents in support of the defenders' plea, which could not have failed to be, if it was well founded. In the case of the point was not mooted; and in that of Lady Mary Lindsay & Co. which was of a special nature, the existence of a power to remit the Court of Session to remit proper enumerated actions was recognised, though the case was found not to fall under the rule.

**LORD PRESIDENT.**—It was the object and intention of the statutes which introduced and extended civil jury trial in Scotland, to substitute a better mode of conducting proofs than formerly existed. Nothing was more unsatisfactory than the old system of proofs on commission, which were replete with irrelevant and singular matter. This Court had long felt them to be a grievance; and the other Lords felt them to be so, more sensibly still. In construing these statutes a doubtful clause occurs, I think it right to keep in view their unquested object and intention, and so to construe them as to advance the remedy which were meant to supply. The present question substantially turns on the interpretation of two sections of the statute 59 Geo. III. c. 35. By § 12, it is made "competent for the Jury Court, when it appears to the said Court, in the course of trial, that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the process" to the Court of Session. I regret the use of words so loose and variable as those of "beneficially applicable" in this clause. Do they mean that the Jury Court were to consider, whether, in respect to the matter at issue, a jury seemed inexpedient? Or, in respect to the length of time which was consumed by the proof, so as to render it too tedious for a jury? Or in what respect, do these words mean that the discretionary power of retransmitting cause to the Court of Session was to be exercised? I feel much difficulty in ascertaining the precise limits of this power; and yet the defenders must make out their case falls within the sphere of its application, or they cannot succeed in their question. But while I do not think that § 12, even considered by itself, supports their argument, I think the effect of § 13, is entirely to destroy it. That must be viewed in connexion with the preceding one, and it would be an unreasonable mode of construing the 12th section, if it was to be taken without reference to the 13th. Now that last section specially declares, that nothing in the statute prevents this Court from ordering a proof on commission, or according to any of the old forms, "save and except in the cases concluding for damages hereinafter enumerated." This provision has precisely the same effect, in my opinion, as if it contained an express prohibition against our taking proof by the old forms, in the cases of the enumerated causes. When power is given to do certain things, but with a special exception as to one class of these things, that is tantamount to a prohibition.

gard to the excepted class. And this depends on no rule of construction which is peculiar to a statute, more than to any other public document, or private deed. For instance, the case of a trust-deed, conferring powers on the trustees, whose they receive power to appoint any responsible factor, and, except he be of themselves, to give him a salary; it cannot be doubted that the effect of those words is tantamount to a prohibition against giving the salary, in case the factor appointed be one of the trustees themselves, and so falls within the exception.

No. 198.  
Mar. 10, 183  
Kerr v. Blah

It is for the same reason, that I consider the terms of the 13th section of the Act, (which except the enumerated actions from those in which this Court was empowered to order a proof according to the old forms,) to be the same in effect as if they prohibited us from allowing such proof in any of the enumerated actions, and left no other mode of trial open, save that by jury. If I could have allowed legal considerations to sway me in the construction of a statute (which, however, is impossible), I should have had a strong inclination to read the statute otherwise, and to have discovered the existence of some discretionary power at least, to be vested in the Court; but I am unable to see any ground for such a construction, and I conceive that all the enumerated actions must be tried by jury.

**ORD JUSTICE-CLERK.**—It is not without regret that I have felt myself constrained to form the same opinion, after a careful consideration of these statutes. I concur with your Lordship in thinking that one undoubted object and intention of these statutes was to substitute a more perfect manner of conducting proofs of stated facts, in the room of the old proofs on commission, which were extremely unsatisfactory. This object was in the view of the first Law Commission, and noticed in their report in 1810. And afterwards, in 1815, when the statute Geo. III. c. 42, was passed, another important object was pointed out as to be attained by means of a jury, which was the assessment of the amount of damages to be awarded, in actions for reparation by pecuniary damages. By the 13th section of that statute, power is given to the jury, in all issues tried by them in such actions, to assess the damages due, and the Court of Session were forever relieved of that duty. When the act 59 Geo. III. c. 35, was afterwards passed, I do not see any ground for reasonable doubt of the position, that, when a certain number of cases were enumerated and set apart from all others, as being peculiarly the subject of jury trial, and as such to be remitted at an early stage to the Jury Court, this was tantamount to a declaration by the legislature that these were cases to which jury trial was held to be beneficially applicable. The first three sections of the act enumerate these cases, and enjoin the instant transmission of them to the jury, under the single exception as to questions of law or relevancy. There is no exception as to any of them on the ground of jury trial not being beneficially applicable; but the whole are to be instantly sent to the Jury Court. For this class of causes is provided for, in these three consecutive sections, the 13th section begins the provisions as to “all cases other than the actions for damages hereinbefore enumerated.” In disposing of the non-enumerated actions, no notice is made back to the sections regulating the enumerated actions. It is a distinct and separate set of legislative provisions which is entered on. And I think every strong circumstance, corroborative of the view which I take of these statutes, that the universal understanding appears to have been, that the enumerated actions could not be tried excepting by a jury. As there has been a very large number of causes brought into Court, and disposed of under these statutes,

1837. I cannot doubt that the point which has now been stirred would have been made the subject of express decision long ago, had it not been that the universal understanding of the construction of the statutes was such as I have stated. No instance has been pointed out, in which a party objected to any of the enumerated actions going before a jury, unless in cases where questions of law or relevancy were involved.

In regard to the import of § 12, my opinion very much coincides with that of your Lordship. I think the earlier part of the section, giving the Jury Court power to retransmit a cause where questions of law or relevancy require to be previously decided, and also the power to the Court of Session to return such cause to the Jury Court, if, after settling the questions of law or relevancy, there be disputed matters of fact remaining, does clearly relate to the non-enumerated actions only. And I can see no principle of fair construction, according to which the latter part of the same section, in giving a power to the Jury Court to retransmit causes, if they involve complicated accounting, or if jury trial appears to be beneficially applicable to them, should be held to apply to a different or to a larger range of actions, than the first part of the section embraced. And I do not see how an action, where damages only are concluded for, is likely to involve a complicated accounting; nor yet, how it is possible to hold that such an action is one to which jury trial is not beneficially applicable, seeing that it is not only one of the enumerated actions, but that the legislature has expressly conferred upon juries the power of assessing damages. But if any doubt could otherwise have existed, I think it is removed by the terms of the 13th section, which must be read in connexion with the 12th. That section declares that "nothing in this act contained" shall prevent this Court from taking a proof by the old forms, "and excepting in the cases concluding for damages hereinbefore enumerated." These words ride over the whole act, and they are just a declaration, that, in the excepted cases, which are the actions of damages before enumerated, the Court should not have power as formerly to order a proof on commission or by the old forms. I think they amount to an unambiguous prohibition against our taking proof in these actions, by the old forms; so that no mode is left of doing so but by jury trial. After this, it would require the most express and imperative words in some other part of this statute, or in some subsequent statute, to authorize this Court to deal with one of the enumerated actions of damages, as with a cause which they were not bound to try by jury; and if such a provision did any where exist, I can only say, I think it would be directly contradictory to this one. Before the introduction of trial by jury was made part of the ordinary administration of justice by the Court of Session, these causes must have been tried in the Jury Court; and now, they must, for that reason, be tried by jury in this Court.

There is a section (33) in 6 Geo. IV. c. 120, which, though not referred to by either of the parties, has an important bearing, I conceive, on this question. The first part of the section provides for various special circumstances, according to which, a remit may be made by the Jury Court to the Court of Session, and then it concludes by the positive declaration, that if, after such remit, "there shall remain any main matter of fact to be ascertained between the parties, the said matter shall be tried by jury." I think it important to notice that the provisions of this act are perfectly in accordance with that which I conceive to be the true construction of the statutory enactments of 59 Geo. III. c. 35, and imply that there was a change

f cases which required to be tried by jury and in no other way. If an opposite No. 19:  
 construction is to be adopted, it will open the door to a wide field of loose discus-  
 on in every individual case whatever, whether the circumstances of that case are Mar. 10, 11  
 such as to render it expedient to have a trial before a jury, or a proof on commis- Kerr v. Bl  
 on. In place of this, I think it was the object of the statutes to take away all  
 discretionary power from this Court, in regard to the enumerated actions of da-  
 mages, and it appears to me that their enactments have taken away all such dis-  
 cretion.

LORD GILLIES.—I have been unable to arrive at the same conclusion with your  
 Lordship and the Lord Justice-Clerk. The question is, whether this Court pos-  
 sesses power, in any of the enumerated actions, to try them, without the interven-  
 tion of a jury, if we are satisfied that they are causes to which jury trial is not  
 beneficially applicable. And on looking at the various classes of actions which  
 are enumerated, I think the Court will not lightly presume that it was the intention  
 of the legislature peremptorily to declare that they must all be tried by jury, and  
 that no discretion should be trusted any where to interpose, and prevent the actual  
 justice of subjecting any individual action to that form of trial, if, in its circum-  
 stances, it was not fit to be so tried. There may be many such causes among  
 those which belong to the enumerated class. It has been observed, indeed, that  
 an action, concluding only for damages, can scarcely involve a complicated ac-  
 counting. I am afraid, however, that that observation is not well founded. Sup-  
 pose that a party obtains a warrant against another, as in *meditatione fugæ*,  
 whom he alleges to be his debtor, and that he imprisons his alleged debtor, who  
 afterwards brings an action of damages for wrongous imprisonment, in respect that  
 he was not indebted to the party who had imprisoned him. The fact whether  
 the imprisonment was wrongous, might altogether turn upon the state of accounts  
 between the pursuer and defender, and these might be complicated or not, accord-  
 ing to circumstances. Jury trial is not always the best means of unravelling com-  
 plicated accounts; and yet that may be essential to the trial of an action concluding  
 for damages only, in the circumstances now supposed; and so it equally may in  
 any other of the enumerated actions. Indeed, it must be familiar to the expe-  
 rience of those who have been much in the Jury Court, that causes have fre-  
 quently been brought on for trial, in which parties were urged, even after the jury  
 were met, to adopt another mode of trial on account of the cause being unfit for a  
 jury. Notwithstanding these considerations, however, if the statutes be indeed  
 imperative and leave no discretion in the Court, but direct the whole enumerated  
 cases to be tried by jury, whether that mode of trial be beneficially applicable to  
 them or not, such enactments must undoubtedly receive effect. But we must take  
 care to be assured that these unqualified enactments really exist, before we give  
 them effect to the statutes.

In regard to the enumerated causes, the Court are directed by 59 Geo. III. c.  
 1, § 1, to send them at once to the Jury Court, as soon as defences are given in;  
 and the only limitation in this order, imposed by the two next sections, relates to  
 a mode of deciding or reserving questions of law or relevancy which may appear,  
 and be pointed out, at so early a stage. The course of procedure, as to the non-  
 enumerated causes, was quite different and distinct from this; and, in particular,  
 there was this difference between them, that, as the non-enumerated actions were  
 left in the discretion of the Court of Session, that Court might not only decide at  
 an early stage, on the expediency of a trial by jury, but they might also settle the issue,



1938. or issues, themselves, and send them to the Jury Court for trial ; whereas, in the enumerated causes, issues for trial were never settled before the remit was made to the Jury Court. Keeping these observations in view, the 12th section of the statute is now to be considered, for the purpose of ascertaining whether the discretionary power, given at the close of that section, relates to all causes, both enumerated and non-enumerated, or whether it relates to only one of these classes of actions, and, if so, to which of them. In the commencement, the section empowers the Jury Court, when it appears to them " in the course of settling an issue or issues, or, at any time before trial," that there are questions of law or relevancy which ought to be previously decided, to remit the cause back to the Court of Session, for such decision. And at the close of the section, the important words occur, that if it appear to the Jury Court " in the course of settling an issue or issue or issues, that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the whole process " to the Court of Session. I consider that this discretionary power of retransmission relates to all causes, enumerated and non-enumerated ; and that the legislature did not intend to subject any action whatever, whether enumerated or non-enumerated, to trial by jury, if it was a cause to which trial by jury was not beneficially applicable. But if the application of the section was to be limited to one of these classes only, then I think it was the class of enumerated actions to which it more especially applied. The other actions were not sent to the Jury Court until the Court of Session, after being acquainted with their circumstances, had judged it expedient that a trial by jury should take place ; and it was likely, that comparatively few of these cases would be such as to justify a retransmission by the Jury Court, before trial. In these cases also, the Court of Session frequently had settled the issue before making the remit. Whereas, in the enumerated actions, as they were instantly sent to the Jury Court, without reference to the individual circumstances of each case, excepting in so far as questions of law or relevancy might be raised ex facie of the summons and defences, it was more likely that a discretionary power on the Jury Court might require to be frequently exercised in retransmitting them to the Court of Session if they turned out unfit for jury trial. And the stage when this discretionary power, in terms of the latter portion of § 12, was to be exercised, was, when the Jury Court had reached the period for settling the issue or issues. That was never done, in the enumerated actions, prior to their transmission to the Jury Court ; but it was often done in the non-enumerated actions. And on taking all these considerations into view, I think the discretionary power was more requisite in regard to the enumerated actions, than to the non-enumerated ; and that the stage of preparation, when discretionary power was to be exercised, more peculiarly points out the enumerated actions as the subject of it ; so that if the words of the latter part of § 12 were to be limited to only one of these two classes of actions, I think it should be read as applicable to the enumerated actions rather than the other ; but I see no warrant for thus narrowing the construction of the statute, and I think the discretionary power applied to all actions which truly appeared to be unfit for trial by jury.

It is said, however, that the sense of § 12 is controlled by that of § 13. That section provides that, in all cases " except the cases concluding for damages hereinbefore enumerated," the Court of Session might order a proof on commission, or otherwise, according to the old forms. I do not think this section was meant to

its in § 12. It appears to me to have had no other intention than ly providing, by way of precaution, that the non-enumerated actions in all respects as fully under the disposal of the Court of Session, as before the Jury Court existed. But such a provision was limited exclusively to non-enumerated actions; and as to the enumerated actions nothing can be founded upon this, because the provisions respecting them are to be found in previous Acts, not in this. I think, therefore, that nothing can be founded upon this with regard to the enumerated actions, because it was intended to relate, not to the non-enumerated actions only.

It is also important to notice, that, by 6 Geo. IV. c. 120, § 28, there is a repeal of the provisions of 59 Geo. III. c. 35. But the repeal is extended only to the provisions there specified, and it does not extend to the provisions of § 12, on which the present question turns, and which therefore remain in full force.

Discretionary power, if formerly in the Jury Court, is now vested in this Court. We receive that we are entitled to say whether jury trial is or is not beneficial to any action, before subjecting that action to trial by jury; and apprehensive of that discretion being improperly exercised, as I think it is, I require to be an action of damages of a very peculiar sort indeed, in which the Judge in this Court would consider to be not fitted for trial by jury.

LEWIS and COCKBURN\* concurred with the LORD PRESIDENT.

BLACKBURN.—I am of opinion that the Jury Court possessed the discretionary power for which the defenders contend; and that such discretionary power was accordingly vested in this Court. It has been pleaded by the pursuer that the Jury Court possessed no discretionary power whatever over the enumerated actions. But I cannot entertain any doubt that that is an erroneous construction of the statute. The enumerated actions were sent to the Jury Court when the Jury Court came afterwards to examine them materially, is maintained, that, though they found the summons grossly irrelevant, or the case of absurdity, they had no power of retransmission, but were bound to take up an issue and send the cause to a jury? Were they bound to try the case out and out by jury? I cannot imagine it is possible to doubt that, in the enumerated actions, the Jury Court were not bound so to proceed; and that it was with the understanding and practice of every one conversant with the law that the enumerated actions were, over and over again, sent back to the Court of Session, under the discretionary power vested in the Jury Court, referred to that Court, at settling an issue, that questions of law or relevancy which required to be decided previous to trial. And I see no warrant in the words of the act for excluding from this discretionary power the enumerated actions. It is made to apply generally to “the cases remitted to them.” These words include equally the enumerated and non-enumerated actions, and it has alike been “remitted as aforesaid” before coming under the cognomen of the Jury Court. The words, therefore, expressly admit the application of discretionary power, under this branch of the section, to enumerated actions. The reason of the thing is equally clear for so admitting it. But it is

No. 198.

Mar. 10, 1837.  
Kerr v. Blair.

198. in the very same section, and by a repetition of the same words, towards the close of it, that the discretionary power is given, of remitting a cause to the Court of Session, when it appears to the Jury Court, at settling the issues, to "turn upon matters of complicated accounts, or other matter to which trial by jury is not beneficially applicable." Between this part of the section and the former, I do not discover no such distinction as to induce me to read the same words, in a different sense. It appears to me that the discretionary power, given by the latter part of the section, equally with that given at the former part of it, extends to enumerated actions, as well as to those non-enumerated. I think the objection of complicated accounts might readily enough occur in some of the enumerated actions, and any of them might be of such a nature that trial by jury was not beneficially applicable to it. By all means let the word, "beneficially," be strictly interpreted, so as to exclude any supposition that one of the enumerated actions should be lightly withdrawn from a jury, wherever it might seem that in some respects a different mode of trial would be better. But, taking it thus strictly, there may be cases, among the enumerated actions, which cannot be duly and satisfactorily tried by a jury, and to which, therefore, jury trial certainly is not beneficially applicable; and as to these, it appears to me that a discretionary power was given to the Jury Court to retransmit them to the Court of Session. And such power was the less necessary as to the non-enumerated actions, because these were sent, *de plano*, to the Jury Court, but were only sent when the Court of Session held it expedient to remit them to the Jury Court for trial.

I do not see any inconsistency in directing that certain whole classes of causes should be remitted to the Jury Court, and that a discretionary power should remain to that Court, at a more advanced stage of each respective cause, to decide whether it should be retransmitted to the Court of Session. There still was a marked distinction established between the enumerated and non-enumerated causes. And at the date of passing the 59th Geo. III. c. 35, there might be some doubt whether it was not better to deprive the Court of Session of the discretionary power of deciding as to all causes without exception, whether any one of them should be sent to a jury trial; and to select certain causes to be remitted *de plano* to the Jury Court, while a discretion was at the same time vested in that Court, of determining whether any of these causes should not ultimately be transmitted back to the Court of Session. There could be no ground of apprehension that the Jury Court would be too apt to defeat its own jurisdiction by sending cases back to the Court of Session which ought to have been retained by it, and tried by jury. Whatever prejudice could have been supposed then to exist in the Court of Session against jury trial, none could exist in the Jury Court; and such discretionary power was there vested by the statute.

It does not appear to me that the provision of § 13 materially affects the present question. The exception, contained in it, is not inconsistent with the construction either of the one or the other party. There is nothing excepted, according to the tenor of the previous provisions of the statute: and in order to discover the extent of the exception, it is necessary just to construe the previous provisions, which are neither enlarged nor diminished by § 13.

But it has been said that the statute 6 Geo. IV. c. 120, § 28 and 33, take away the discretionary power, as to the actions there enumerated, even if it had previously existed. I do not so construe that act. It is true that by § 28, the

le classes of causes enumerated are declared to be causes which are "appro- No. 198  
e to the Jury Court, and shall, for the purpose of being discussed and deter-  
id in that court, be remitted at once to that court." But although this remit Mar. 10, 18;  
o directed, it cannot be construed to mean that none of the remitted causes Kerr v. Blair  
ever come out of the Jury Court, excepting after a verdict. By § 33 of the  
statute there are various cases specified, in any of which, the cause, though  
e enumerated class, might be retransmitted to the Court of Session. And as  
remit, directed by § 28, was not absolute, but subject to exceptions; and as  
section farther expressly states the limited extent to which the statute 59  
III. c. 35, was repealed, I must hold the rest of that statute to be in full  
, and that if the discretionary power existed in the Jury Court, anterior to  
6 Geo. IV. c. 120, it was not then taken away. I do not consider that § 33 of  
last statute is exhaustive of all the cases in which one of the enumerated  
ns may be remitted to the Court of Session. It specifies those which are  
red under that act, and it repeals some of the provisions which existed under  
previous statute; but, as it only repeals some of these, the others which were  
pealed must remain in force. And I conceive that the discretionary power  
a by the concluding portion of § 12, of 59 Geo. III. c. 35, remains unrepealed,  
in force. The power of retransmission from the Jury Court, in respect of  
trial not being beneficially applicable to a cause, is not noticed by 6 Geo. IV.  
10, and I think therefore it cannot be held to be repealed.

this discretionary power was in the Jury Court, while a separate court, I  
give it is now vested in this Court, under the statute 11 Geo. IV. and 1 Will.  
c. 69, which amalgamated jury trial with the ordinary administration of justice  
in the Court of Session.

Whether it was prudent or not to give us this discretionary power is not the  
question: the question is whether or not we have it, and I think we have. But  
believe the cases may be, in practice, so few where we may be compelled to  
use the discretionary power and refuse a trial by jury, that I shall not feel  
urged although many years elapse before we find it necessary to use it. On  
abstract point of the competency of our jurisdiction, however, it appears to me  
it is competent.

JUD COREHOUSE.—The question under consideration is of great consequence  
to the due administration of justice by the method of jury trial. After all the  
consideration which it has received, I retain the opinion which I always held, that  
the Court is competent to remit a cause, though one of the enumerated actions, from the  
jury roll, to the common roll of the other causes depending in the Court of Session.  
I will shortly state the grounds of that opinion, but not without diffidence, when  
I am that they are opposed to the views of your Lordship, and others of my  
rank, to whom so much deference is due.

The question is not whether the form of jury trial is beneficially applicable to  
an individual case before us; it is the abstract question, whether it is competent  
in any action, and under any circumstances, to retransmit one of the enume-  
rated actions from the jury roll, on the ground that trial by jury is not beneficially  
applicable to such action.

In judicial procedure, causes may occur, and perhaps not rarely, which are not  
fit for this mode of trial. An action may be raised which may either involve  
complicated accounts, or a great and intricate mass of documentary evidence, or  
questions of abstruse science. The merits of such an action may be altogether

196. unsusceptible of adequate explanation to a judge and a jury during the period of a jury trial. And if it were necessary to confirm the position that there are such causes, I would refer to the terms of the statute 59 Geo. III. c. 35, itself, as a declaration by the legislature that there are causes to which jury trial is not beneficially applicable, as it has expressly recognised their existence, and given directions for disposing of them.

h. 1837.  
Blair.

But if there be such causes, it must next be examined whether they may occur among the enumerated actions, as well as among the non-enumerated. And I have no doubt that they may; and not only so, but that actions to which jury trial is not beneficially applicable, will sometimes be so shaped as to fall within the enumerated class, for the express purpose of perplexing a jury, if this Court shall determine that it has no power to interpose in any circumstances, and prevent an action, if of the enumerated class, from being tried by jury. There is no difficulty in figuring actions, among the enumerated class, to which jury trial may not be beneficially applicable. Suppose, for example, that a merchant has dismissed a clerk, alleging that he kept irregular books, and embezzled money; that the clerk raised an action of damages for defamation, and that the merchant pleaded the *veritas convicti*. It may be necessary, in trying the action, to go into the accounts of the mercantile concern for ten or twenty years back, and must all this be done before a jury? Or suppose that trustees are accused of embezzling trust-funds, and they deny the allegation, and plead that their accounts exhibit a full and fair statement of their whole intrusions, and instruct that there has been no embezzlement; it is evident that a mass of accounts may be requisite for trying such an action, which might be very ill suited for the arbitration of a jury. And there are other actions, such as those relating to the alleged infringement of patents, and many more which might be mentioned, among all which, though there might be some, and even a majority, which were well fitted for trial by jury, there might evidently be others which were not fitted for being so tried. I am satisfied that among the enumerated actions there may be some of which it would be found in terms of 59 Geo. III. c. 35, § 12, that they "turn upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable." And if there may be any such causes, that is enough to support my present argument; because it must not be forgotten, that, to subject any one cause whatever to a form of trial which is not beneficially applicable to it, is to inflict a grievous injury upon the parties concerned in such action, and is nearly tantamount to a denial of justice to them. It is not lightly to be presumed that the legislature has passed an enactment leading to this result, which, however, I fear it has done, if it has taken away all discretionary power from this Court, and made it imperative on us to try every one of the enumerated actions before a jury, whether such a mode of trial be beneficially applicable to it or not. But if the statute be imperative and unambiguous in enacting, we of course are bound to give effect to it. I shall immediately state the grounds on which I think the statute is not to be so construed; but I may notice, in passing, a suggestion which has been thrown out, that if this Court sustained the competency of its jurisdiction to withdraw any of the enumerated actions from jury trial there would result a practical evil, from the risk of a too frequent retransmission of causes from the jury roll, and a consequent narrowing of the beneficial operation of jury trial. I believe this apprehension, even if it could have any weight in determining the construction of a statute, to be altogether without foundation. Any prejudices which may formerly have existed against jury

removed, so completely, that I believe there is as little hazard that any of the Ordinary, or either of the Divisions of this Court, should unwarrantably remove causes from jury trial, if fit to be so tried, as there formerly was that such removal should have been taken by the Lord Chief Commissioner whilst he presided in the Jury Court. I am satisfied that if any attempt should be made to withdraw a cause from trial by jury, which was fitted for that mode of trial, such attempt would at once be put down by any Lord Ordinary before it was assayed.

No. 198

Mar. 10, 1823  
Kerr v. Blair

I would therefore consider it a subject of much regret if the discretionary power of the Court did not extend to enumerated as well as non-enumerated actions; I shall now state shortly what I consider to be the true construction of the Act affecting this question. I shall be brief, as my observations have been, in measure, anticipated.

The pursuer appears chiefly to argue that the three first sections of 59 Geo. III. refer exclusively to the enumerated causes; that the next eight sections refer solely to non-enumerated causes; and that the twelfth section is merely a continuation of this last series of clauses, and is limited to non-enumerated actions only. I do not at all see no ground whatever for holding that opinion. The words of the Act afford no warrant for it. With regard to the first clause of the section, "that it shall be competent for the Jury Court, when it appears to the Court, in the course of settling an issue or issues, or at any time before trial, in cases remitted to them as aforesaid, that there is a question or questions of relevancy, which ought to be previously decided, to remit back the whole or any part of the cause" &c. I am at a loss to find any thing in these words which restrict the operation of the power of retransmission to one class of causes more than another. It applies to *all* the cases "remitted to the Jury Court as aforesaid," and therefore to the enumerated as well as the non-enumerated actions, both of which are included. I conceive that there are several decisions which support this construction of the clause. In *Leslie v. Blackwood*,<sup>1</sup> one of the enumerated cases, a motion was made to remit the cause from the Jury Court to the Court of Session, on a question of law occurred which ought to be settled previously to trial. That motion was indeed refused, but it was refused on the merits, and not on the competency. The motion was entertained as competent, and was refused because ill-founded on the merits. Again in the case of *Allan*, which also was one of the enumerated actions, a motion was made in the Court to retransmit it to the Court of Session for the determination of a question of law. The motion failed, but the Lord Chief Commissioner, in disposing of it down explicitly that it would have been competent to grant the motion, if it had been well founded on the merits. And in another case, in 1823, which was for damages only, indisputably one of the enumerated actions, a motion was made to retransmit the action to the Court of Session in order to have a question of law determined. I was of counsel in that cause, and the motion was granted, and the cause was retransmitted; after which, the Lord Ordinary sustained the defences and assoilzied from the action. The Inner-House adhered to this judgment, so that the cause, thus retransmitted, was finally disposed of in the Court of Session.

<sup>1</sup> July 22, 1822 (3 Murr. 157).

1808. I consider therefore, both on principle and authority, that the words of the first clause in § 12 apply to enumerated as well as non-enumerated causes. *And* where is the distinction between these words and the words of the last clause in that section? The last clause is in these terms:—That “it shall be competent to the Jury Court, when it appears to the said court, in the course of settling an issue or issues, that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the whole process,” &c. On perusing these words I can discover no distinction, either express or implied, between them and those in the first clause of the section; if the first clause extended both to enumerated and non-enumerated actions, I think the last clause must necessarily apply to both of these classes of actions also.

But it is said, that, even if this would otherwise have been the just construction of § 12, it is no longer so when reference is had to § 13. I do not feel moved by this argument. That latter section had a perfectly legitimate object in view without producing any alteration on the import of § 12. It was necessary in regard to the disposal of non-enumerated causes, and it affects them only. But I shall not go more fully into this point, as it has been well explained in some of the Opinions already delivered.

But the pursuer has farther pleaded, that, by 6 Geo. IV. c. 120, § 28, a new enumeration of causes was made, and it was declared that all these “shall be held as causes appropriate to the Jury Court, and shall, for the purpose of being discussed and determined in that court, be remitted at once to that court,” in manner therein mentioned. It is pleaded by the pursuer that this is an imperative enactment that all such causes, when transmitted to the Jury Court, must be discussed and finally determined in that court, before a jury. But it will be observed that the statute thus founded upon does not repeal or alter the statute 59 Geo. III. c. 35, excepting to a partial extent; which in itself is, by implication, a confirmation of those parts of the statute which are not repealed or altered. And in deciding on the question, whether the general words which I have just quoted have the effect of abolishing the particular power expressly conferred by 59 Geo. III. c. 35, § 12, of retransmitting both enumerated and non-enumerated actions from the Jury Court to the Court of Session, there is one fundamental rule of construction which must be carefully kept in view. If, in the same statute, a particular thing is expressly given, in one part of it, it is not held to be taken away by subsequent general words; and, in like manner, in partially repealing the prior statute 59 Geo. III. c. 35, general words are not to be extended to take away what was particularly granted in that statute, and is not particularly repealed. Both in reference to this rule of construction, and from a consideration of the respective sections, I am of opinion that the power of retransmitting enumerated causes, so given by 59 Geo. III. c. 35, § 12, was not abolished by 6 Geo. IV. c. 120, § 28.

It has, however, been farther pleaded by the pursuer, that, by 11 Geo. IV. and 1 Will. IV. c. 69, § 2, a provision is made which is decisive of this question in his favour. It is there enacted, undoubtedly, that “all causes and issues, which if they had occurred before the passing of this act, must by law have been tried by jury, in the Jury Court, shall be tried by jury in the Court of Session.” But this provision just leaves the matter where it stood before. The question remains the same, what were the causes, which, prior to this act, must have been tried by jury in the Jury Court? These were the enumerated actions, but under such limits



be applicable to that class of actions. These limitations were neither enlarged No. 198.  
 narrowed by the act in question, and the point now at issue must be decided  
 in the same manner and as if these acts had never passed.

Mar. 10, 1837  
 Kerr v. Blair.

considering these various statutes I am of opinion that it is not imperative  
 on this Court, in each and every one of the enumerated actions, to send it to trial  
 by a jury, if it appears to be one to which trial by jury is not beneficially appli-  
 cable. It is true that there may be few instances, among the enumerated actions,  
 in which jury trial should not be resorted to; and I hope that, every year, the  
 number of trying causes by jury will increase, so as to extend the beneficial appli-  
 cation of that mode of trial more and more. The institution of jury trial is one  
 to which I, and I am sure all of us, feel much admiration; and I consider it to be  
 a great advantage to that institution, as well as to the general administration of justice,  
 that the construction of the statute, which appears to me to be the true one, shall  
 have the sanction of the Court. If the opposite construction be adopted, I  
 apprehend it will have the unfortunate tendency to bring jury trial into some dis-  
 repute, by rendering it occasionally the instrument of injustice, in consequence of  
 being resorted to in causes to which it is not beneficially applicable.

The following five Judges, LORDS GILLIES, MACKENZIE, MEDWYN, CORE-  
 WOOD, and MONCREIFF,\* then gave their votes to the effect that the Court of  
 Session did possess a discretionary power as to the mode of taking a proof, both  
 in the enumerated and the non-enumerated actions.

The following six Judges, LORDS PRESIDENT, JUSTICE-CLERK, MEADOW-  
 CROFT, FULLERTON, JEFFREY, and COCKBURN, gave their votes that the Court  
 possessed no such discretionary power in regard to the enumerated actions.

LORD GLENLEE was not present, and LORD CUNINGHAM declined to vote,  
 on the plea of non liquet.

LORD PRESIDENT.—Now that the question is decided, I may mention that the  
 opinion of the Lord Chief Commissioner of the late Jury Court, is in accordance  
 with that of the majority of this Court; and I am sure that it is highly satisfactory  
 to all to know that the judgment which we are about to pronounce is that in  
 which he would, if present, have concurred.

The following interlocutor was pronounced:—"The Lords having heard  
 counsel in presence of the whole Court, and having considered the different  
 acts of Parliament regarding trial by jury in civil causes, and having parti-  
 cular regard to the 12th and 13th sections of the act 59 Geo. III. c. 35,  
 are of opinion, and find and declare accordingly, that, in the cases enume-  
 rated in the said acts as appropriated for trial by jury, where the conclusion  
 is for damages, they have no power to take proof by commission, on remit,  
 or in presentia, but must remit all such cases to be tried by jury."

WOTHERSPOON and MACK, W.S.—TOD and HILL, W.S.—J. MILLER.—Agents.

LORD JEFFREY, as also LORDS MONCREIFF and FULLERTON, delivered  
 opinions at length. But as it does not appear that there are any cases to which  
 the decision in this cause can be a precedent, the Reporters have only given the  
 chief Opinions which were delivered on each side, as sufficiently indicating  
 the reasons by which the Court were moved.

199. HERCULES INSURANCE COMPANY and ROBERT SALMOND, Pursuers  
*D. F. Hope—Robertson—Neaves.*  
 JOHN HUNTER, Defender.—*M'Neill—Anderson.*

10, 1837.

Dec  
 1837  
 any v.  
 R.

*Process—Jury Trial—Insurance—Jurisdiction—Court.*—1. In a submission and decret-arbitral, whereby it was averred, as one of the reasons of reduction, that the insurance was fraudulently effected by the defender with the intention of destroying the property by obtaining an exorbitant sum from the office; a corresponding issue was put to the jury: "Whether the insurance was effected by the defender on a fraudulent over-valuation of the machinery with the intention of destroying the same by fire?" The verdict was returned finding on this issue that the insurance was effected on a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire.—Held that this was in substance a verdict for the defenders, and that the pursuers had failed to establish their reason of reduction. 2. From connexion with one of the parties so many Judges of one Division of the Court successively declined that a quorum cannot be had, the declaration was overruled.

10, 1837. SEQUEL of the case reported ante, XIV. pp. 147 and 1137.

The issues sent for trial, on the narrative of certain admissions, were as follows:—

OPINION.  
 Cases.  
 R.

1. "Whether the defender destroyed the said machinery, or caused the same to be destroyed as aforesaid, for the purpose of defrauding the pursuers of the said sum insured as aforesaid?"

2. "Whether the said insurance was effected by the defender, on a fraudulent over-valuation of the said machinery, with the intention of destroying the same by fire?"

The jury returned a verdict in the following terms:—

"Find for the defenders on the first issue, and on the second issue find that the insurance was effected by the defender upon a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire."

Thereafter a question arose as to the import of the finding of the jury on the second issue. The pursuers moved the Court to apply the dictum, setting aside the submission and decret-arbitral in question, finding the defender liable in expenses. The defender, on the other hand, craved the Court to assoilzie him from the conclusions of the decret and to find the pursuers liable in expenses.

*Pleaded for the Pursuers—*

This may be in form a verdict for the defender, but in substance a verdict for the pursuers; though it do not in terms affirm the issue, it establishes that the insurance was effected fraudulently, which is a part within the issue, though less than the whole, and is relevant to set aside the submission. The jury have affirmed a leading part of the fraudulent



ject ascribed in the summons to the defender in effecting the insurance, No. 199  
 and the verdict, as it stands, establishes a fraudulent intent sufficient to  
 side any demand for recovery under the policy; in other words, the  
 pursuers would have been entitled to an issue on the first part of the  
 second issue without the second part, an affirmance of which would have  
 made out their case; for looking to the first additional reason of reduction  
 (ante, XIV. 148), there is a substantive allegation in point of fact as to  
 the valuation being fraudulent, though the "intent to destroy by fire"  
 were out of the case, and this allegation is relevant to set aside the con-  
 tract and submission. If the one cannot be disjoined from the other, the  
 court should not have received the verdict, or, at all events, the opposite  
 party should have objected to its being received as it stood.

March 10, 1883  
 Hercules  
 Insurance  
 Company v.  
 Hunter.

*Pleaded for the Defender—*

This matter is to be considered with reference to the summons and  
 reasons of reduction and to the discussion on the shape of the issue in  
 question. In the issue as finally approved of, the Court limited the ques-  
 tion to its terms; the verdict has not affirmed its terms, and therefore, on  
 the general rule that the pursuer is bound to make out his case, it must be  
 taken as a verdict for the defender. The Court never held the allegation  
 as to fraudulent over-valuation, without the intent to destroy by fire being  
 stated, relevant to set aside the submission, and they refused an alterna-  
 tive issue on it alone (ante, XIV. 149). The issue was given with refer-  
 ence to the particular description of fraud stated on the record, upon  
 which the action was based, and this was fraudulent over-valuation with  
 intent to destroy by fire; this intent, therefore, being an integral part of  
 the fraud alleged, and the jury having found that there was no such in-  
 tent, the verdict is directly negative of the grounds of action, and conse-  
 quently of the issue. Supposing the verdict to have been ambiguous or  
 effectual, it was for the pursuers to have made application to have it  
 considered, and on their failing to do so, it could only be taken as a ver-  
 dict for the defender.<sup>1</sup>

LORD MEADOWBANK, after stating the nature of the previous proceedings,  
 observed—To the terms of Lord Moncreiff's charge to the jury in this case it is  
 very important to pay particular attention, because when fully considered, as no  
 objection was taken to it at the trial, it will be found to be nearly conclusive as  
 to the point now in dispute. "The second issue," he says, "goes back to the  
 terms of the insurance, and asks you whether it was effected with the intention of  
 destroying the machinery by fire?" (His Lordship then read from these words,  
 given in the Report, ante, XIV. 1140, to the words "by several witnesses,"  
 starting particularly to the following passage). "You are to consider the whole  
 of the case, and by combining them, to satisfy yourselves whether it is proved  
 that the property in question has been destroyed, not by accidental, but by  
 intentional fire, or that the insurance was made with intent so to destroy it. The

<sup>1</sup> Adam on Jury Trial, p. 234, 235.

No 199. question, whether there was a fraudulent over-valuation, is, by express terms of the second issue, a part of the case, and of course the fact is competent to be proved. The arbiters have found that the property was valued correctly, and their decret is matter of evidence, but that decret being itself under reduction, the proof cannot be considered as thereby closed, and the Court having found that the present investigation is competent, you have to inquire, first, whether upon all the evidence before you there was an over-valuation; and secondly, whether it was made with the intention of destroying the machinery by fire. If the facts are such as to show that the fire was wilful, or that the insurance was made with the intention of destroying the property, this evidence will draw back on the question of over-valuation; for the circumstances coming before the jury operate reciprocally on each other; and it is by combining the whole, that the jury arrive at their verdict. You must judge on the whole facts, always remembering that, unless you are satisfied either that the fire was wilful or that the insurance was made with intent to destroy the property by fire, they can be of no effect to warrant a verdict for the pursuers."

The jury found for the defender on the first issue, and on the second issue they found that the insurance was effected by the defender upon a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire. The question which has been raised for the consideration of the Court is whether the verdict upon the second issue is to be received as a verdict for the pursuers or for the defender? The pursuers contend, that the jury by affirming the fact that the contract of insurance was entered into upon a fraudulent valuation had done enough to vitiate the contract altogether, and that it would be iniquitous for the Court, after such a finding, to sanction a charge for payment of a sum arising from a fraudulent over-valuation of the property. On the other hand it is contended for the defender, that it was essential to the success of the pursuers that they should establish not only that there was a fraudulent over-valuation, but also that it was made with the intention of destroying the machinery by fire; that this was the main and substantial part of the proposition undertaken to be established, and, as that essential part of it had been negatived by the jury, the verdict was in effect a verdict against the pursuers and for the defenders. If this action had been brought by the defender on the policy, concluding for the sum thereby insured, then I think that an averment of fraudulent over-valuation made by him would have formed a relevant defence against the action, and that a verdict, finding such over-valuation proved would have been a verdict against the party insured. Whether such a verdict would have rendered the insurance void altogether, or only have limited the extent of the claim, is a matter not now before us. But the present case is presented in a very different shape, and to that shape it is important to attend in order fully to understand the effect of the verdict. This policy contained an obligation to enter into a reference, which was recognised and acted upon, and while the parties were before the arbiters, a charge of fraudulent over-valuation was made and offered to be proved. The arbiters, however, found that the value of the machinery destroyed was equal to the sum insured, and that the pursuers were liable. Now after the first issue had been settled by the Lord Ordinary, the fact of wilful destruction by fire for the purpose of defrauding the pursuers and the application for a second issue came before the Court, the effect of the decret of the arbiters was not lost sight of, and your Lordships accordingly did not send the question of fraudulent over-valuation alone to the jury, but fraudulent over-valuation with the intention of destroying the machinery by fire. 1-

No. 199

Mar. 10, 1881  
Hercules  
Insurance  
Company v.  
Hunter.

proposition has been negatived by the jury; and it will be observed that the pursuers are in petitorio, and the question is, whether they have made out the affirmative of the issue, or have obtained a verdict entitling them to a decree of reduction of the decret-arbitral. On considering all the circumstances, I have found it impossible to arrive at the conclusion that the verdict can be taken as a verdict for the pursuers, or such as to entitle them to the decree for which they contend. No doubt, being bound to hold that the verdict has established that the insurance was made on a fraudulent over-valuation, it can only be with great reluctance that a decret-arbitral can be sustained by which effect is to be given to that insurance and valuation;—but we are bound to regulate our judgment on the case only as it has been legitimately presented to us for consideration. The terms of the summons and condescendence show clearly the difficulty which was felt of attempting to reduce a decret-arbitral by which the valuation in the insurance was substantially found to be just, upon the allegation that it was not so, but a false valuation fraudulently represented. The difficulty was, that right or wrong, the arbiters, who were the judges chosen by the parties, had negatived this averment by their decree, and that it is undoubtedly incompetent for the Court of Session to review or reduce their decision simply on the ground of iniquity or error of judgment. Accordingly in all the pursuer's pleadings the circumstance of fraudulent over-valuation is conjoined with the quality of intent to destroy by fire, and it was only on that specific averment of the purpose, that the second issue was granted; and the words "or for the purpose of defrauding the pursuers of the sum insured in the event of the said machinery being so destroyed" were struck out by the Court ex proposito as not admissible in the form of the action. It was only the specific statement that the property was over-valued with the deliberate intent to burn the premises, which changed the state of the case in point of relevancy. The over-valuation was material as showing the interest and motive to make the insurance with that intent; and as it was necessarily fraudulent, if made with that view, it was so characterised in the issue. There was, however, another important reason for making the fact of fraudulent over-valuation a part of the issue; because it was necessary to leave no doubt as to the competency of proving a fact so essential, notwithstanding the decret-arbitral under reduction. It might have been a very good issue without those words; but unless the pursuers had been left clearly at liberty to prove the fraud in the valuation, their case in regard to the alleged intent to burn might have been unreasonably limited in the evidence to be offered. The ground on which the second issue was granted was not simply that there were circumstances in the making of the contract which might have prevented the insured from recovering under the policy; but that the fact of a design from the first wilfully to burn went to the root of the insurance as not a contract for indemnity against the peril contemplated, but entirely a simulate transaction, where there was no intention to await any such peril but a direct purpose wilfully to create the mischief, and cheat the company by means of the false valuation. If that intention could have been proved, there would have been no contract of insurance at all, and of course no valid submission relative to it. Whether such a matter would have been competent to the arbiters or not, is doubtful, but it was never submitted to their consideration, and the summons was amended, on the distinct statement that it only came to the knowledge of the parties after this cause was in Court.

In the trial, the pursuers, it was stated to us, led evidence to prove the affirmative of the issues, that the insurance was made with the intention of burning

189. the premises, and this not by inference merely, but directly. According  
 1837. been stated that the presiding Judge laid it down to the jury, in the most  
 terms, that "unless they were satisfied either that the fire was wilful  
 the insurance was made with intent to destroy the property by fire," it  
 could be of no effect to warrant a verdict for the pursuers. With this be-  
 fore them, a charge too not excepted from, and not now objected to, they  
 negatived the averment that the fire was wilful, or that insurance was made  
 with intent to destroy. The verdict was, therefore, not for the pursuers of the issue.  
 In fact, unless they were satisfied that the insurance was made with intent  
 to destroy the machinery by fire, without flying in the face of the judgment of the  
 Court in settling the issue, there could have been no verdict for the pursuers. But  
 finding the verdict to be ambiguous, and that the jury may have meant to bring  
 a verdict for the pursuers, see upon what principles of construction we are  
 to proceed. "If an ambiguous verdict is given, and the plaintiff dies  
 before it is pronounced, and the jury on being called upon to return a verdict  
 alter it, the plaintiff might secure against its effects by electing to be  
 which would prevent a judgment against him founded upon a defective  
 verdict. But if the time was let go by at the trial, and the ambiguity was discovered  
 judgment was entered up, I conceive that the plaintiff might intercept the  
 judgment, by showing the Court that the verdict was ambiguous, and then be  
 to enter a nonsuit. But if the judgment was allowed to become final, and the  
 verdict was then discovered to be defective, it seems to me that it can only be con-  
 sidered as a verdict in favour of the defendant, and so operate conclusively against  
 the plaintiff, just as if he had failed to prove his case, and in consequence lost  
 his case and judgment go against him. Unless the matter is brought in the way ab-  
 scribed to the notice of the Court, there is no proceeding, according to the  
 practice of Westminster Hall, to bring the verdict under the eye of the Court, conse-  
 quently no opportunity for the Court to discover the defective nature of the verdict."

But your Lordships will observe, that there was but one question put  
 to the jury, though it had two qualities adjoined to it. The verdict affirms the first  
 quality, but negatifies the second. The second was essential to the case which  
 the pursuers were allowed and undertook to prove; and therefore when the jury  
 negatived that, they, in reality, refused to find for the pursuers upon the issue  
 which they were bound to do according to the charge of the presiding Judge.

Lord Moncreiff, no doubt, might have required the jury to reconsider the  
 verdict before allowing it to be recorded, and both parties had the power of re-  
 quiring him to do so, but no such motion was made, and the verdict stands as  
 final. But if the jury had adhered to that verdict, and stated that they could  
 agree on any other verdict, I think it sufficiently answers and exhausts the  
 issue, and that he could not finally have refused to take it. Certainly they could  
 have been detained for twelve hours, and then dismissed as without a verdict,  
 while this was tendered; but both parties held it to be a good verdict on the  
 issue, and there being no general issue before the jury, it finds all the matter of fact  
 which was contained in it. It finds one part of that matter of fact proved, and the  
 other not proved; and it is for us to say what is the effect of the whole. As the  
 pursuers have failed to prove the affirmative of their issue, I think it must be taken  
 to have its direct and immediate effect, a verdict for the defender.

<sup>1</sup> Adam on Jury Trial, p. 234.

Lord Moncreiff sat here during a part of these discussions, it may be satisfactory to your Lordships to know that his Lordship entirely concurs in this opinion; and it is also in concurrence with his views that I propose to your Lordships pronounce a special interlocutor, finding, in the first place, in the very terms of the verdict, and secondly, the pursuers having in consequence failed to establish additional grounds of reduction set forth in the amended summons, repelling the same accordingly; and before farther answer remitting to the Lord Ordinary the parties on the remaining grounds of reduction. The other Judges having concurred,

No. 199.

Mar. 10, 1837.

Jamieson v.

Stuart.

THE COURT pronounced the following interlocutor: \*—"The Lords having considered the verdict found by the jury on the issues in this cause, whereby they found for the defender on the first issue, and on the second issue they found that the insurance was effected by the defender upon a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire; and having heard counsel thereon; in respect that the pursuers have in consequence failed to establish either of the reasons of reduction set forth in the amendment to the summons of reduction at their instance, and which are marked *sexto* and *septimo* in the said amendment, repel the same accordingly, and supersede consideration of the other reasons of reduction in the said summons, and of the question of expenses until the next session."†

G. and W. NAPIER, W.S.—JAMES WRIGHT, W.S.—Agents.

ANN JAMIESON, Pursuer.—*Sol.-Gen. Rutherford—J. Anderson.*  
JAMES G. STUART, Defender.—*Keay.*

No. 200.

*Process—Consistorial—Proof.*—1. It is competent for the sheriffs authorized to take proofs in consistorial cases, or for the Lords Ordinary to appoint the proof to be taken in the country in any case they shall think proper. 2. Circumstances in which the Lord Ordinary allowed a consistorial proof to proceed in the country.

THIS was a declarator of marriage at the instance of Ann Jamieson against James Stuart. The pursuer did not ask for a proof of her averments, but the defender required a proof of his, whereupon the Lord Ordinary pronounced the following interlocutor:—"In respect the pur-

Mar. 10, 1837

2d Division.

Consistorial.

Lord Jeffrey.

At an early stage of this cause, Lord Justice-Clerk and Lord Medwyn having declined judging, in consequence of their connexion with the Hercules Insurance Company, pursuers, Lord Moncreiff was called in under the provision in 2 Will. c. 5. After the trial had taken place, Lord Meadowbank also discovered that he ought to decline for the same reason, and declined accordingly. Lords Jeffrey and Cuninghame having been successively proposed to be called in, it appeared that their Lordships were disqualified in the same way, whereupon it was held that it being absolutely necessary to try the case, these declinatures flew off, the Judges accordingly resumed their functions.

The question of expenses was taken up early in the ensuing session, when the court found neither party entitled to expenses.



200. suer does not ask for a proof of her averments, and that the defender does of his, allows the defender a proof of all his averments, and the suer a conjunct probation; remits to the sheriffs-commissaries, one of them, to take the proof; grants warrant for letters of diligence at the defender's instance against witnesses and bawlers, reported by the first sederunt day in May next, and dispenses with minute-book."

A question then arose as to where the proof should be taken.

It appeared that the pursuer resided in Elginshire, and was in possession of no aliment from the defender; and that the witnesses proposed to be examined in defence were numerous, and all resident in counties of Banff and Aberdeen. The pursuer was desirous the proof should be taken at Edinburgh, where she could have the aid of counsel at less expense than in the country; while the defender proposed that it should be led at Aberdeen by the Sheriff of Banff, the sheriffs appointed to take proofs in consistorial causes, in the week preceding the holding of the Circuit Court, when the aid of counsel attending the North Circuit might, if necessary, be secured.

The Sheriff of Banff having been applied to accordingly by the defender, stated it to be the opinion of himself and his brethren, that he was not called upon, and, in opposition to the wish of one of the parties, that he ought not to fix a diet for taking the proof in Aberdeen, declared himself ready to fix a diet for this purpose in Edinburgh.

The defender having brought these circumstances under the notice of the Lord Ordinary, and moved for an order to have the proof led at Aberdeen, his Lordship reported the matter to the Court.

The Court instructed his Lordship, that, under the act 1st Wil. c. 69, § 41, it was competent for the sheriffs authorized to take consistorial proofs, or, if the parties were dissatisfied with their order, for the Lords Ordinary to appoint the proof to be led in the country in case they should think proper, and his Lordship accordingly pronounced the following interlocutor:—

"The Lord Ordinary having advised with the Lords of the Second Division of the Court, finds, in cases of this description, that it is competent to take a proof in the country, and, in the particular circumstances of the case, allows the proof to proceed in the country, in respect the defender states his willingness to pay the necessary expense of a counsel attending the proof on the part of the pursuer, provided one of the gentlemen attending the Circuit Court be instructed; appoints the auditor to fix upon the sum to be so paid to counsel, in the event of the parties disagreeing as to the amount to be so paid."

No. 201.

MRS MARY THOMSON, Petitioner.—*Ivory.*Mar. 10, 1839  
Thomson.*Judicial Factor—Pupil—Nobile Officium.*—Circumstances in which authority to a *factrix loco tutoris* to grant a feu-right refused.

Mar. 10, 1839

2d Division  
T.

IN 1833, the petitioner, Mrs Thomson, was appointed *factrix loco tutoris* to her sons, Robert and John Thomson, who were in pupillarity. hereafter she obtained authority from the Court to make up titles in person of Robert, for vesting in him, as the heir of his father and grandfather, the heritable subjects left by them. She now presented an application, setting forth that, in 1821, a tack had been granted by the pupil's grandfather of a certain lot of ground in favour of one Brown, the lessor becoming bound to advance to Brown the sum of £1600, to be expended, at his sight, in improvements on the premises; "it being understood and agreed upon by the parties, that the said Alexander Brown should have it in his power, at any time during the currency of that tack, upon giving six months' previous notice to the said Robert Thomson, to require from him, and the said Robert Thomson should be bound to grant, to the said Alexander Brown, an absolute feu-right of the ground thereby set, and whole buildings that might be erected thereon, but that only on this express condition, that the said Alexander Brown, or his foresaids, made repayment to the said Robert Thomson of the sum of £1600 sterling, so to be advanced, as before-mentioned." The petition farther stated, that this lease was to expire at Whitsunday, 1837, and that Brown had called upon Mrs Thomson to grant a feu-right to him of the foresaid ground, in terms of the obligation in the lease; that an agent, however, had advised him not to accept of such feu-right, unless under an authority from the Court. In these circumstances, the petitioner prayed to be authorized, "as *factrix loco tutoris* for the said Robert Thomas Thomson, her son, to grant an absolute feu-right of the said ground, as described in the said tack, all in terms of the obligations therein contained and above quoted."

In support of the application, it was maintained, that it would be highly expedient that the feu-right in question should be granted, and reference was made to the precedents of Somerville's factor, Feb. 6, 1836,<sup>1</sup> and Dalmahoy, July 9, 1836.<sup>2</sup>

THE COURT refused the prayer of the petition.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—Agents.

<sup>1</sup> Ante, XIV. 451.

<sup>2</sup> Ante, XIV. 1125.

1802.

ARCHIBALD GALBRAITH and OTHERS, Advocators.—

10,1837.

*Sol. Gen. Rutherford—More—Monteith.*

18th v.

REV. JAMES SMITH and OTHERS, Respondents.—*D. F. Hope—**A. Dunlop.*

*Interim Possession—Jurisdiction—Dissenters.*—The church judicatories of a dissenting body having pronounced a sentence, declaring the minister of a church in their communion out of connexion with them—Circumstances in which the Court awarded a conjoint possession of the church by alternate diets of the minister, on the one hand, and such persons as the judicatories should appoint on the other, pending a declarator as to whether the minister's incumbency was by his agreement with the proprietors of the church, and his right of possession, had been brought to an end by that sentence.

10,1837.

REVISION.  
ledersiff.  
R.

**DURING** the persecutions in the reign of Charles II. a number of Lowlanders took refuge in Campbeltown, and formed there a Presbyterian congregation, the minister of which, after the Revolution, had a stipend modified to him out of the teinds of the parish. Till 1749 the congregation enjoyed the free choice of their own minister, but on the occasion of a vacancy which then took place, and of another which occurred in 1762, the Duke of Argyll, as patron of the parish, and as such claiming the right of presentation, presented individuals very obnoxious to the congregation, who, on the last of these occasions, opposed the settlement, and carried the matter to the General Assembly. They were, however, induced by the Duke to withdraw their opposition on condition that His Grace should, on the first opportunity, present the obnoxious minister to another charge. The Duke accordingly, a few years afterwards, offered the minister another living, but he refused to accept it. On this, the congregation, who had also suffered annoyance from an act of the Synod of Argyll regarding the days of service at the communion, resolved to build a place of worship for themselves. They accordingly purchased a piece of ground, and entered into a subscription, whereby they bound themselves respectively to purchase so many sittings in the new church, each seat to be subject to an annual duty for payment of the minister's stipend, precentor's salary, &c. They did not, till after the church was built, determine with what body they would connect themselves, but they ultimately resolved to join the Presbytery of Relief which had been formed in 1761. Having made an agreement with the Rev. James Pinkerton, a licentiate of the Church of Scotland, to be their minister at a certain specified salary, a call was given to that individual, with the concurrence of the Presbytery of Relief, by whom he was immediately afterwards ordained. The call, which was dated 9th June, 1767, was in these terms:—"We the underwritten inhabitants of the town of Campbeltown and its neighbourhood, having built a house for the public worship of God, not as separatists from the Protestant churches, or the

orthy ministers and members of the Established Church in our land, No. 202. in whom we can freely hold communion, being of one mind with us in March 10, 1833  
faith, worship, and institutions of Jesus Christ. We have taken the Galbraith v. Smith.  
the step to vindicate our Christian, and most natural right, to choose  
a pastor who is to labour amongst us in holy things, in opposition to  
the abuse of the power of patronage, the pernicious effects of which are  
heavily felt in all corners, and particularly in this town; and partly  
that the truth and purity of the gospel may remain amongst us, and be  
transmitted to posterity; and being (many of us) destitute of a fixed gos-  
pel pastor with whom we can cordially join, and all of us being deeply  
sensible of the paucity of faithful ministers in the place, and assured from  
good information, and the experience of some of us of the ministerial  
qualifications, and of the suitableness to our capacities of the gifts of you,  
Mr James Pinkerton, preacher of the gospel, have agreed, with great  
unanimity amongst ourselves, and the concurrence of the Reverend  
Presbytery of Relief, to call, as by these presents we, in pursuance, and  
in conformity to our aforesaid declared principles, do heartily call and in-  
vite you to undertake the office of a pastor amongst us, and the charge of  
our souls," &c.

Shortly after Mr Pinkerton's ordination the pews in the church were  
disposed of by public roup. Thereafter the titles to the property, sub-  
ject to the burden of the conveyances to the seats, which were in the  
form of regular dispositions, with procuratory and precept, were trans-  
ferred by the original purchaser to certain parties as trustees for the  
whole "managers and members, both present and to come, of the said  
Relief congregation." The affairs of the church were conducted by a  
body of managers chosen by the proprietors at a yearly meeting. Mr  
Pinkerton lived till 1804, and on his death, and on two subsequent  
vacancies in 1822 and 1828, ministers were chosen in connexion with the  
Synod of Relief, the members of that communion now comprehending  
several Presbyteries united into one Synod, an agreement as to stipend  
being made with the proprietors or a committee on their behalf. The  
minister chosen on the last of these occasions was the respondent, Mr  
Smith, who was a licentiate of the Relief body, and was, like his prede-  
cessors, ordained to his charge by the Relief Presbytery of Glasgow. In  
1835, on the occasion of discussing in Mr Smith's session an overture for  
union between the Relief and the United Secession churches, Mr Smith  
made some expressions stating a preference to an union with the Estab-  
lishment over that with the United Secession, and also favourable to the  
acceptance of an endowment, which were reported to certain members of  
the Presbytery, and in consequence of this and of other reports, the  
Synod of Presbytery, by direction, as was alleged, of the Presbytery,  
though without any entry on the subject in their minutes, wrote to Mr  
Smith, requesting him to fix a day for a conference with the Presbytery.  
But Mr Smith declined, and thereafter the Presbytery appointed a

302. meeting of their body to be held at Campbeltown, that they might determine on the spot the state of matters in that church in reference to its adherence to the principles of the Relief Synod, and take measures for that adherence being confirmed and strengthened, seeing that unfavourable reports on this subject are abroad, which imperatively call for the Presbytery's investigation."

The meeting thus appointed was held by the Presbytery at Campbeltown on the 15th and 16th October. The Presbytery examined a number of the managers and elders, and had produced to them the minutes of the managers and session, with a letter from Mr Smith to the managers on the subject of the overture for union with the United Secession; but the minutes of this investigation were not produced, and ultimately the Presbytery adopted a resolution thus set forth in the minutes:—"After again holding conference with the session and managers, the members expressed their sentiments to the effect, that Mr Smith had failed in his duty to his brethren when he declined holding conference with the Presbytery in September: That he erred in using unguarded expressions in session, which unhappily gave rise in the minds of his elders to the idea that he had a wish to join the National Church: That Mr Smith ought, in duty and prudence, to come forward and express his regret at having used such expressions, promise carefully to avoid such expressions in future, and declare that he cordially adheres to the determination of the session and managers to abide by the regulations and principles of the Synod of Relief as at present constituted: Which being moved and seconded, was adopted."

Mr Smith being called upon to say whether he acceded to this minute, declined to do so, and he was thereupon cited apud acta to appear before an adjourned meeting at Glasgow on the 3d November following. Mr Smith accordingly attended this meeting, at which he was again asked to accede to the minute above quoted, with the following addition explanatory of the sense in which the terms "the principles of the Synod of Relief" were used, viz. "in the sense in which they were understood at the period of Mr Smith's ordination, and in which they are received by the members of the Synod at the present day." This Mr Smith still refused to accede to, on the ground, as alleged by him, that the Synod at the present day held the principles commonly called "Voluntary," which he (Mr Smith) considered contrary to Relief principles; but he offered a declaration of his own, which he stated to be, as finally framed in the following terms:—"I pledge and oblige myself to adhere strictly to Relief principles as understood at the period of my ordination, and to do nothing that will tend to alienate the property of the Relief Church of Campbeltown from the Relief Synod: And as it has been stated, that certain expressions used by me as to endowments, and joining the Established Church in preference to the Secession, left an improper impression on the minds of some of my session, for which it is the opinion of the

Presbytery, that I should express regret, while, as one of the members of this court, I may disagree with many, and claim with them the right giving my own judgment and opinion; I feel bound, as a measure for me, to regard it a matter of regret, that from any cause they should be misapprehended my meaning." No. 202  
March 10, 1836  
Campbell v.  
Smith. 211.

The Presbytery refused to accept this declaration, and Mr Smith declining to accede to their minute, which they ultimately varied (though, alleged by Mr Smith, without his being aware of it), by leaving out the words "the members of," the following procedure took place, as set forth in the minutes of Presbytery:—"The members delivered their sentiments at great length, to the effect that some speedy and decisive step ought to be taken in the matter. It was moved and seconded, that, in the written expressions of Mr Smith's opinion, and in his verbal declarations in court, connected with his declining to give satisfaction to the Presbytery, there is sufficient evidence before the court that he is not adhering to his ordination vows, and acting on them, he ought to be cut off from connexion with the Relief body. Agreed to adjourn till eight o'clock, and appoint Messrs Thomson, Brodie, and Struthers to converse with Mr Smith.—Eight o'clock, same day. The committee reported their conference with Mr Smith. Mr Smith being called on to say whether he still refused to accede to the minute of court, declared that he still refused to accede. The Presbytery resumed, and the proceedings of the committee were read. The motion formerly submitted was then put to the vote: it was unanimously adopted. Wherefore the Presbytery did, and hereby do, declare Mr Smith out of connexion with the Relief body: Against which decision Mr Smith appealed to the first meeting of Synod, for reasons to be lodged in due time, took instruments in the clerk's hands, and craved extracts."

The stated meeting of Synod stood fixed for May, 1836, but to dispose of this appeal a pro re nata meeting was held on the 15th and 16th of December, when the sentence of the Presbytery was affirmed.

Thereafter the Presbytery having met, declared Mr Smith out of connexion with their body, and the Campbeltown church vacant, and appointed Mr Harvey, one of their number, to preach there, and intimate their deliverance. On this sentence being communicated to the managers of the church, a meeting was held by them and the elders; it was moved on the one hand, "that in consequence of Mr Smith being now cut off from the Relief Synod from all connexion with that body, he is now no longer our minister, as a Relief Church, we cannot consent to admit him to the pulpit;" and on the other, "that as the proprietors of the church had no opportunity of considering the proceedings of the Synod in regard to Mr Smith, and the question to be considered deeply involves the interest, that a general meeting of the proprietors and members of the church be called, to consider the whole circumstances of the case, and that in the meantime Mr Smith be allowed to preach in the church,

202. with a declaration that his doing so shall not interfere with the rights of either party."

1837. The first of these motions was carried, and the meeting farther resolved, "that Mr Harvey should be allowed to preach the church vacant. On this Mr Smith and two of the proprietors presented a petition to the Sheriff of Argyleshire, praying him to interdict the managers and bannock from giving access to any person except Mr Smith to preach in the church or green belonging thereto, and also to interdict Mr Harvey or any other minister of the Relief Presbytery from preaching the church vacant. The Sheriff granted interdict ad interim as craved, and appointed a record to be made up.

While this record was in preparation, an action of declarator was raised by Mr Smith and the other two applicants for the interdict, concluding, inter alia, to have it found and declared that the principles held by the Relief Presbytery when the Campbeltown church was founded and joined in their connexion were neither opposed to endowments of church establishments; that no one holding principles opposed thereto, or in any other way opposed to the principles held by the original Presbytery of Relief, was entitled to preach in the Campbeltown Relief Church, or interfere in the management of it; that the proprietors possessed the exclusive management of the same, free from any control by the Synod of Relief, and not affectable by their acts and deeds; that the Reverend Mr Smith adhered to the said principles; that the proceedings and sentences of the Presbytery and Synod were ineffectual to deprive him of his character of minister of said church, or of any rights and privileges belonging to him as such; that his incumbency had not thereby been brought to an end, and that he had right to preach in the church, and possess and enjoy all the rights and privileges belonging to the minister of the same during his incumbency.

In the process of interdict, the Sheriff (15th April, 1836) pronounced this interlocutor: "In respect the object of this process seems to be to *continue* and not *invert* the present state of possession, continues the interdict already granted, and decerns, reserving, however, to the respondents (Galbraith, &c) to apply for its recal, in the event of the pursuers (Smith, &c.) being unsuccessful in establishing the conclusion of the action of declarator which they have raised before the Supreme Court."

Of this judgment, Galbraith, &c. brought an advocacion, in which they alleged that an overwhelming majority of the proprietors and congregation adhered to the Synod. On the other hand, while it was not disputed by Smith, &c. that the adherents of the Synod constituted a decided majority of the proprietors and congregation, it was denied that their number was nearly so great as was represented.

The Lord Ordinary appointed the cause to be argued in Cases.  
*Pleaded for Galbraith, &c.*



In forming a connexion with any religious communion, it is a necessarily implied element of the contract that the parties forming that contract are to submit, in all things regarding the doctrines and discipline of the sect, to the judgment and determination of the church judicatories of the body, whose resolutions explaining or altering the original tenets or regulations of the sect are conclusive against all the members, and must be received as probatio probata by courts of law in all questions of civil right which may be affected thereby. Courts of law are not entitled to look to the grounds of their decisions, nor to consider whether they be in accordance with the original principles of the body or no, but can only inquire whether they be truly the sentences of the Courts, or, in the case of a division, whether the court claiming to represent the body be truly composed of the majority, and this being ascertained, their decisions must be looked to merely as facts, and be held as conclusive with all parties united to the sect; and all property appropriated to the purposes of worship in connexion with the sect must be administered in accordance with the principles and determinations of the majority of the church courts.<sup>1</sup> In the present case, there can be no doubt that the church at Campbelltown was appropriated to the purposes of religious worship in connexion with the Presbytery and Synod of Relief. It has continued in that connexion since first opened, and the Reverend Mr Smith, like all his predecessors, received his character and status as minister of that church, by ordination from the Presbytery of Relief. He only possessed that church as a Relief minister, capable of ministering to a congregation in connexion with the Relief Synod; and being now cut off by a sentence of the supreme court of the body, his character of a Relief minister has come to an end. He is no longer capable of ministering to a congregation in communion with the Synod. His sole title, therefore, to officiate at the church has fallen, and even although it were competent for the civil court to consider the validity and effect of the sentence of the Synod, declaring him out of connexion, it would be a total inversion of the possession, in the meantime, if the church were allowed to be used, contrary to what has obtained since it was first opened, by a minister having no spiritual relationship to the Synod of Relief, and no longer in connexion with them, and still more if the interdict, in the terms granted by the Sheriff, were to stand, whereby every minister of the body in connexion with which the church was constituted, is prohibited from preaching therein. It is not, however, competent for the civil courts to judge of the validity of the sentence of the Synod, and the question attempted to be submitted to the decision of the court by Smith, &c. here, is one of pure spiritual jurisdiction, calling on this Court incompetently to review and alter the decision of a Church Court in a matter purely spiritual. Even, however, looking to the objections taken to the sentence of the Synod in this case, they are altogether

Mar. 10, 1881

Galbraith v. Smith.

<sup>1</sup> Aikman v. Davidson, June 27, 1805, (F.C. and M. 14584).

§ 202. untenable. There is no ground for any averment of change of principle, and as to the proceedings against Mr Smith being in violation of the regulations of the Synod, which require a regular libel, &c., this is unnecessary where the party confesses, as was done here, or where, at least the sentence of the Synod falls to be considered as proceeding on open contempt in their own presence, which may always be acted upon without formal process. But at any rate, whatever may be the effect to be given to such objections in the declarator, they ought not, in a question of interim possession, to interfere with the enforcement of a sentence of the supreme judicatory to which Mr Smith owes obedience; and there is the essential difference between the present case and those of Aikman and Bulloch, where the possession of the ministers cut off was maintained, that in these there was a schism in the body itself, and the questions raised were new to the Court, while here the Synod was unanimous, and there is no schism or division in the Relief body.

*Pleaded for Smith, &c.*

In all questions regarding the property or possession of a building devoted to the purposes of religious worship in a particular communion or other civil interests connected therewith, the determinations of the judicatories of the sect can have no force independent of contract, beyond what contract may attach to them. The decisions of such judicatories have no legal efficacy to affect civil interests, such as belongs by statute to the courts of the Established Church, but are exactly in the situation of resolutions of any other voluntary association, and it matters not whether the object of such association be religious, social, or literary. So long as their resolutions do not affect civil interests, the courts of law will not interfere with them, but they will as little interfere with a social or literary as with a religious association, there being no distinction in law between the latter and the former classes. The ground on which the civil courts will not interfere with such determinations of a dissenting church court, is not that they have religion for their object, but that they do not concern civil rights, which alone form the subject of adjudication in a court of law. So soon, however, as the resolutions of a voluntary association are pleaded to the effect of determining civil interests, they immediately become, whether they be resolutions of a mason lodge or the like, or sentences of a church court, the proper subject of cognizance by courts of law, so far as is necessary to decide the civil interests competently before them. Here the only question raised is as to the right to the use of a material building, and it is a perversion of terms to call that a question of pure spiritual jurisdiction. It may be that the question will depend on the sentence of the church court, but solely by reason of the contract, express or implied, whereby the right of possession may have been rendered affectable by such sentence. This, however, is still merely a civil question of contract, competent to the courts of law, who are entitled to look to the proceedings of the Relief Church courts here, (which

to the effect of turning Mr. Smith out of the possession of the No. 202.  
 erto had by him,) in order to ascertain and determine whether Mar. 10, 1887,  
 dings so founded on are those contemplated by the contract, Galbraith v. Smith.  
 h a civil effect has been agreed to be given. Then, in deter-  
 , it is a total mistake on the part of the advocates to maintain  
 tence of the church court must be taken as probatio probata  
 ontracts appropriating buildings to the purposes of worship, in  
 with a particular communion, absolute submission is come under  
 ch courts of the body, so as to entitle them, even to change the  
 o be inculcated in it, or that the decision of the majority of the  
 rts is conclusive as to the principles of the sect. On the con-  
 as finally settled, in the ultimate decision of the case of Craig-  
 ie House of Lords,<sup>1</sup> that it is an essential condition of such  
 on of buildings as places of worship in connexion with parti-  
 , that the principles and doctrines of the sect existing at the  
 : appropriation, be maintained inviolate, the maintenance of  
 ; the great object of the appropriation,—that the only determi-  
 such judicatories to which civil effect can be held to have been  
 to be given, are determinations in accordance with the rules  
 oles of the sect; and that in the event of difference of opinion,  
 inations of the majority of the church judicatories have no con-  
 thority, but that it is the province of courts of law to decide  
 eir determinations are or are not in accordance with the prin-  
 he maintenance of which the place of worship was erected, and  
 any inversion of it in opposition to these principles. Applying  
 ent case the rules so laid down, and appealed to in subsequent  
 inally settled,<sup>2</sup> it is to be observed that in the declarator,  
 ., undertake to establish that the foundation of the sentence  
 m was his adherence to the principles which they contend to  
 those of the Relief Presbytery when this church was constitu-  
 the sentence of cutting off, even if regularly pronounced, is not  
 a nature effectual to bring Mr. Smith's incumbency under his  
 ith the proprietors to an end, nor to dissolve the pastoral rela-  
 etween him and the congregation; that it was, moreover, pro-  
 a total violation of the rules of the Synod, being for an offence  
 erious nature, "violation of his ordination vows," though that  
 r the first time in the sentence finding him guilty of it, without  
 el, or trial, all required by their own regulations; that the  
 of there being a confession, or of the sentence proceeding on  
 are both negatived by the very terms of the sentence itself, and  
 ether the proceedings are in violation alike of the fundamental

<sup>1</sup> *McClellan v. Aikman*, July 21, 1820, 2 Bligh, 529; See also prior judgment,  
<sup>2</sup> *McClellan v. Aikman*, 1 Dow, 1.

<sup>3</sup> *Wentworth v. Jacob and Walker*, 247.

1822. principles, and of the regulations of the body, adherence to which is an essential element in any sentences of the church courts, in order that they may have any civil effect in regard to the use and possession of the church in question. In these circumstances the point to be here decided is whether civil effect is to be given, ad interim, to the proceedings of the Presbytery and Synod of Relief, pending the declarator for heretice, decided whether they are of a kind to which any civil effect is due. The true rule in such a case is not to alter the existing possession now in the hands of Smith, by giving a civil effect to the sentences of these church courts pending the declarator. This was the rule followed in the cases of *Man* and of *Bulloch*,<sup>1</sup> and there is no valid ground of distinction here, because, although the Synod in the present case was unanimous, the principle laid down in the House of Lords makes that circumstance of no consequence, while there are serious objections to the regularity of the procedure here, which did not occur in these cases.

The Lord Ordinary, on considering the cases, made *avizandum* to them to the Court, issuing at the same time the subjoined note.\*

<sup>1</sup> *Aikman v. Davidson*, June 27, 1805 (F.C. and M. 14584); *Bulloch v. Smith*, January 31, 1809, (F.C.)

\* "As the Lord Ordinary is not prepared to recall the interdict, at least is of opinion that sufficient grounds have not been shown for disturbing Smith's possession as minister of the church at Campbeltown during the pendency of the process of declarator, he thinks it the most advisable course to adjourn the cause.

"The way in which the advocates have prepared their case is at least attended with inconvenience. It has evidently occasioned expense and trouble to respondents; but it has, besides, tended to perplex and extend the discussion unnecessarily. Certainly it is true, that the advocates, in the debate, from the opening on all the history and merits of the cause, of which pleading the Lord Ordinary has full notes before him; but the most awkward result is, that the ground now taken in justification of the proceedings of the Relief Presbytery and Synod is essentially different from any thing previously maintained, and is not easily to be found in the terms of the sentence itself. Whether it is solid and available or not, it does not appear to have been the ground of judgment contemplated.

"The advocates represent this cause as of very great importance to all associations of Dissenters in this country, and seem to be of opinion, that even to entertain the question of interdict is inconsistent with their privileges. The Lord Ordinary doubts much if it will be found to be of the importance attached to it unless it should turn out in the declarator that the trial of it is to be made that of something different from the apparent merits of the cause itself; and in the view which he has of the possessory question, it does not appear to involve more general question than such as the Court have frequently dealt with before.

"The advocates, and the Ecclesiastical Body to which they state themselves as belonging, need be under no alarm lest the Court should interfere with the spiritual determinations of their Presbytery and Synod, in matters of a purely spiritual nature. The Lord Ordinary is well assured that this is what the Court never will do, and for himself, he has too deep a sense of the importance and extent of the laws of toleration to give any judgment which he could imagine to have any such tendency. But the soil and fabric of a church are a subject of civil property; and when a question arises either as to the absolute right and title in

**LORD MEADOWBANK.**—Your Lordship having been pleased to call upon me to deliver my judgment upon this case, I can have no difficulty in stating the facts which have occurred to me on going through this very voluminous record, No. 202.  
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March 10. 1837.  
Galbraith v.  
Smith.

subject, or as to the right to possess it, while the question of property is under consideration, the Court must necessarily judge of such questions, by applying to this case the principles of title and contract, with due regard to its great peculiarity, the same principles of municipal law which regulate similar questions on other contracts; and they must not be deterred or excused from doing so, merely because the dispute comes out of the spiritual relations of the parties, and the spiritual objects for which the building was acquired, or because the discussion may involve the necessity of taking some view of ecclesiastical affairs.

"This is a case of contract simply, and it is perfectly manifest that no aid can be obtained in the argument, on the one side or the other, from the law applicable to the Established Church, which rests on public statutes.

"The advocates lay the basis of their argument on an assumption, which they would like to be proved, that, by the contract, the church in question is held as a trust for a congregation of Christians in *inseparable* connexion with the Presbytery and the Relief, and that all Mr Smith's status and rights as minister in it are absolutely dependent on his remaining in that connexion;—then it is farther assumed to be settled law, that, in the case of a difference among the proprietors of such a building, the orders or determinations of the Presbytery and Synod, whatever they may be, however they may have been arrived at, and whatever may have been the ground of charge or point of difference, must be absolutely conclusive and binding on the proprietors and the minister, and must constrain the civil court at once to decide the civil question accordingly;—and it is finally assumed, that the sentence of the Synod in this case is *a sentence of deposition*, or equivalent thereto, and that the appointment of Mr Harvie to preach the church vacant is a *spiritual* proceeding, with which the civil court ought not to interfere.

"However probable the grounds may be thought to be on which the first assumption is made, it is distinctly controverted in the extent maintained, on facts and reasonings which will require investigation and discussion. The Lord Ordinary is desirous not to prejudge any question which must be tried in the declarator, and therefore he gives no opinion on that question of fact at present. But suppose it could be held, notwithstanding the denial, that, *previous to the dispute*, the church, the minister, the proprietors, and the congregation, were in such connexion with the Relief Synod as to be permanently under their *ecclesiastical* jurisdiction, the advocates go a great deal too fast in assuming the law to be so broadly laid as they allege. They seem to have misled themselves, by looking only at the first judgment of the Court in the case of *Craigdallie v. Aikman*; but it is impossible to read the judgment of the House of Lords remitting that cause, the ultimate interlocutor of the Court, February 21, 1815. (Respondent's case, p. 75,) and the speech of Lord Eldon in affirming it, without seeing that it was *not* there that all consideration of the grounds of dispute or the nature of the proceedings must be excluded, and that there may be much room for discussion before it is clear that a similar judgment must be pronounced in this case. The Lord Ordinary desires to express no opinion on the matters actually alleged as being relevant or insufficient to warrant the plea of the respondents; but to show the doubtful nature of the point here taken by the advocates as conclusive in point of law. Under the case of *Craigdallie* in the question of possession, he will make the proposition that the Synod *had actually resolved* to join the *Secession* Church, and he says, that, attending to the original *principles* of the Relief Church, and the principles delivered by Lord Eldon, it would be difficult to hold that Mr Smith is deprived of his condition and rights as minister of the Campbeltown Church, or that any portion of the proprietors could be deprived of their property because he or they declined to concur in such a union, and it is also a ques-

in such a case ; and very sure he is, that it is a thing altogether of a different kind and leading to consequences essentially different, from the sentence pronounced. But there is not even any act of the Synod *dissolving Mr Smith's moral relation to his congregation*, supposing that to have been done ; for this the Lord Ordinary must consider as raising a farther very serious case of the advocates for recall of the interdict. He is aware of the case of *Mr Dalziel* (but not in *Bulloch's*), similar words only with those used here. But in that case, the minister had voluntarily separated himself from the Synod, and rested his case on the departure from *principle* which he sought to prove against them ; and yet an interdict against altering the possession of the church. The question here is, Whether the anomalous sentence pronounced (*recall, suspension, or deposition*) of cutting Mr Smith off from communion with the Relief Synod, is sufficient, *de plano*, to compel a change in the possession of the church. It appears to the Lord Ordinary that this must be solved in favour of the Synod, even on the showing of the advocates, if the step by which he is to be removed from the church is to be considered as *wholly or partly* a civil, and a spiritual proceeding. That it is in its main purpose and effect civil to the Lord Ordinary.

" The Relief Presbytery and Synod have no property in, or control over, this church as a subject of property. It belongs to the proprietors, and to the purposes of the trust. Put the case, then, that *all* the persons who are that every one person connected with it, concurred with Mr Smith, in separating from him, what would be the effect of a sentence of the Synod, *cutting off Mr Smith from their connexion*? Manifestly none at all, but that he and his people would lose the benefit of such a spiritual connexion. Could the Synod, under the colour of such a proceeding, to come to the pulpit of the church and declare the place *vacant, till another minister, willing to be associated with them, should be appointed*? Surely not. The statement here is, that the majority of the proprietors and congregation adhere to the Synod. It is so. But that does not alter the force of the illustration to prove the nature of possession, *under such a sentence*, is a civil, and not an ecclesiastical proceeding. Neither of the parties here say that the point is to be determined by the proprietors ; and the cases do not warrant such a rule. Yet in the same sentence it is undeniable that in the case supposed, the civil and

an v. Craigdallie and others, and the rest of the cases to which we have been referred. No. 202

First, I take it to be clearly and finally settled, that a trust may be legally established, a civil right created for behoof of a body of Dissenting Christians professing certain tenets, and agreeing to have those civil rights fixed by and dependent upon the observance of such rules and regulations as are inherent in, and calculated to maintain, the principles they support. March 10, 18: Galbraith v. Smith.

Secondly, That it is a legal object of such a trust that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognised body the right and power of controlling and modifying those rules and regulations, in conformity with the fundamental principles of that sect of dissenting Christians to which those constituting the trust may have professed to adhere, and that the civil court will not take cognizance of the proceedings and determinations of those ecclesiastical judicatories, as they may be termed, upon matters of doctrine and discipline, but hold them to be probatio probata of the principles of the sect.

Thirdly, That the original deed or other instrument by which the trust is created need not, in order to be effectual, specify within itself the particular conditions of its creation, but that these objects may be ascertained, in order to their recognition and enforcement by courts of law, by facts and circumstances, and by a train of proceedings indicative of the purposes and the views of the parties.

Fourthly, That in order to confer upon a party the right of enforcing the objects

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majority or minority of those maintaining the property on its own purposes, could not bear to be spoken of.

"The case of the advocates gets some plausibility from the *particular form* of the interdict asked and granted—to prohibit all persons, except Mr Smith, from preaching in the church, or on the green, and particularly Mr Harvie, *from preaching the church vacant*. Perhaps the form of words may not be the best chosen possible. But even the *form* may be justified, on this ground, that the Presbytery, by cutting Mr Smith off from their connexion, had no right to interfere with his liberty in his own church, *unless they can establish the point that the effect of such a sentence was to invert instantly the civil rights connected with the church*; and as to the substance of the thing, however it may be expressed, both parties agree that it is simply whether there are grounds for turning Mr Smith, and the professors who adhere to him, out of possession of the premises, while it is yet substance in the declarator whether Mr Smith's contract can be so infringed, and whether the trust stands for the one class of proprietors or the other. The notion that *excluding Mr Smith from the church* is no inversion of the possession, because he *cannot preach there as a minister in connexion with the Relief Synod*, is little better than a play upon words.

The matter being thus reduced to a question of civil rights, the Lord Ordinary looks to the precedents, and he sees that, in the case of Craigdallie, and more remarkably in that of Bulloch, January 31, 1809, even after the first judgment in Craigdallie, interdicts against any change of possession were granted, and that the right of possession was also preserved in the case of M'Crie, February 24, 1809, final judgment. The present case appears to the Lord Ordinary to be much *stronger* for not altering the possession than any one of those cases, because the *inversion* of the church and congregation is more doubtful, and the grounds of *objection* to the proceedings against Mr Smith, and the change of principle by the *judgment*, are much more tangible. Very possibly the advocates may ultimately *lose* out their case; but it must be fairly tried, and not seized summarily."



to in the papers, and in the case of Aikman and Craigdallie.

In the present case it is unnecessary to discuss any question of title. no doubt that each of the parties has a *persona standi*, and both have interest to enforce the object for which they are contending; but I have thought it indispensably necessary for me, even in this question of possession, to state how those settled doctrines to which I have referred are to be affected by the judgment we are now to pronounce in favour either of the one party or the other. Your Lordships will therefore permit me to state, in the first place, in point of fact, that I have no doubt that the meeting-house at Campbeltown was originally created, and the endowment connected with it thereafter created, for the use and congregation of dissenting Christians, to be in all future time connected with the subordination to, that body which the contributors and congregation recognised as the Synod of Relief. This object of the trust, I may state generally, and then going into particulars, is sufficiently ascertained by a consideration of the facts of the case of the parties exactly as they were in Craigdallie's case (and, in fact, the resemblance here is, *mutatis mutandis*, little else than a transcript of the case there), and from the call and ordination of the different clergymen, and from the fact that Smith himself, under authority of the Synod, and whose sole title of in-licence to preach which he had received from the judicatories of the church. Secondly, It is admitted, nay, it is maintained by both parties, that the tenets of the Relief church are those of the Church of Scotland, and the Faith and Formulae of the latter constitute the foundation of the faith of these, your Lordships know well, the rights of presbyteries, synods, and assemblies, in all matters of discipline and doctrine, are declared to be binding, and while these judicatories in the Established Church possess the power of determining the ecclesiastical relation between pastors and congregations, so in the Church of Relief they possess a power equally as irreversible. Of the effect of the ecclesiastical relation, in the Established

right to the character or function in which alone he had acquired the civil No. 202.

latter must follow of course the loss of the former.

or the same effect is to be produced upon the pastors of Relief congrega- March 10, 1837.  
 en deprived by their ecclesiastical superiors of the character and functions Galbraith v.  
 Smith.

men, if bodies having a *persona standi*, and a legal interest to maintain  
 its, come before your Lordships, proving that it was a fundamental prin-  
 the Relief Church that the right of deprivation lay with the Synod—that  
 d exercised their ecclesiastical power—and contending that the pastor be-  
 red of his function, could no longer be maintained in the civil possession  
 , which, by the agreement of parties, had been created solely for the pur-  
 maintaining a congregation in connexion with the Relief Church, is the  
 we are now required to determine.

respect, I am humbly of opinion, that the Established Church and the  
 church are precisely in the same situation. The difference between the  
 prebend to be simply, that the one is an endowed church, where the civil  
 is from the provision of the state, while, in the other, it has been consti-  
 the voluntary agreement and obligation of the parties. But in both, it is  
 to the function, as determined by the ecclesiastical authorities of the  
 spectively, upon which the civil and patrimonial rights of the parties in  
 ect must altogether depend ; so, accordingly, in England the law was so  
 by Lord Mansfield, in a case where a mandamus was applied for to re-  
 clergyman to a Dissenting meeting-house. “ The right,” his Lordship  
 o the function is the substance, and draws after it every thing as a perti-  
 eto. The use of the meeting-house and pulpit follows by necessary con-  
 the right to the function of the minister, preacher, or pastor.”<sup>1</sup>

pon the same principle, the late Lord Justice-Clerk Macqueen pronounced  
 nent, as Lord Ordinary, in the case of Auchincloss in the year 1792.  
 oss, it appears, was deposed from the office of a minister by the Associate  
 ry of Stirling in the month of September, 1790. A portion of his con-  
 adhered to him, and a petition was therefore presented by some of the  
 mbers of the congregation to the sheriff of Stirling, praying that he should  
 ed to remove from the manse, glebe, and pertinents, and deliver up the  
 the church. The petition was finally refused by the sheriff-depute, 2d  
 r, 1790 ; but a bill of advocation being presented, and an action of decla-  
 ed at the instance of Auchincloss and that portion of the congregation  
 lhered to him, the Lord Justice-Clerk Braxfield, in the year 1792, pro-  
 the following judgment:—“ In respect the Lord Ordinary does not con-  
 ompetent for this Court to review the decisions of Associate congregations,  
 y called Burghers, when sentences are pronounced by them in their eccle-  
 character ; therefore, sustains the defences,” &c. and found expenses due.  
 it adhered, on advising petition and answers, and Auchincloss thereupon  
 d the meeting-house.

case, it is quite plain that the civil right was by Lord Braxfield deter-  
 depend altogether and exclusively on the right to the ecclesiastical func-  
 the judgment of the Dissenting judicatory taking away that function

<sup>1</sup> 3 Barrows, 1265.

202. being, by the principle and rule of the Dissenting sect, final and conclusive right of Auchincloss to the meeting-house and endowment was necessary and determined. In that case, no doubt, the term depose had been employed by the Burgher Synod in dissolving their connexion with Auchincloss; and the ordinary, in his note, seems to be of opinion, that the want of it in this case operate to the prejudice of the argument maintained by the advocates. I think this is altogether a mistake. The meaning of depose is just the same, although, in the judicatories of the Established Church, it has, by long and constant usage, obtained a technical, and, when applied to ecclesiastical affairs, particularly solemn signification. In fact, in those judicatories there is the same term employed, when a clergyman is deprived of his function, or his connexion with his congregation, or with the church, dissolved and abrogated; the reverse in the case of different bodies of Dissenters. There, if a minister is cut off from his connexion with the body for a moral offence, the terms employed are those of depose and deposition; but it seems that when this is done merely in consequence of a difference of opinion, or contumacy, or other not inferring moral delinquency, terms are employed less offensive in tone and character, such as dropping the name of the party from the roll, or cutting him out of connexion with the body. Accordingly, in the case of *Mr Craigdallie*, the former words were employed with respect to Mr Jarvie's connexion with the Associate Synod was thereby held by this Court to be dissolved, and who and his adherents were finally removed from possession of the Burgher meeting-house and endowments at Perth, and the latter are the terms which are employed in the present case by the Relief Presbytery to the termination of Mr Smith's connexion with that body, the abrogation of his license to him to preach, and the extinction of that ecclesiastical relation between him and his congregation which was altogether dependent upon this function which the Synod had first conferred, and then taken away, and whose right to exercise himself had expressly recognised and acknowledged, both at accepting his ordination and receiving his ordination.

I pray your Lordships also to observe, that in this case the determination of the Synod was unanimously pronounced, and there is no room for maintenance of argument, as was done in the cases of *Bulloch* and *Craigdallie*, to which more immediately refer in the sequel, that here had been a schism in the judicatory of the dissenting body, one party adhering to, and the other against the original tenets, for maintaining which the trust then in question was constituted; and it was therefore *prima facie* incumbent upon the Court to maintain, not merely what was the original tenet of the body, but which of the parties continued to adhere to it, and by so doing had, in truth, become the Associate Synod. Here the unanimous decision must, upon every principle, be taken as *probatum probata* of what is the true doctrine of the sect; and, upon general principle, and in a preliminary question of possession, I should have thought that, if the points I have before referred to had not even been finally and determined, as I take them to have been, the party who, by his own act, has been deprived of that character, under which alone he got possession of the meeting-house, and that is the only question before us at present, is bound to give it up for the use of those in whose favour a right was constituted, of a nature exclusive of any interference on his part, cut off as he is from his connexion with the Relief Church.

While I state this generally, however, I am free to admit, that, upon a consideration of the circumstances in which Craigdallie's case was ultimately determined in a Court, though not upon the terms of the judgment of the House of Lords, admitting the case for consideration, that it might be thought and contended, that, supposing the respondents to have distinctly averred that the whole of the Relief

No 202.

Mar. 10, 1837  
Galbraith v. Smith.

mod had concurred in abandoning the original tenets they professed, by becoming Mahomedans, Unitarians, or Episcopalians, it would have been incumbent upon your Lordships, after due inquiry, and being ascertained of the fact, to have pronounced judgment finding that that judicatory was no longer the Relief Presbytery, and that the respondents or others, as the case might be, as adhering to their original tenets, were entitled to enforce the maintenance of a trust in consonance with the principles and objects for which it was originally constituted.

But this is an extreme case, which cannot admit of being supposed, and is not applicable to the presbyteries and synods of the Established Church, as to the presbyteries and synods of the Dissenters; and your Lordships might just as well be asked to consider what would be the effect upon the civil rights of a clergyman imposed by the Church of Scotland, after that church had in their ecclesiastical judicatories become unanimously reconciled to the See of Rome, or become professors of any Heathen superstition. At present we have nothing resembling this before us. Here the supreme ecclesiastical judicatory has been unanimous on the matters of doctrine and discipline, and against their judgment, which, the principles of the sect is final and conclusive, we have nothing but the simple attestation of this single individual and his few adherents. Indeed Mr Smith appears to me pretty much in the situation of a bishop in the early days of the church, mentioned by Gibbon, whose name I think was Paul of Zamosata, Bishop of Antioch, who, having been deposed for schism, appealed to the Emperor Aurelian against the judgment of his ecclesiastical superiors; but Aurelian, having convoked a conclave of some seventy or eighty bishops, whose opinions were unanimous in one way, while Paul stood alone in support of his own opinion, held, that a sentence of deposition, affording evidence which must be held probatio probata the loss of the function (and through which alone he had a right to the temporalities of the see), ordered him to be removed from the possession of the office.

In like manner, in the present case, I repeat, that upon general principles, I must hold that the judgment of the Relief Synod is, if not probatio probata, at all events, *prima facie* evidence of the principles of the sect;—that from their judgment alone we can gather what were and what are the doctrines and principles of the Relief church;—that by having his connexion with them cut off, after an appeal, too, referred by himself from the decision of the Presbytery to the highest judicatory of the body, by whom the original sentence was confirmed, he must be held to have abandoned their principles, by professing which he originally acquired the right to the function which has now been abrogated and taken away; and, therefore, in maintaining himself in possession of that civil right, which was incident to the function, he is endeavouring to invert the original objects of the trust in a way the most offensive to the feelings of those who, continuing in connexion with the Relief church, are entitled to be recognised as the party for whose benefit the church was originally constituted.

It is, however, now proper, that, having had opportunities of knowing intimately every circumstance connected with the cases referred to in the papers, I should

202. state to your Lordships what appears to me to be material in each of affecting the judgment we are called upon to pronounce, and upon which ties have in some things been but inaccurately informed. But before do feel it to be incumbent upon me to vindicate a respectable and pious body the Synod of Burgher Seceders, from what is unquestionably a very unfounded calumny, to which they have been subjected in the case for the ents. That calumny is the more offensive, that, whether the statement be false, it has, and can have, no connexion whatsoever with the questions at our consideration; and thoroughly aware as I am of the whole circumstances which it is founded, it would be with deep regret if I did not avail myself opportunity which is now offered me of vindicating the character of the im concerned from the aspersions to which I have referred, and which I believe to be as unfounded in fact, as they are totally and entirely dissimilar with the subject of discussion. I am sorry the learned gentleman by whose paper is drawn is not in his place at the bar, because I shall immediately your Lordships, that nothing but utter and entire ignorance of the subject he refers could palliate the statement, which your Lordships will find at 1 and 75th pages of the case for Smith and others. After an extract from report of the case of Craigdallie, it is said—"It is not now disputed that the rents of the Synod in that case practised a gross deception on the Court's principles which they entertained—denying their abandonment of the principles of the sect—or that the change in the preamble to the formula really ad the doctrine which the minority contended was involved in it. At the day it is acknowledged, that the change did import a repudiation of the principle originally maintained by the Secession, of the duty of the state to the cause of religion, and support an establishment for that end, and was in stance a declaration of the voluntary principle now openly defended by them it is unlawful and antichristian for the civil powers to give any support to it. That this was truly an abandonment of the principles of the sect, on a most important point, no one can deny; and if then admitted, it would, as we immediately see, have led to a decision directly the reverse of what was then pronounced. By most dishonest ingenuity, however, in framing the preamble their formula, which two of the members of the synod themselves (Dr Dick and Dr Peddie), who held the voluntary principle involved in it, justly describe 'cover to duplicity,' and by concealment in Court, in denying any real change adherents of the synod persuaded the judges that there was no intelligible distinction between the sentiments of the two parties, and, consequently, that the minority must be viewed as withdrawing themselves from the communion of the without any cause; and on this footing the case was decided."

Now, what may have been said years afterwards by Dr Dick or Dr Peddie neither know nor care. It may be very likely that these gentlemen, at the age of thirty years or better, having changed their own tenets, might have wished to vindicate their new lights by pretending that they were only following out that were entertained by others of their body in the year 1799. And for us know, such might have been the views of some of their brethren, or of some of their brethren, at that remote period; but in order to have authorized them that the proceedings in that year were of the nature they are alleged in the case to have been, it was incumbent upon the respondents, at least, to have shown some principle was recognised, or some declaration made by the associates;

as, to the effect alleged, although clothed in ambiguous and doubtful terms, by No. 202  
 ch this voluntary principle, as it is termed, was in truth, though not ostensibly,  
 nt to be recognised, sanctioned, and promulgated. Now, I beg leave to tell <sup>Mar. 10, 18</sup>  
 r Lordships, that the only questions which then agitated the judicatories of <sup>Galbraith v.</sup> Smith.  
 gher Seceders were, first, as to the extent of the power assigned in the Confes-  
 of Faith, as recognised in 1648, to suppress blasphemies and heresies, to pre-  
 t corruptions and abuses in worship, when taken in connexion with the words  
 he Solemn League and Covenant, by which, for these purposes, it was declared  
 e lawful for the civil magistrate to have recourse to the sword; and, secondly,  
 ether the obligations imposed by the Solemn League and Covenant were the  
 e upon the present generation as upon their fathers who swore them. These  
 g the only two questions in agitation, the synod resolved, 1st, That they dis-  
 roved of all doctrines which are understood "as favouring persecution for con-  
 nce sake, and ascribing an exorbitant power of religious interference to the civil  
 gistrate;" and, with respect to the other question, they declared, that while the  
 od "hold the obligations of our covenant upon posterity, they do not interfere  
 h the controversy with respect to the nature and kind of it, and recommended  
 all their brethren to suppress that controversy as tending to engender strife rather  
 n godly edifying." These were the only matters determined on by the Synod;  
 I while I remember well, that both by the late Sir Ilay Campbell in giving judg-  
 nt, and by the different counsel employed for those in connexion with the mino-  
 y of the Synod, every sort of improper motive was attributed to them, views of  
 ovation of all kinds, and even disloyalty to the sovereign; neither by these  
 rned persons, nor by the Rev. Mr Jarvie, or the Rev. Mr Watson, or by any  
 e else, was it ever alleged, that the views, and proceedings, and resolutions of  
 y Synod did import a "repudiation of the religious principle originally maintain-  
 by the Secession, of the duty of the state to advance the cause of religion, and  
 port an establishment for that end." Your Lordship will observe, that I don't  
 what may have been the views of Dr Peddie or Dr Dick, or any other indivi-  
 d, upon these or any other matters, that it is within our competency to imagine  
 believe; but what I do say is, that, as a body, no deception was or could have  
 n practised upon the Court as relative to this matter, because no question was  
 r agitated or maintained, in which any thing with respect to an established and  
 lowed religion could have been promulgated or laid down. Accordingly, I beg  
 ve to read to your Lordships the notes of an opinion given by Lord Hermand  
 l the other judges who were present at the decision of the case of Craigdallie  
 en returned from the House of Lords, and which proves the accuracy of the  
 tement I have now made to your Lordships.

"LORD HERMAND.—Of opinion that no deviation on the part of Aikman. Site  
 e to judge of what he understands, and if party will not explain what it is he  
 ans, presumes he has no cause. I am satisfied that, formerly misled by Fraser's  
 tion (a petition to the Associate Synod on the subject which was by it reject-  
 ), which, if adopted, would have been a deviation, seems to him just that, if the  
 railing party becomes Mahometan or Episcopal, though retaining name, subjects  
 ould go to minority. Therefore, enquire what done—goes through it. Do they  
 an to say, that we should carry fire and sword into England, and knock down  
 heocracy to Establish Presbyterian religion?—Satisfied no disaffection to  
 rnement."

202. "LORD BALMUTO.—This is not a question of religion; Section 12 is a civil magistrate nothing to do with religion. Cannot see where any deviation." —

1637. "LORD BALGHEAL.—Anticipated by Lord Hermand. This is a question of fact and have pursuers made out their allegations? Think not. Simply, is any thing in preamble which contains a deviation? No; it is dictated by common sense and principles of Christianity. Look to the feelings of pursuers when under discussion.

"LORD SUCOOTH.—At a loss what conclusion to arrive at. Do not differ from what is said as to the preamble,—but does not see how that is to affect the question."

And now I beg leave to mention the case (the import of which I think Lord Mencrieff has rather misapprehended) in the order in which they occurred.

The first is the case of Bulloch, which came into Court in the month of December, 1799, by a bill of suspension and interdict at the suit of some of the managers of a meeting-house at Kilpatrick, praying for an interdict against Mr Watson and others, whose connexion with the Associate Presbytery had been dissolved, and that they should be interdicted from letting the seats of the meeting-house; and that the suspensors should be maintained in the interim possession. Lord Ashaville granted the interdict; but that interdict was recalled upon a petition in opposition to a very small minority, but the bill was appointed to be answered; and by an interlocutor of the 17th of January, 1800, Lord Glenlee took the case to report upon the bill, answers, and replies. These papers came to be advised on the 27th of May thereafter, when it appears from the notes upon the late Lord Meadowbank's papers, that the vote stood thus:—For passing the bill, Dunsinnan, Craig Methven, Glenlee, Meadowbank, Cullen, and Bennetysse. For refusing under any circumstances, Justice-Clerk, Polkemaet, Armadale, Balmuto, Hermand, Ashaville, and President. But it was discovered that there was a supposed informality in the prayer of the bill, and so it stood refused by a majority. A reclaiming petition was then drawn by myself, then a very few months at the bar; and I found it stated in one of the subsequent papers in the case of Craighallie, that this petition would have been appointed to be answered, but for an inaccuracy, which in a very young counsel perhaps may have been excused, that it omitted, as the forms of Court required, to transcribe the interlocutor reclaimed against. This was the fate, therefore, of the case which first came into Court, the deliberations having been mixed up with a good deal of political discussion, which had really nothing to do with the merits of the question; and upon the ground which I have already shown your Lordships to be untenable, that all such cases were to be determined with a view solely to the extent of the patrimonial rights of the parties, and without having regard to the ecclesiastical principles or uses, for the maintenance and purposes of which the trust had been originally constituted.

An action of declarator was no doubt afterwards raised in that case, but it was not determined till after the decision in the case of Craighallie was carried by appeal to the House of Lords.

That case (*viz.* Aikman v. Craighallie) came before Lord Armadale, and his Lordship proceeding upon the doctrine that the right to the disposal of the subject held in trust belongs to the majority of contributors to the foundation, appointed a condescendence of the contributors of the parties to be given in, as well as of all the other circumstances connected with the constitution of the trust.

In the mean-time, the question of interim possession was brought before the



Sheriff of Perth, afterwards Lord Advocate Colquhoun, who pronounced a judgment, giving the right of possession to Mr Jarvie the one half of each Sunday, and to Mr Aikman the other half, for these gentlemen were colleagues, the charge being collegiate. The principal cause was first determined on 16th November, 1803, when the Court was thus divided :—Polkemmet, Cullen, Bannatyne, Meadowbank, Woodhouselee, for sustaining the defence of Aikman and others, that the trust was one constituted for behoof of a congregation in communion with the Associate Presbytery ; while the President, Justice-Clerk, Armadale, Balmuto, Hermand, Dunsinnan, Craig, and Glenlee, voted for finding the right of disposal belonged to a majority of the contributors ; but of these, it is stated in Lord Meadowbank's notes, Craig, and particularly Armadale, voted “ on the imperfect terms of the titles as expressive of the trust. I thought the object and practice interpretative of the titles.” A very short petition, signed by Mr Henry Erskine, referring mainly to the argument in the information, was appointed to be answered by a vote, at which Lord Bannatyne was added to the former minority, and Lord Armadale “ signified a change of opinion, and thought it was not an absolute property in the contributors, but for behoof of a congregation of Christians in communion with the Associate Synod.” Answers to this petition, signed by the late Lord Kinnedder, came along with it to be advised by the Court on 1st of February, 1804, when, by the majority by which the petition was appointed to be answered the following interlocutor was pronounced :—“ Alter the interlocutor complained of, and find in terms of the petitioners' libel, that the property in the subjects in question is held in trust for a society of persons who contributed their money, either by specific subscriptions or by contributions at the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debts contracted for these purposes, such persons always by themselves, or along with others joining with them, forming a congregation of Christians, continuing in communion with, and subject to the discipline of a body of dissenting Protestants, calling themselves the Associate Presbytery and Synod of Burgher Seceders ; and remit to the Lord Ordinary to proceed accordingly.

Against this interlocutor a very full petition was given in by my friend at the table (Mr Thomas Thomson) on the part of Craigdallie, which was no doubt extremely well drawn ; but in which, I recollect, by a singular mistake, my learned friend argued his case upon the supposition that his client, James Craigdallie, was the same person who had been an original contributor and trustee, but who had been for sixty years at rest in his grave, and this petition was answered by a long paper written by myself. When the case came to be advised, the last interlocutor was adhered to, and I believe by the very same state of the vote, because I find it stated in the Lord Chancellor's speech, that, in point of numbers, the Court was equally divided, though, from the Lord President being in the minority, judgment went for the defender.

I have thought it right to state the circumstances so fully to your Lordships, because, although this case was taken up and determined with the very view of clearing and settling a general question, by a most culpable neglect on the part of the reporters, all notice of it has been entirely omitted in the Faculty Decisions. Your Lordships will find the fact I have now mentioned expressly stated in Lord President Blair's judgment in the case of Bulloch, when it was finally determined in the First Division of the Court in the year 1809. No doubt, in that case the decision was contrary to what it had been in the case of Craigdallie, but it was

No. 20

Mar. 10, 1

Galbraith v

Smith.

1837. pronounced before the remit in the case from the House of Lords, which finally extinguished the doctrine, that the rights of the parties were at all dependent upon the amount and extent of their contributions, and established, beyond all future question, that the civil rights of the parties were to be settled simply upon a proof of their adherence to, or departure from, the principles on which the trust was originally constituted. It is unnecessary that I should trouble your Lordships with the precise terms of the judgment of the House of Lords in the case of *Craigdallie*, but it was to this effect, that it was proved as matter of fact, first, That the purposes of the parties in constituting the trust was that of founding a place of religious worship for the uses of a congregation agreeing in religious opinions: Secondly, That this body, consisting of the contributors and congregations, had, both before and after the establishment of the trust, belonged to and formed a branch of the dissenting body of Burgher Seceders, and had acceded to and continued in communion with the Associate Synod. But the House of Lords found further, as matter of fact, that it did not appear to what purposes the subject should be applied, if the whole, or a part only, of the persons using the same should change their religious opinions, principles, and persuasions, and should cease to adhere to the Associate Synod; and, with these findings, the case was remitted for reconsideration to this Court.

The pursuers (the party who were in opposition to the majority of the Synod and who had renounced its authority) presented a petition to apply the judgment in which it was fairly admitted that the House of Lords had upset that ground of their action, which rested upon the proposition that the rights of the parties were to be determined by their numerical majority according to the amount of their contributions, and that the subjects must ultimately be decreed to belong to those who continued in communion with the Associate Synod, upon the principles on which the Secession was originally formed.

Aikman's party, of course, agreed in this explanation of the views of the House of Lords, but it would have been competent for them to have shown, as matter of fact, that it having been a fundamental rule of the sect, that in the supreme judicatory alone was vested the power of determining all questions of doctrine and discipline, so the judgment of the Synod was to be received as probatio probantis of their adherence to their original principles, it being incompetent for the Civil Court to review the decisions in such matters of the ecclesiastical judicature. But they were advised at once to join issue with their opponents upon the fact, that there had been no apostacy on the part of the Synod, and that the tenets which it, and those adhering to it, professed, were the original tenets of the Burgher Secession. Accordingly, a condescendence was ordered to be given in by the pursuers of what they averred as to change of doctrine; and, upon advising the pleadings of the parties, the Court pronounced a judgment, finding that there had been no deviation, on the part of the Synod, from their original standards and principles; and, therefore, sustained the defences of Aikman, and ordained the others to be removed from the possession of the subject.

It is unnecessary that I should trouble your Lordships with the words of the judgment, but I would recommend it to the consideration of the respondents in this case; because the findings of the interlocutor seem to afford ample refutation of the calumnious charges which they have thought fit so unnecessarily to bring against the respectable persons of whom the Associate Synod was at that time composed.

The case went back to the House of Lords, and there the judgment of the Court of Session was finally affirmed by Lord Eldon, who, according to his own statement, had bestowed the utmost pains in considering the questions involved in determination in all their bearings. I shall not trouble your Lordships by referring to the Lord Chancellor's observations, which are to be found in the Reports (1 Dow, p. 16; 2 Bligh, 544, 545). But it is desirable that your Lordships should see the light in which that judgment was considered by the same great lawyer some years afterwards in the case of *Foley v. Wontner*,<sup>1</sup> which was a case of a similar description with that of *Aikman*, and where his Lordship thus laid down the law:—"One of the most difficult questions in these cases is, what is to be the course when the doctrines, which it was originally matter of agreement should be inculcated, are not adhered to by all the congregation; some of them having changed their religious opinions. I take it to be now settled, by a decision in the House of Lords,<sup>2</sup> on appeal from Scotland, that the chapel must remain devoted to the doctrine originally agreed on."

And again, in the case of the Attorney-General v. Pearson, 3 Merivale, p. 399, his Lordship says:—"When an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust, what form or species of religious worship was intended, the Court can find no other means of deciding the question than through the medium of an enquiry into what has been the usage of the congregation in respect of it; and if the usage turns out, on inquiry, to be such as can be supported, I take it to be the duty of the Court to administer the trust in such manner as best to establish the usage, considering it as matter of implied contract between the members of that congregation."

Afterwards he adds:—"I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, We have changed our opinions; and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alterations which we have taken place in our opinions." He says also, "that the nature of the original institution of the body must be looked to as a guide for the decision of the Court."

And, last of all, he observes:—"Where a congregation becomes dissentient among themselves, the nature of the original institution must alone be looked to as a guide for the decision of the Court; and that to refer to any other criterion—as the sense of the existing majority—would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character of the Court."

Your Lordships have here distinct evidence, therefore, that in all such cases Lord Eldon held the law to be settled by the case of *Craigdallie*; and I find that it has since, and that recently (April, 1836), been so recognised and acted upon by the Court of Exchequer in Ireland, where, after the most learned judgments delivered by the bench, the same principles were laid down and enforced in the

<sup>1</sup> 2 Jacob and Walker, 247.

<sup>2</sup> *Craigdallie v. Aikman, &c.*

1292. case of the Rev. Francis Dill and others, against the Rev. David Watson, or, as has been termed, "The Clough Case."

1837. Your Lordships will therefore consider, in how very different a situation we are now placed from that in which our predecessors stood, when the Kilpatrick and Perth cases were first brought forward six-and-thirty years ago. At that time questions of this kind were altogether new, and the majority of the Court was of the opinion, that the civil interests of the parties were to be determined, not by a consideration of the religious purposes for which the subjects had been originally destined, but according to the amount of the pecuniary contributions which the parties respectively had embarked in the concern. Accordingly, in the question of interim possession, it was but natural that the Court should proceed with reference to that state of their opinions. But the matter is very different now. The judgments of the House of Lords have placed the matter on quite a different foundation, and their Lordships have taught us the principles on which all such cases are to be adjudicated, and from which, in my humble opinion, we have no right to depart.

In truth, therefore, we now stand as the Court stood the day that the judgment in the case of Craigdallie was pronounced in the year 1815, and would ask your Lordships, whether if one or a dozen of cases similar to that then determined had for the first time come into Court upon that day, and the point of possession had come before their Lordships, they would not, and must not, have applied the principle they had then recognised, and removed from the interim possession the different subjects the individuals who had dropped their connexion with the Associate Synod? But the case before us now is in precisely the same situation. The subjects here, it is admitted, were destined for the purposes of a religious community in connexion with the Synod of Relief. The Synod of Relief as a body has adopted no new profession whatsoever. It is not even pretended that it has done so. The respondent, Smith, was inducted as pastor over the congregation, solely in virtue of the license to preach which he had received from the Relief Synod, and the induction and ordination under their authority which subsequently took place. To the authority of that body he was bound to submit in questions ecclesiastical. In fact, as to the matters which have given rise to the question, by pleading before the Presbytery, and then appealing to the Synod, he again solemnly recognised their power to determine the matter at issue between him and his brethren. By that supreme ecclesiastical judicatory he was in effect deprived of his license, and of all ecclesiastical connexion with it, in virtue of which alone his relation of pastor over a Relief congregation was originally created, and must for ever depend. Now, as I find all this to be quite clear, as a matter of fact uncontroverted, and as I understand it in point of law uncontrovertible, I think that the advocates have made out a case *prima facie* which requires of us to place them in possession of this meeting-house, which it is their object to apply to the purposes of a congregation in communion with the Synod of Relief, and to remove from that possession the respondent, who has lost all title to retain it, just as much as if he had been reconciled to the Church of Rome, or had declared himself an Episcopal.

I am sorry for having detained your Lordships at so great length, and for having been compelled to deliver my opinion in a manner so very loose and desultory; but I was prevented, from the pressure of the rest of the business of the Court.

in opening the record till yesterday, and bestowing upon it that time which No. 202  
 ould have been required for condensing, and arranging in a more satisfactory Mar. 10, 18  
 dner, an exposition of the views I entertain upon the subject. At the same time, Galbraith v.  
 never imperfectly I may have been able to convey to your Lordships a view of Smith.  
 judgment I have formed, I beg leave to state, that my opinion in the case is  
 y clear and decided.

LORD JUSTICE-CLERK.—If we were to decide all the points argued in the  
 pers, this would be a very important case indeed; but we are not warranted to  
 licate any opinion on the merits involved in the declarator. The question to be  
 cided here is, whether, under all the circumstances in which this person has  
 en dealt with, his application against being summarily ousted was competent, and  
 urther the interdict granted was well-founded? I am perfectly aware that there  
 a great deal of argument in the papers as to what is the subject of the declarator  
 ow in dependence. But the only question here is, are we to maintain Mr Smith in  
 ossession of his pulpit, or are we to recal the interdict, and invert certainly the  
 ossession? I have heard with much satisfaction the speech of Lord Meadow-  
 ank, which may be of great service when we come to the merits. I confine my-  
 elf, however, to the question of possession. On looking to the cases of Craig-  
 allie and Bulloch, I see that, in similar circumstances, the possession of the  
 minister was maintained; and, therefore, I think we have great authority for the  
 iew I take, that Mr Smith's possession ought not to be disturbed pending the  
 iscussion of the declarator. The final decision in the case of Craigdallie settled  
 he law, and did not affirm our first decision. In both cases, however, the posses-  
 ion was maintained, and there are strong authorities for adhering to the interlo-  
 ator of the Sheriff.

LORD GLENLEE.—I found great difficulty in determining what would be the  
 sue of the declarator, and, therefore, I am rather for letting this lie over till it  
 decided.

LORD MEDWYN.—I have a great difficulty in coming to any conclusion on a  
 eat deal of what has been argued. The Presbytery declare Mr Smith out of  
 onnexion. The managers and elders resolve not to admit him. But an inter-  
 ct is obtained, and observe what it is—an interdict against giving access to any  
 e but Mr Smith, and it prohibits Mr Harvey from preaching in the church.  
 ow, when I consider that this is the case of a church in connexion with the  
 elief Synod, and that the great body of the congregation adhere to the Synod, it  
 a strong case to keep Mr Smith in possession. It is difficult to say that the pos-  
 sion is in the minister, and not also in the proprietors. If the parties here  
 ere in the same situation as in the case of Craigdallie, I would follow the same  
 le; but they are not in the same situation. That decision is partly in favour  
 and partly against Smith. The point taken in the first cases was, Who have  
 e majority? and in the cases of Bulloch and Aikman, each claimed a majority  
 interest also. Now, by the final decision in the case of Craigdallie v. Aikman,  
 e majority is not to rule, and so far it is in favour of Mr Smith; and, although the  
 hole Synod had concurred in deserting their original principles, yet, according to  
 e decision of the House of Lords in the Craigdallie case, we are bound to inquire  
 to that, and maintain the use of the church in accordance with these principles. So  
 if this decision is favourable to Mr Smith. But, again, in that, and all the other  
 es, there was a schism in the body. Now, here there is no division in the  
 dy, but an unanimous judgment of the Presbytery and Synod. That makes a

202. great difference as to the question of interim possession, and I would wish to adopt some middle course. In the case of Dr M'Crie, an arrangement was made for a joint possession by the contending parties, and I think something of the same sort might be adopted here.

Dean of Faculty Hope, for Smith, &c.—We have no objection to such an arrangement, and made an offer to that effect when the cause was before the Sheriff, but it was rejected.

The other Judges concurring in this suggestion, the Court (March 1837. delayed for a few days, that the parties might adjust the terms of an interlocutor for giving effect to it, and this day the following judgment was pronounced :—

“ The Lords, upon the report of Lord Moncreiff, having advised the cases for the parties, and heard counsel, advocate the cause, and recall the interlocutor pronounced by the Sheriff; and find that, till otherwise ordered by the Court, the advocates and respondents shall enjoy an equal possession of the meeting-house and pulpit in question, commencing on Sabbath, the 19th day of March, the advocates having the use on that day of the said meeting-house for the forenoon and evening diets, and the respondents for the afternoon of that day; and on the succeeding Sabbath, the 26th March, the respondents having in like manner the use of the meeting-house for the forenoon and evening diets, and the advocates for the afternoon diet, and so on alternately on each succeeding Sabbath throughout the year; but under this qualification, that, on the occasions of the ordinary administration of the sacrament, the advocates shall have the exclusive use of the meeting-house on the Communion Sabbath, and relative days of service on the summer sacrament; and that the respondents shall have the like exclusive use of the meeting-house on the occasion of the winter sacrament; and declaring that, in the meantime, no steps shall be taken to preach or declare the said meeting-house vacant; it being understood that this shall not interfere with any right on the part of the advocates to have a stated pastor appointed to them, provided he shall not be appointed a minister of the said meeting-house; and, to the effect aforesaid, grant the interdict applied for, and, quoad ultra, refuse the same in hoc statu, and decern: Quoad ultra, remit this process to the action of declarator raised at the instance of the respondents, and now depending before Lord Moncreiff, with power to his Lordship to determine all questions of expenses, hinc inde, at the issue of the cause: And, further, allow the decree now pronounced in regard to the question of interdict, and as regulating the interim possession, to be extracted ad interim.”

**WILLIAM ROBERT JACK, Pursuer.—*D. F. Hope—Russell.***  
**WILLIAM UMPHERSTON and JOHN KERR, Defenders.—*Sol.- Gen. Rutherford—Ivory.***

No. 203.

Mar. 11, 1837  
 Jack v.  
 Umpherston.

*Reduction—Process—Justice of Peace.*—A master presented a petition to the Justices of the Peace, complaining of his servant's desertion, and craving warrant to apprehend him for examination, and, on proof of the desertion, craving warrant to imprison him until he found caution to return to his service; the servant was apprehended, and, after some procedure, warrant of imprisonment was granted, as prayed for; the master, by minute lodged in process, abandoned the warrant as a warrant of imprisonment; the servant raised a reduction of the whole proceedings: that, as the decree could be put to execution without being extracted, reduction was a competent form of review though no extract had been taken.

**WILLIAM UMPHERSTON and JOHN KERR, millwrights in Dundee,** Mar. 11, 1837  
 presented a petition to the Justices of the Peace of Forfarshire, stating 1st Division.  
 William Robert Jack had deserted from their service, without giving Ld. Cockburn.  
 14 days' notice as he was bound to do, and craving warrant to apprehend and bring him up for examination, and, on proof of his desertion, praying warrant for committing him to some legal place of custody until he found caution to return to their service for 14 days at least, reserving their claims for damages and expenses. The justices granted warrant to apprehend Jack and bring him up for examination; this warrant was indorsed by Lanarkshire Justice of the Peace, and Jack was apprehended at Glasgow and conveyed in custody to Dundee, where, after a proof on the merits, and an interval of some days, during part of which Jack was allowed to be at liberty on finding caution for £5, *de judicio sisti*, the Justices pronounced this judgment: "Find it proved that the work people at the petitioners' work are paid their wages every fortnight, viz., on Saturday evening for the two weeks preceding: Find that sufficient evidence has been adduced, that it has been the invariable practice at the petitioners' work, for the workmen to give a fortnight's intimation before leaving the service, and for the masters to give the same intimation to the servants before dismissing them from the service: Find it farther proved, that the respondent received payment of his wages on Saturday the 1st instant, for the two weeks preceding, and failed to return to his service on the Monday following: Find that the respondent deserted his service without having given the petitioners the requisite previous notice of 14 days: Find, therefore, that the respondent has illegally deserted his service; and therefore grant warrant for committing him prisoner to the gaol of Dundee, therein to be detained until he shall find sufficient caution and surety acted in the Justice of Peace court-books of Forfarshire, under the penalty of £5 sterling, that he shall return to the petitioners' service, and continue therein for the space of 14 days after so coming to the petitioners' service, reserving to the petitioners their



1837. claim against the said respondent for the expense of these proceedings, and for the damages they have sustained in consequence of his desertion, and decern." After this judgment was pronounced, Umpherston and Kerr lodged a minute in process to the effect that they did not intend to put the warrant in force, and abandoned it as a warrant of imprisonment.

Jack raised a reduction of these whole proceedings. The action also concluded for declarator that the apprehending him, detaining him in custody, carrying him in custody from Glasgow to Dundee, requiring him there to find bail, and the other proceedings there adopted against him were "illegal, malicious, oppressive, unwarrantable, and unjust," and that the defenders were liable in damages. These conclusions were also expressed as to depend upon the conclusions of reduction being sustained, but were stated independently of the reductive conclusions.

Umpherston and Kerr pleaded, in defence, that the proceedings having ended in a final judgment, which was not extracted, reduction was an incompetent remedy; that this was so decided in the case of *Coutts*, and that the form of a reduction had been resorted to by Jack, in order to avoid the legitimate mode of review by advocacy, in which case Jack would have been required to find caution in common form; and that the defenders had a substantial interest in compelling Jack to resort to that mode of review, in place of attempting the present form which was irregular. His action ought therefore to be dismissed.

Jack answered (1.) that in the case of *Coutts* the proceedings were in the Sheriff Court, where decrees were extractable; but that, in this instance, the proceedings were before the Justices of the Peace, and the warrants of which he complained were always put in force without extract, the original warrant being delivered to the party who was to execute it. And as the defenders had abandoned all intention of enforcing imprisonment under the warrant, it was not likely they should ever attempt to obtain an extract of it. In these circumstances it was competent for him to pursue a reduction of the decree though unextracted. But (2.) the action contained other conclusions, especially for damages, which did not depend on the reductive conclusions, and in which he was entitled to insist, whatever might be decided as to the reductive conclusions.

The Lord Ordinary "sustained the first defence, which is of a dilatory nature, viz., that the decree or decrees of the inferior court not being extracted, the reduction is incompetent, dismissed the action and decerned: and found the pursuer liable in expenses."\*

\* Dec. 5, 1835. (ante, XIV. 110).

\* "NOTE.—The Second Division of the Court decided in the case of *Coutts* 5th December, 1835, that reduction was not a competent mode of obtaining redress against the decree of an inferior court not extracted. But in that case the decree was not a final one, whereas here it is; and it is contended by the pursuer that this difference makes that case inapplicable, while it is maintained by the defenders that

The pursuer reclaimed.

No. 203.

**LORD GILLIES.**—When there is a decree pronounced, of the ordinary sort, so as to be capable of extract, then I understand it to be fixed that there can be no reduction brought, before extract; there must be advocacy. But I do not think it follows, from this, that when a decree is pronounced which is not extractable, the rule must apply. This Court should not lightly cut off the old established mode of reviewing decrees by a process of reduction; and although this form is not now to be applied to an unextracted decree, which is extractable, and requires to be extracted before being put to execution, I think it ought to apply to an unextracted decree which is not extractable, or which may be put to execution without being extracted. For, I consider that such decree, before extract, stands upon the same footing, in so far as a process of reduction is concerned, as any other decree, which is extractable, stands upon, after it has been extracted.

Mar. 11, 1837.  
Jack v.  
Umpherston.

**LORD PRESIDENT.**—I am of the same opinion.

**LORD MACKENZIE.**—I also concur. And I think the pursuer's right to bring a reduction might be supported on the separate ground that the defenders have substantially abandoned the decree. The case is therefore ended and over, to all intents, and I do not see of what use a process of advocacy would be, or a process of suspension either, or any other process but a reduction. The case of Coutts stood in different circumstances from this.

**LORD COREHOUSE.**—I am of the same opinion. The case of Coutts was not the same with this case, but essentially different. The decree in that case could not have been put to execution until extracted. The decree in this case could be put to execution without being extracted. I think the case of Coutts was well decided; but it is quite consistent with the rule established by it, to hold that the process of reduction is competent here.

**THE COURT** altered the interlocutor of the Lord Ordinary, and found the process of reduction competent; and remitted to the Lord Ordinary to proceed as should be just.

**GREIG and MORTON, W.S.—FLEMING and JOHNSTON, W.S.—Agents.**

principle and the object of the decision was to fix, that extract was necessary in all cases. The Lord Ordinary has proceeded on this last view, which seems to me to be warranted by what passed on the bench when the case of Coutts was decided. The effect, and generally the object, of proceeding by reduction where there has been no extract, is to evade finding caution in an advocacy or suspension; and if this be incorrect, the practice ought to be checked, because it appears to be on the increase. There are several cases in the same situation at this moment, and the Lord Ordinary hopes that the preceding interlocutor will be submitted to review, in order that the point may be fixed."

No. 204.

MRS ELIZABETH BIRNIE OF CRAIGIE, Pursuer.—*A. McNeill.*  
 LAURENCE CRAIGIE, Defender.—*Sol.-Gen. Rutherford—A. Murray.*

Mar. 11, 1837.

*Craigie v.*  
*ralgie.*

*entts v. His*  
*reditors.*

*Husband and Wife—Aliment.*—A woman, having obtained decree of divorce against her husband, insisted in a conclusion for suitable aliment: she had a bond of annuity from him, for £40, but she alleged this to be inadequate, as he possessed considerable funds; he averred that he was in a state of utter destitution; she declined to go into a proof on the subject:—Held, in respect of her so declining a proof, that there were no grounds established, *hoc statu*, for awarding aliment.

Mar. 11, 1837.

*or Division.*

MRS ELIZABETH BIRNIE OF CRAIGIE, raised an action concluding her husband should be divorced for adultery, and should be ordered to pay to her a suitable aliment. She obtained decree of divorce, and in regard to the aliment, the Lord Ordinary "having heard counsel for parties, decerned against the defender for twenty pounds sterling of aliment, with the expense of extract, if necessary, and granted warrant for extract ad interim, and appointed the defender, by the first box-day, to give in a condescendence of his means and effects."

The defender reclaimed against this interlocutor, and also appended the reclaiming note a condescendence, stating that he was utterly destitute of funds, and that a bond of annuity for £40, which he had some time ago granted to the pursuer, was annually paid, not by any funds of his own, but solely by the aid of his friends. He pleaded, therefore, no award of aliment should be made against him. The pursuer presented answers to the condescendence in which she alleged that the defender was possessed of considerable funds. On advising these counter-arguments, the Court intimated to the pursuer that unless she undertook to prove her averments as to the defender's funds, they could not make an award of aliment, in the face of the most pointed allegation by him that he was in a state of complete destitution. The pursuer declined to go into a proof, and the Court, in respect of her so declining, recalled the interlocutor of the Lord Ordinary, and found that there were no grounds established, *hoc statu*, for awarding aliment against the defender.

FISHER and DUNCAN, S.S.C.—BELLS and RUTHERFORD, W.S.—Agents.

No. 205.

ROBERT YEATTS, Pursuer.—*Sandford.*  
 HIS CREDITORS, Defenders.—*Robertson—Mure.*

Mar. 11, 1837

*1st Division.*

*Cessio.*—A pursuer who had suffered imprisonment for 20 months, and found entitled to the benefit of the cessio; and it being impossible for him to report the oath, before the end of the session, the Court granted a writ for his liberation, without caution.

ROY and WOOD, W.S.—A. NAIRN, S.S.C.—Agents.

JAMES BROWN, Pursuer.—*Sol.-Gen. Rutherford—G. Dundas.*  
 MR EVAN J. M. MACGREGOR and OTHERS, Defenders.—*D. F. Hope—*  
*Neaves.*

No. 206.

Mar. 11, 1837

Brown v.  
Macgregor.

**Entail—Adjudication—Faculty.**—1. An entailer disposed his lands to himself in liferent, and to his son in fee, whom failing, to a series of substitute heirs of entail, including not only descendants of his body, but also collateral relations; the structure of the deed showed that the entailer considered the institute to be included under the term “heirs of entail;” the irritant and resolute clauses provided that if “the heirs descending of my body, or any of the other heirs of tailzie fore-mentioned shall contravene, &c., the person or persons so contravening shall forfeit, &c. :”—Held, by a majority of the Whole Court, that these words did not apply to the institute, although he was, in one sense, an “heir descending of the body” of the entailer, because, both in respect of the strict construction applicable to entails, and also in respect of the sense in which these words were actually used in the deed, they applied to no heirs but heirs of entail,—and such words could not be extended to include the institute, however clearly it might appear that the entailer had supposed them to be sufficient to include him.—2. Question, (1.) on the assumption that the prohibition against altering the order of succession was not imposed on the institute, but that prohibitions, duly fenced, against sales or leases, were imposed on him, is it competent for a creditor to adjudge the fee of an entailed estate in payment of his debt? or (2.) failing this, is it competent to adjudge the debtor’s faculty of altering the order of succession, and thereby set aside the entail?

In 1814 the late Sir John Murray Macgregor, Bart., of Macgregor, Mar. 11, 1837  
 executed a deed of entail of the lands of Lanrick and others, by which  
 “disposed these lands “to himself in liferent, and to his son, Evan 1st Division.  
 Macgregor Murray, in fee;” whom failing, to John Atholl Bannan Ld. Corehouse  
 Macgregor Murray, his grandson, and a certain series of substitute  
 heirs, including not only descendants of the entailer’s body, but also colla-  
 teral relations.

Immediately after the destination, there were inserted several condi-  
 tions as to bearing the name and arms, &c., each of which was imposed  
 on “the whole heirs of tailzie under the above destination, and the  
 heirs whomsoever succeeding in virtue of the tailzie.” The prohibitory  
 clauses in the entail, 1st, excluded rights of terce or courtesy on the  
 death of any “heir of tailzie” in possession; and provided, 2d, “That it  
 shall not be in the power of any of the heirs of entail hereby substituted  
 to me, to alter, innovate, or change this present deed of tailzie, or other  
 deed or deed to be made by me, or order of succession hereby prescribed,  
 which may therein be appointed, or to do any act or deed that may  
 alter or infer any alteration, innovation, or change thereof, directly, or  
 indirectly. But with this exception always, that, in case any presumptive  
 heir or heirs, who might succeed to the said lands and estates,  
 should be forfeited or attainted of treason,” &c.—then the heir in possession  
 should renew the entail, excluding the attainted party. “3d, That it shall  
 be in the power of the said Evan John Macgregor Murray, or John

Q. 206. Atholl Bannatyne Macgregor Murray, or any of the other heirs substituted to me in manner foresaid, who shall succeed to my lands and estates, to sell, alienate, wadset, impignorate, or dispose of the lands and estates, or any part thereof, either irredeemably or in reversion, onerously or gratuitously, or to gift or dispose of the said grant securities affecting the same, or to burden the said lands and estates, in whole or in part, with debts or sums of money, interest, annualrents, or any other burden or servitude whatever, nor to contract debts, nor grant deeds, nor to incur the guilt of treason or misprision of treason, nor in short to do any act or deed, directly or indirectly, whether of a public or private nature, whereby the said lands or estates shall be burdened, affected, forfeited, escheated, or evicted from their present manner of way whatever, or this present tailzie or course of succession hereby prescribed, in any shape prejudiced, altered, or infringed. That it shall not be in the power of any of the said heirs of tailzie to accept always my son, the said Evan John Macgregor Murray, whose taste and judgment I have the utmost confidence, to be the heir down trees," &c.

The irritant and resolute clauses were in these terms:—"In case the heirs descending of my body, or any of the other heirs before mentioned, shall contravene any one of the particulars specified, &c., that then, and in any one of these cases, not only the said acts, &c., shall be null, &c., against the other heirs of tailzie; but the person or persons so contravening, &c., shall ipso facto stand seised and forfeit all right, &c., to said lands, &c."

The enabling clauses gave power to "each of the said whole entail above mentioned" to make certain provisions on spouses and younger children. Power was also given to "the several heirs who shall succeed," &c., to make excambions of land on certain conditions, and it was also "specially provided and declared, that the said John Macgregor Murray, or John Atholl Bannatyne Macgregor, and the other heirs of tailzie and provision, shall have power, and are hereby authorized, to excamb the lands of Gart, either in whole or in part, upon receiving an equivalent therefor in lands more or less to my said estates, and the difference in value (if any) in money at the event of such excambion not taking place, my said heirs shall be entitled, and are hereby authorized, to sell the said lands of Gart," &c.

The deed reserved power to the entailer "not only to alter the course of succession, as to all the heirs of tailzie before specified, but also to sell or burden, &c." The deed also contained a provision that if the entailer died without making up titles to all the lands in the entail it should be obligatory on "my heirs-at-law, and other heirs," to make up titles, and denude themselves "in favour of the said heirs of tailzie." The obligation to record the entail was imposed on "the said Evan

Macgregor Murray, my son, and, failing him, the said John Atholl Bannatyne Macgregor Murray, and all the other heirs of tailzie." The precept of seisin directed infeftment to be given to the granter in liferent, and "to the said Evan John Macgregor Murray, my son, whom failing, the said John Atholl Bannatyne Macgregor Murray in fee, and the other heirs of tailzie above mentioned."

No. 206  
Mar. 11, 1835  
Brown v.  
Macgregor.

Sir John Macgregor died without altering the entail, and his son, Sir Evan, who also succeeded as heir-at-law to some unentailed heritage, expedite a charter under the precutory of entail, and was infeft in 1824. The entail was duly recorded.

Sir Evan afterwards became one of three co-acceptors of a bill for £1000, which was protested for non-payment, and assigned to James Brown, accountant in Edinburgh, who, being advised that the entail was ineffectual, raised a summons of adjudication of the lands contained in the deed of entail; against which action, defences were lodged by Sir Evan, the institute, and by his son John, the first substitute, who pleaded, that the entail was valid and effectual, and that nothing but the life-interest of Sir Evan could be adjudged.

Cases were ordered by the Lord Ordinary.

*Pleaded by the Pursuer—*

1. The clause of prohibition against altering the order of succession was directed against "the heirs of entail hereby substituted" to the entailer. This did not reach Sir Evan, who was the institute, and was not an heir of entail.<sup>1</sup>

2. There was no other part of the deed which effectually applied this prohibition to Sir Evan. It was true that the next clause, which was directed nominatim against him, prohibited selling, burdening, contracting debt, committing treason, &c., and summed up the detail of these prohibitions with the following brief and general words:—"Nor, in sort, to do any act or deed, directly or indirectly, of a public or private nature whereby the said lands may be burdened, affected, forfeited, &c., in any manner of way whatever, or this present tailzie or course of succession thereby prescribed, in any shape prejudiced, altered, or infringed." But, even in an ordinary deed, the general summary at the end would be construed with reference to the particulars which preceded it, and could not be extended to a different species of prohibitions, especially where such species was already appropriately provided for, in a separate clause which was wholly framed in reference to it. Much more must such a rule of construction be applied, against extending the fetters of an entail.<sup>2</sup> And

<sup>1</sup> Edmonstone, Nov. 24, 1769 (4409), reversed April 16, 1770; Leslie, 1752; *John v. Tailzie*, No. 49; Erskine, Feb. 14, 1755 (4406); L. Elibank, July 2, 1833 (ante, XI. 858), affirmed Mar. 19, 1835 (1 S. and M.L. Appeal Cases, 1); Moreland, July 2, 1833 (ante, XI. 863), reversed March 31, 1835 (1 S. and M.L. 29).  
<sup>2</sup> *Dick*, Jan. 14, 1812, F.C. Bruce, Jan. 15, 1799 (15539); *Barclay*, May 1831 (1 Shaw, App. Ca. No. 8).

206. this deed was essentially distinguished from those of the Roxburgh Lochbry entails by the existence of the separate prohibitory clauses, respecting the order of succession, as well as by the enumeration of particulars, which immediately preceded the general summary.

3. If there was no prohibition against Sir Evan's altering the succession, there was no effectual entail, in any question between him and his creditors. He had the power to make up a new investiture, under which he must enjoy all the rights of a fee-simple proprietor; and this alone warranted an adjudication of the estate, as it was incongruous to hold that a party could possess an absolute control over his estate, and that his creditors should not have power to adjudge it from him. He was barred from opposing such an adjudication, and, a fortiori, as his substitute was barred from doing so; especially as the entail was absolutely defeasible at the will of Sir Evan, and the heirs had merely a right of succession. Besides, it had been held,<sup>1</sup> that a defect in any one of the three main prohibitions of an entail, amounted to a nullifying of the whole entail, even in questions inter heredes; and at least, such defect in reference to the order of succession, which was of the essence of an entail, must have that effect, in a question with creditors. But, separately, the pursuer had recently raised an action to adjudge Sir Evan's faculty of altering the order of succession, by which means the pursuer might defeat the entail, precisely by that species of deed, which was prohibited, in case the Court should consider any other mode of defeating it, to be inept.

4. But even if the entail were otherwise good, its irritant and resolutive clauses were so framed as not to include Sir Evan. They were only directed against "the heirs descending of my body, or any of the other heirs of tailie before mentioned." This reached only to heirs of entail, and not to the institute.<sup>2</sup> The heirs of entail consisted, partly of heirs of the body, and partly of collaterals, so that every word of the clause received full meaning without being extended to the institute. And, though the institute happened to be an heir of the body, it was plain that the only kind of heirs, against whom the irritant clauses were directed, or who were at all contemplated in the deed of entail, were the heirs of entail alone.<sup>3</sup>

*Pleaded by the Defenders—*

1. The prohibition against altering the order of succession was repeated in two separate clauses of the deed, the last of which, being directed against Sir Evan nominatim, was chiefly relied on by the defenders, and it did not refer to the previous one, but possessed a complete and independent sense by itself.

Sharpe, April 18, 1835 (1 S. and M.L. 504).

<sup>2</sup> See references under the first plea.

<sup>3</sup> 3 Ersk. 8, 47; Steel, June 27, 1817; 5 Dow, 72.



the last clause, there were embodied all the great prohibitions No. 206.  
tail, against selling, or burdening, or altering the order of suc-  
cession.

These were briefly but comprehensively expressed by the Max. 11, 181  
prohibition against doing "any act or deed, directly or indirect- Brown v. Macgregor  
er of a public or private nature, whereby the said lands or  
may be burdened, affected, forfeited, escheated, or evicted from  
any manner of way whatever, or this present tailzie or course of  
is hereby prescribed, in any shape prejudiced, altered or in-

This amounted to an express prohibition against altering the  
succession. It was even more specific than the phraseology of  
the 1685, c. 22, required, or than had been expressly sustained  
in *James of Roxburghe*<sup>1</sup> and *Lochbuy*.<sup>2</sup> And as there was no given  
words, or order of arrangement, which was essential to an entail,  
though if a sufficient prohibition against Sir Evan's altering the  
entail was found within the deed.

Even if a defect occurred in this member of the entail, the pro-  
hibition against selling and burdening were directed against Sir Evan  
himself, and were duly fenced. The present action, being an adjudi-  
cation of the debt of Sir Evan, must therefore be unavailing: and both  
Sir Evan's son, or any heir-substitute, had a title and interest to defeat  
the action. Even if there was one mode of defeating the entail, by  
the succession, the heirs-substitute had an interest to plead that  
the entail was duly fortified against every other species of attack.<sup>3</sup> And  
as to the new action to adjudge the faculty of altering the order  
of succession, such power of alteration inhered in the testator, and was strictly  
limited to Sir Evan, and could no more be adjudged than his power of  
altering his last will. But the merits of that action were not hujus

modi. The irritant and resolute clauses were so expressed as to include  
Sir Evan. He was the only son of the entailer, and had taken up his  
residence, and some heritage, as heir-at-law. He had been mentioned  
in the deed, besides the heirs of tailzie, in various previous parts of the  
deed, especially in the prohibitions; and the irritant and resolute clauses  
referred to "the heirs descending of my body, or any of the other  
heirs of tailzie before mentioned." These words, by their true import,  
included Sir Evan, who was an heir descending of the body before men-  
tioned, and undoubtedly the sense in which the entailer used these words  
was intended to include him. But there were various decisions<sup>4</sup> importing that an in-  
terest might be included under any designation such as "person," &c.

<sup>1</sup> 23, 1807 (M. Tailzie, Appx. No. 13).

<sup>2</sup> 23, 1807 (M. Tailzie, Appx. No. 14).

<sup>3</sup> *James v. James*, March 8, 1821 (F.C.); *Cathcart*, July 18, 1831 (5 W. & S. App. 1).

<sup>4</sup> *James v. James*, Feb. 27, 1799 (15473); *Douglas*, Nov. 14, 1823 (ante, II. 487, or 51).

1837. which unequivocally applied to him, and there was one recent case<sup>1</sup> which was almost a direct precedent for including the institute, under the very words of this deed.

The Lord Ordinary "repelled the defences; decreed in terms of the libel; and found the pursuer entitled to expenses." \*

<sup>1</sup> Baughn, Jan. 14, 1834 (ante, XII. 231).

\* "NOTE.—It appears to the Lord Ordinary perfectly clear, that there is no prohibition in this entail against altering the order of succession, effectually imposed on Sir Evan John Murray Macgregor, the institute. There is a very careful and anxious clause against alteration and innovation, and all acts and deeds directly or indirectly importing them, but that clause is expressly limited to the heirs of entail substituted to the maker, and, therefore, as is admitted, it cannot bind the institute.

"A second prohibition is directed against alienating, burdening, contracting debt, and committing treason, or misprision of treason, and, of the acts and deeds of that nature, a special and detailed enumeration is given. Then follows a general clause, professing to be a summary or abridgement of that special enumeration, 'not, in short, to do any act or deed by which the lands may be burdened, affected, &c. or this present tailzie or course of succession prejudiced, altered, or infringed.' Now, there is no rule of law better established than that laid down by Mr Erskine, namely, that in all deeds and instruments whatever, a general clause, following a particular enumeration, is not to be extended further than the particulars enumerated. Therefore, it is certain, that the general clause at the end of the second prohibition must be restricted to deeds of alienation, debts, and crimes, and cannot include the acts which form the subject of the first prohibition. The second prohibition, therefore, though directed against the institute, as well as the heirs, cannot supply the defect which exists in the first. It is this rule of law that distinguishes the present case from that of Roxburgh and others, in which clauses expressed in general terms, but not preceded by special enumerations, were found to have a more extensive operation, and to render effectual the entails in which they occurred.

"The irritant and resolute clause appears to be exposed to the same fatal objection of not being expressly directed against the institute. It provides, that in case 'the heirs descending of my body, or any of the other heirs of tailzie before mentioned, shall contravene the prohibitions, the acts of contravention shall be null, and the contravener shall forfeit his right.' The defenders maintain, that as the institute, though not an heir of tailzie, is an heir descending of the entailer's body, the clause is sufficiently broad to comprehend him; but, in that argument, the principle is overlooked, that while the construction to support the fetters of an entail must be of the strictest nature, the construction to break the fetters is directly the reverse. In the former, no aid can be obtained from inference or presumed intention, in the latter, these are the sources from which the meaning of the words used, may and ought to be collected.

"By the clause of destination, the estate is conveyed to heirs of two descriptions, one being, heirs descending of the entailer's body, and the other, heirs not descending of his body, but both, by virtue of the conveyance, heirs of entail. It is plain, that the irritant and resolute clause is directed against both descriptions of heirs, and against them exclusively, it has no application to persons not being heirs of the entail, though heirs of the entailer's body. It is very true, that the entailer intended to fetter the institute, as well as the heirs of entail, but he attempted to do so under the erroneous belief that the institute was an heir of entail, as is evidently demonstrated by a long series of provisions in the deed, and more especially, by the clause relative to the cutting of timber. It is thought, therefore, to be contrary to the established rule of interpretation to hold the words 'heirs descending of the body' in this clause, as importing heirs of line, heirs of

On considering the cause their Lordships expressed an opinion that it **No. 206.**  
 could be proper to advise with the Judges of the Second Division before **Mar. 11, 1861**  
 deciding it, especially in reference to the effect of the case of **Baugh's Brown v. Macgregor.**  
 After having so advised, the Court made a general remit of the cause to  
 the Lord Ordinary with a view to have farther argument on the effect of  
 any defect in the prohibition against altering the order of succession. His  
 Lordship ordered supplementary cases, and reported them to the Court,  
 after which the following interlocutor was pronounced:—"The Lords  
 order the cases to be laid before the whole Judges, with a view to deter-  
 mine the following questions:—Whether the interlocutor of Lord Core-  
 house, Ordinary, ought to be adhered to on both or either of the grounds,  
 that in the entail founded on by the defender, there is no prohibition  
 against altering the order of succession, and that the irritant and resolu-  
 tive clause of that entail is not applicable to the institute; or on any other  
 grounds? or, Whether the said interlocutor ought to be altered, and, if  
 altered, what judgment ought to be pronounced in place thereof?"

The following Opinions were returned.

LORDS JUSTICE-CLERK, MEADOWBANK, FULLERTON, MONCREIFF, JEFFREY,  
 DOCKBURN, and CUNNINGHAME.

"This is an action by the pursuer for adjudging the lands mentioned in the  
 summons, for a debt due to him by Sir Evan Macgregor, the proprietor in the fee  
 of those lands. The defence stated for Sir Evan Macgregor, and for his eldest  
 son as the next heir of entail, is, that the estate is possessed by Sir Evan solely  
 by virtue of a strict entail, whereby he is effectually restrained from contracting

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conquest, heirs in mobilibus, or any description of heirs, except heirs of entail, of  
 whom alone there was any question in this deed; and, if that be so, the present  
 case becomes identical with that of Duntreath, and a numerous series of precedents  
 to the same effect. On this point the case of Dougaldston, on the one hand, and  
 that of Baldastard, on the other, afford an apt illustration. A 'person' contraven-  
 ing in the one case, and a 'member of tailzie' contravening in the other, are both  
 terms in themselves sufficiently comprehensive to include the institute, as well as  
 the heirs. But in the case of Dougaldston, there was nothing in the context to  
 limit the term 'person,' so as to exclude the institute, whereas, in the case of Bal-  
 dastard, it appeared by reasonable inference, from a comparison of various clauses,  
 and from the whole structure of the deed, that the term 'members of tailzie' was  
 employed to denote heirs being members of tailzie. But the inference in this case  
 is much clearer than in that of Baldastard; for, it is undeniable, 1st, that Sir John  
 Murray Macgregor, in the clause in question, had no heirs in contemplation but  
 heirs of entail; and, 2dly, that he conceived his son, Evan John, to be an heir of  
 entail. The Lord Ordinary is aware, that an opinion in the case of Bauch v.  
 Murray, to which the highest respect is due, is opposed to what is now stated;  
 but he cannot acquiesce in that view. The case of Baldastard shows that it is not  
 enough that the entailer should have intended to fetter the institute, and that he  
 made use of a term which, in one view, is large enough to include him, if it is clear  
 from inference that he used that term in a different sense, and one totally inappli-  
 cable to the institute. The case of Bauch cannot be regarded as a precedent here,  
 as the decision of the Inner-House rests on a separate and unexceptionable  
 ground."

debts for which the estate may be adjudged, under the pain of irritancy or forfeiture, and all such debts are declared to be null and void, and adjudication for payment of them is declared to be incompetent.

"The interlocutor of the Lord Ordinary, in general terms, repels the defence and decerns in terms of the libel. And the material question now before the Court, and upon which our opinion is required, is, whether that interlocutor ought to be adhered to, or altered.

"From the pleadings of the parties, and the note of the Lord Ordinary, it appears that three points of law may be involved in this question. The pursuer maintains, that the entail founded on is essentially defective in two respects, in as far as it can be stated to have relation to the acts and deeds of Sir Evan Macgregor, the proprietor in the fee: 1. Because it contains no clause prohibiting him, as institute, from altering the order of succession; and, 2. Because the irritant and resolute clauses are not so conceived, as to apply to him as the institute or disponent, but apply only to heirs of entail.

"If the first of these points were established, it would constitute a very serious defect in the entail. But, in order to render the objection effectual to sustain the present action of adjudication, it requires that the Court should determine the question, of more general and abstract law, viz. whether an entail, which does not contain an effectual prohibition against altering the order of succession, can be of any effect at all, even in those points in which it might be found to be in other respects technically correct and sufficient. The second objection taken to the sufficiency of the entail, if well founded, is at once decisive against the grounds of defence to the present action. For this is a question with onerous creditors, proceeding to adjudge the estate, for payment of their debts contracted by the proprietor in the fee. And the law has been long and well settled, that, unless the prohibitions of the entail, whether against selling or against contracting debts, are duly fortified, both by an irritant clause declaring the deeds done in contravention of them to be null and void, and by a resolute clause declaring that the party contravening shall forfeit all right to the estate, unless these clauses are so expressed, as to comprehend the acts of the individual whose acts or deeds are objected to as contraventions, they can be of no effect at all against the rights or the diligence of onerous creditors or purchasers.

"We therefore think it proper, in answer to the question, Whether the Lord Ordinary's interlocutor ought to be adhered to or altered, to direct our attention, in the first place, to this last point, viz. Whether the irritant and resolute clauses are effectual against the acts and deeds of Sir Evan Macgregor in the present case? And we are of opinion, that they are not sufficient.

"By the conception of the deed of entail, it is quite clear that the estate is given to Sir Evan Macgregor directly as disponent, or heir, and not as an heir or an heir of tailzie. The entailor disposes 'to myself in liferent, during all the days of my life, and to Evan John Macgregor Murray, &c., whom failing, &c. &c. in fee. And, after the cases of Wellwood, February 23, 1791; the Marchioness of Titchfield v. Cuming, May 22, 1798; Miller v. Cathcart, February 12, 1799, and other cases, there can be no doubt that these words constituted Sir Evan the disponent, or institute, and not an heir of tailzie.

"This being clear, the question, whether he is effectually put under all the fetters and irritancies, depends on principles which have been firmly settled, ever since the decision of the House of Lords in the case of Edmonstone of Dun-

1. It is unnecessary to go into the particulars of that well known case. The No. 206.  
 al rule laid down by it is, that prohibitions, or irritancies, applied only to  
 of tailzie, do not affect the institute, however clear it may be, from other Mar. 11, 183  
 es of the deed, or the general conception of it, that the entailer intended to Brown v.  
 de the institute in the operation of the clauses. This rests on the broad Macgregor  
 iple, that all such clauses are of the strictest construction, and therefore can-  
 e extended, by any implication of intention, either to persons or to cases not  
 ssly comprehended in them. And this has been held so decidedly, that even  
 s introduced incidentally into the clauses themselves, which might seem to  
 ate such an intention, or the use of words of an ambiguous nature, have been  
 ys held not to be sufficient.

The general rule had been decided in two cases before the case of Dun-  
 h. But that important judgment has been followed by very many cases,  
 ighout which there has never for a moment been any departure from the  
 iple. Nice cases have arisen, in the question whether the party was institute  
 ir of tailzie, such as Wellwood, M'Culloch, &c. And nice cases have also  
 n on the question, whether special and express words used did apply to the  
 ute or not. But no doubt has ever existed that, if the party were clearly  
 ute, and if the clause in question were not applied to him as institute, but  
 ied to the heirs of tailzie, no words merely indicating that the entailer may  
 considered him as an heir of tailzie, and in that view intended him to be  
 id, will render the clause effectual against him. It is needless to go through  
 detail of all the cases. It is impossible to read the case of Wellwood, or the  
 of Titchfield, or the case of Miller v. Cathcart, or the case of Baldastard,  
 out seeing that, if any implication of intention would have done, the entailer  
 indicated, in one and all of them, that he meant the institute to be bound,  
 considered him as an heir of tailzie as much as the substitutes named. But  
 principle of strict construction necessarily carried with it another rule, that  
 most liberal construction must be given in favour of liberty, so that any  
 iguous words, or loose expressions even introduced into the clauses, shall not  
 ccepted instead of the direct words proper for imposing the fetters on the in-  
 te. For example, in the entail of Gordonstone, the prohibition was, that it  
 ld not be lawful 'to the heirs of tailzie above designed, male or female, nor to  
 heirs who shall happen to succeed to the lands and dignity,' to do any of the  
 ibited acts, 'it being always understood, that although the before-named per-  
 be designed heirs of tailzie, and be to succeed to my estate as such,' yet they  
 have no greater powers than liferenters. The institute in that case was an  
 of the entailer, and did succeed to the lands and dignity. But, in that entail,  
 as not an heir but disponee; and the restraining clauses being applied to  
 of tailzie, it was found that he was not bound by them.

So also in the case of Miller v. Cathcart, James Taylor, the institute, was  
 ed in many of the clauses as 'James Taylor and all the other heirs of entail,'  
 in one clause it was said expressly, 'notwithstanding the before written con-  
 ns, limitations, and restrictions, put upon the said James Taylor and the other  
 e-mentioned heirs of entail,' &c., power was given to the said heirs to do cer-  
 things. But the restraining, and irritant, and resolute clauses themselves  
 applied to heirs of tailzie; and it was therefore found 'that the said James  
 art Taylor being institute in the entail was not affected by the fetters thereof,'  
 therefore, that the entail could not be pleaded in bar of payment of his debts.  
 The case of Baldastard was an extremely strong case, and particularly illus-

296. 1837. p. 6  
 native of the principle, that even the use of words in the disputed clause itself, which in some sense might include the institute, cannot be construed to have that effect, if it appears from the connexion in which they stand, that they were merely used as a form of describing the heirs of tailzie. 'Heirs and members of tailzie' might in a popular sense comprehend the institute; but it was held, both here and in the House of Lords, that the word 'members' was limited by the connexion in which it stood with 'heirs,' and therefore could not be taken as importing more than heirs 'being members' of tailzie, and describing persons who were 'members' because they were 'heirs.'

"The few cases in which the institute has been found to be bound, are cases in which the words employed, not only did directly apply to the institute, but could not, from the form in which they were used, admit of any other construction. It was in the case of *Syme v. Ronaldson Dickson*, February 27, 1799, although that was certainly a nice case upon the resolutive clause. But, while the prohibitions were expressly laid on the institute by name, the commencement of the irritant and resolutive clauses expressly included him, running thus:—'In case of said son, or any of the heirs of tailzie,' &c. should contravene, the deeds should be null, and 'the person, or persons, heirs of tailzie foresaid, so contravening,' &c. should forfeit. The case turned on the word 'person' in the singular number, which was held to stand apart from the words following on it, and, in this view, necessarily to relate to the institute, the son, and to no one else. The late case of *Dougaldston* was perhaps clearer, though also not decided without difficulty. For the irritant and resolutive clauses provided, that in case the said Henry Glassford 'or any of the heirs of tailzie and provision substituted to him,' should contravene, not only the deeds should be null, 'but also each and every heir or person, so contravening,' should forfeit. The majority of the Court who decided that case held that, from the context, it was impossible that the word 'person' could apply to any other person but Henry Glassford the institute, named in the beginning of the clause.

"The ruling principle, however, was again recognised in the case of *Lord Elibank v. Murray*, July 2, 1833. Another case<sup>1</sup> of importance was, indeed, decided on the same day, in which the Court, resting on a general clause, which was thought to express a positive intention that the whole clauses should be binding on William Morehead the institute, came to an opposite conclusion. But the House of Lords, even in that strong case, looking simply at the terms of the clause itself, which in its commencement was directed against heirs of tailzie alone, found that it did not reach the institute.

"We are aware, that the decision in the case of *Baugh v. Murray*, January 16, 1834, may seem to have involved a question of a somewhat similar nature with that which is now before the Court. But that case was taken up as a very special case: The judges were not agreed upon it; and while it does not appear from the report that the decisions on the subject were brought fully before them, there seems to have been an impression, that in the shape of the cause the Court were not under the necessity of deciding any point, except that nothing had been done to make the provision effectual against the entailed estate. At any rate, upon full consideration, we cannot hold that case to regulate the decision of the present case.

Attending to the principles of the law universally recognised, and to the whole

<sup>1</sup> *Morehead v. Morehead*.

of the decisions, we are of opinion that the irritant and resolute clauses in the present case cannot be held to affect the institute. The prohibitory clause as to selling or contracting debt, no doubt, applies to him nominatim, as it did in all of the cases which have been referred to, and very remarkably in the case of Morehead. But the irritant and resolute clauses are very differently constructed. They run thus :—‘ That in case the heirs descending of my body, or any of the other heirs of tailzie before-mentioned, shall contravene,’ &c. ; not only the institute shall be null, and the estate shall not be affected by them, ‘ but also the person or persons so contravening,’ shall forfeit all right, &c. It is perfectly clear that unless the first words of these two clauses shall be held to comprehend the institute, there is neither a good irritant, nor a good resolute clause. For, independently of other cases, the same word ‘ person ’ was used in the resolute clause in the case of Morehead, and was found to be of no effect under much more difficult circumstances. It clearly would have been so found by the Court, but for the irritant clause, which alone raised the difficulty. But the first question here is, whether there is a good irritant clause, any defect in which is alone sufficient to vitiate the judgment of the Lord Ordinary. If the words had run simply, ‘ In any of the heirs of tailzie shall contravene,’ the case would have been identical with Morehead in this point, without the difficulty of it ; and there could have been no doubt of it. The only question is, whether, attending to the strict principles of the law, the prefixed words, in the connexion in which they stand, can be held to alter the construction : ‘ That, in case the heirs descending of my body, or of the other heirs of tailzie before-mentioned,’ &c. It is apparent that the words, ‘ the heirs descending of my body,’ do not specially describe the institute, but describe a class of heirs belonging to this entail. For the case stated is that the institute contravenes the entail. They have no reference to general descent, but to natural birth, or succession at common law, but have a special application to the heirs of this entail, and nothing else. Yet it is of heirs only that the entail speaks—of heirs, no doubt, descending of his body, but of these heirs as heirs of the institute, contradistinguished from the other heirs of tailzie called. There might be numerous classes of heirs of tailzie descending of the entailer’s body, who are without special destination ; and there might also be numerous classes of heirs of tailzie not descending of his body, within it. And what he says is, that, if the heirs descending of his body, or any of the other heirs of tailzie before-mentioned, shall contravene, the nullity and forfeiture shall take place.

We are of opinion, that, in consistency with the principles which have been established in all the cases since Duntreath, the words, ‘ the heirs descending of my body,’ can only be construed to mean such heirs of his body as were heirs of the institute, and so might be distinguished from the other heirs of tailzie. And it appears to us, that to construe the term ‘ heirs ’ in this entail as specifically designating the institute, merely because he is in fact an heir of the entailer’s body, would not be consistent with the principles on which so many previous cases have been determined. He is not an heir in this entail. He does not take the estate by service as heir ; and though a description here given of other persons who are heirs, who are also heirs of tailzie, might comprehend him in a natural sense, it does not at all comprehend him in any relation to the right or the character by which he takes and possesses the estate in question.

Having come to a decided opinion, that the irritant and resolute clauses do not affect Sir Evan Macgregor, and therefore that the entail cannot be pleaded

No. 206.

Mar. 11, 1837

Brown v.

Macgregor.



1836. against the debts contracted by him, or the diligence of his creditors, we think it necessary to decide also on the objection taken, that there is no sufficient clause against altering the order of succession, or on the abstract question raised to the effect of that objection in the present action, supposing it to be well-founded. On the ground which we have fully explained, we are of opinion, that the petition is entitled to decree in his action, and that the interlocutor of the Lord Ordinary ought to be adhered to."

LORD GLENLEE.—"Although I cannot take it upon me to dissent from the foregoing opinion, yet it is not without great hesitation that I concur in it. I doubt very much whether the principle which governed the Dunrobin case, and various others, can justly be applied to this individual case."

"I understand very well, that if the tailzie applies the irritancies to persons described by an established and known technical designation, we are not by implication to consider any person as included in the designation, other than those who fall under it, according to its proper technical meaning. But if the tailzie does not apply the irritancies to a description of persons so worded, as in itself, without interpretation, to point out clearly who they are, and if we are at all obliged to find out this by implication, and presumptions of intention, it ought to be *toti lege perspecta*, that we form our judgment on the matter."

"Now, the irritant clause in this case is not directed simply against 'any of the heirs of tailzie,' but against 'any of the heirs of tailzie before-mentioned,' which throws us back to the prohibitory clause."

"The first prohibition, which is against alienations, &c. &c. is directed against the institute, and first substitute nominatim, and the 'other heirs of tailzie substituted to me in manner foresaid, and succeeding to my said lands.'"

"The remaining prohibitions appear to be directed against the heirs of tailzie above described, that is the 'heirs of tailzie substituted to the maker of the entail.' Now, as there is not, technically speaking, any person in the whole tailzie who is an heir substituted to the maker of the entail, we are forced, from implication and presumption, to interpret his meaning; and I do not see why, considering his peculiar mode of expression, we are to confine that meaning to heirs of tailzie, properly so called, and not to include, as he himself evidently intended, the institute as well as them; and, in short, as signifying the whole persons called to the succession."

When these Opinions were returned the cause was advised by their Lordships of the First Division.

LORD MACKENZIE.—I have read the opinions of the consulted Judges with great care, and although my own opinion in this case is greatly shaken, yet I am not able to say I have changed it, nor can I adopt the opinion that has been given by the consulted Judges. I shall express my views, however, very briefly.

The entailor calls all his descendants, beginning with his eldest son, going through his younger sons, and ending with, "whom all failing, the heirs whatsoever of my body." He then in the irritant clause applies the irritancy first to the heirs "descending of my body." That expression, if taken by itself, is quite sufficient to include and express the institute. It means clearly all persons being his heirs by descent from his body, that is, all his descendants. It is void of ambiguity.

technical difficulty. How then do you limit it? By adding to it the words "or heirs of entail," and then applying to the clause a sort of interpretation that I have here used for the first time. In the first place, by the strict verbal reading of the Duntreath case, rejecting inference, you take the words "heirs of entail," standing alone, and so hold that expression to exclude the institute. Then, secondly, you have recourse to free construction, and by inference from the words "other heirs of entail," you conclude that the entailer, in using the words "heirs of my body," meant only heirs of entail, and so you arrive at a conclusion in certain defeasance of the entailer's true meaning. Now, I am not able to give this kind of what I may call double-dealing interpretation, applying both verbal interpretation, and free interpretation by inference to the same sentence. I know of no example of this. The Duntreath case, and the cases following, afford none. I think you may interpret, word by word, as in these cases, giving inference and explanation of one word by another; but you cannot, at the present moment, adopt inference from the very words which you have, by rejection of inference, interpreted in a way contrary to the entailer's meaning. Perhaps, it would be sufficient to say, that if you adopt free construction at all, you must look to the entailer's true meaning, and nothing else, and cannot defeat that meaning by interpretation of any kind.\*

**LORD PRESIDENT.**—I concur with the majority of the consulted Judges. The heir, Sir Evan, is undoubtedly, in one sense, an heir descending of the entailer's body, but, according to the principle of construction which must be applied to entails, I cannot find any words sufficient to extend the irritant and resolute clauses to him. He was the institute, and his sole connexion with the entail was of the institute, and not that of an heir.

**LORD GILLIES.**—I concur with the majority of the consulted Judges.

**LORD COREHOUSE.**—The majority of the consulted Judges are of opinion that the interlocutor pronounced by me ought to be adhered to; and I shall only say I remain of the same opinion as when I pronounced that interlocutor.

**THE COURT** pronounced this interlocutor:—"Refuse the reclaiming note; adhere to the interlocutor reclaimed against, except as to expenses; and of new adjudge, decern, and declare in terms of the libel, but find neither party entitled to expenses; and to that extent recall the interlocutor of the Lord Ordinary."

A. and C. DOUGLAS, W.S.—T. THOMSON, W.S.—Agents.

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\* This Opinion was revised by his Lordship.

tures on which the securities were held :—Held, that the factor should be appointed with the usual powers only, leaving him to make up his titles as best advised. 2. Expenses of opposing the prayer for unusual powers should be paid out of the funds of the minors. 3. Under a petition to appoint a factor, “or any other person your Lordships may think proper to appoint, made of a different person, without ordering fresh intimation of the

**Mar. 11, 1837.** IN 1820 the late Charles Nairne, W.S., was appointed tutoris to Philip-David and James Hay, sons of Captain Hay. He invested the funds falling under the factory, partly on heritable and dispositions in security, and partly on moveable securities. Heritable bonds were taken payable to “the said Charles Nairne loco tutoris foresaid, or to his successors in office, or to his assigns.” Infestment was taken under the disposition, “in favour of the said Charles Nairne, as factor loco tutoris foresaid.” On the death of Charles Nairne, a petition was presented in name of Philip-David Hay, residing in Ireland, and his father, as his administrator-in-law, to James Hay, W.S., as their mandatary, stating that the young James Hay, junior, was absent from the country, and that it seemed expedient to have a factor loco tutoris appointed to the petitioner Philip-David Hay, a factor loco absentis to James, so that there might be a power to uplift and discharge the heritable securities. And as Philip-David Hay was to attain majority in June 1837, it was expedient to provide means for then uplifting his share of the funds invested. The petition prayed the Court “to appoint the said James Hay, or any other person your Lordships may think proper, to be appointed loco tutoris to the said Philip-David Hay, and James Hay, junior.”

he subjects held in security thereof ; and, if necessary for that purpose, No. 207.  
 obtain a renewal in his name, as factor foresaid, of the investitures on Mar. 11, 1887  
 on which the said securities are held ; and also to audit the final accounts of Hay v.  
 said deceased Charles Nairne, as factor loco tutoris foresaid, &c. and Boreland.  
 xoner," &c.

Answers were lodged by Mrs Murray and her son, the debtors in one  
 the heritable bonds, and proprietors of the heritable subject therewith  
 joined. They objected to the unusual powers prayed for, in respect  
 they were not necessary, and therefore it would be irregular to grant  
 them;<sup>1</sup> that there was a real right remaining in hereditate jacenti of the de-  
 ceased factor loco tutoris ; and the new factor might make up a title to this,  
 in conformity with previous cases,<sup>2</sup> he must do so by a declarator and  
 adjudication, followed by charter and sasine ; at least, it could not be done  
 by powers summarily given to such factor in the interlocutor appoint-  
 ing him to the office. They also stated that the petitioner, Philip-David  
 was near majority, so that there could be no appointment of a factor  
 loco tutoris, as it was in his power to choose a curator for himself.<sup>3</sup>

**ORD PRESIDENT.**—The former factor loco tutoris was infest. There may be  
 difficulty in transferring de plano the feudal security to the new factor as prayed  
 for in this petition. I think the Court ought not to grant the extraordinary powers  
 prayed for, but should appoint a factor with the usual powers, leaving him there-  
 to make up a title to the feudal subjects as he shall be best advised.  
 The other Judges concurred.

The respondents moved for an award of expenses out of the funds of  
 the minors, in respect that their appearance had been rendered necessary  
 on the terms of the petition, and had been useful for the interests of the  
 minors. The Court awarded expenses as craved.

It was then stated from the bar, that, in place of the factor suggested  
 in the petition, the parties desired that Henry G. Watson, accountant,  
 should be appointed.

The following interlocutor was pronounced:—"Appoint Henry  
 George Watson, accountant in Edinburgh, to be factor loco  
 absentis to the said Philip-David, and James Hay, junior, with  
 the usual powers, and to make up the title to the heritable property  
 as he shall be advised, he finding caution in terms of the Act of  
 Sederunt, before extract, and decern ; and allow the expenses of  
 the answers to be paid out of the funds of the minors."

J. NAIRNE, W.S.—A. and C. DOUGLAS, W.S.—Agents.

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**1 B.**, Jan. 27, 1829 (ante, VII. 320) ; **M'Lellan**, Feb. 25, 1832 (ante, X.

**Dalziel**, March 11, 1756 (16204) ; **Drummond**, June 30, 1758 (16206).  
**Macnetyne**, May 19, 1827 (ante, V. 684).

No. 208.

MRS GRACE HAY OF ANDERSON, and HUSBAND, Petitioners.—

*A. McNeill.*

1837.

Anderson v.

II.

JAMES HILL and OTHERS, Respondents.—*Paterson.*

may v.

his Creditors.

1st Division.

*Appeal—Process.*—A petition was presented praying for leave to appeal against the judgment reported ante, p. 481; the Court refused the petition with expenses.

G. DUNLOP, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

No. 209.

— RENNY, Pursuer.—*H. G. Bell.*HIS CREDITORS, Defenders.—*Mackenzie.*

*Cessio—Process.*—Where a creditor, defender in a process of cessio, raised 6 and 7 Will. IV. c. 56, gives in a list of persons whom he alleges to be creditors of the pursuer, and who have not received letters of intimation through the office, nor been cited,—Held that the pursuer is bound, before proceeding to cite them, and that the notice in the Gazette does not supersede the notice of this; but that the creditor-defender will be liable for all the expense occasioned by this objection, if the parties in the list are not creditors of the pursuer.

Jan. 11, 1837.

1st Division.

IN a process of cessio, raised before the Court of Session, under 6 and 7 Will. IV. c. 56, a defender gave in a list of persons whom he alleged to be creditors of the pursuer, but who had not been cited, or certified by letter through the post-office, and who had got no notice except from general intimation in the Gazette. He therefore moved the Court for reference to A. S., 11th July, 1828, § 102, and the practice which followed thereon, to direct the parties contained in that list to be cited before proceeding further. The pursuer answered that the provision in A. S. had no reference to proceedings under the late statute; that he had cited all persons whom he knew to be creditors; and that the intimation in the Gazette, under the new form of process, was meant to supply any omission which was not mala fide made.

It was observed by the Court that all the creditors must be cited; the pursuer was bound to know who his creditors were; and that, in the mean-time, he must cite the parties contained in the list, under the condition that the defender who gave in the list would be subjected to all the expenses thereby occasioned, if these parties were not creditors of the pursuer. The Court directed accordingly.

—Agents.

WILLIAM DUNN, Pursuer.—*D. F. Hope—Robertson.*

JAMES HAMILTON, Defender.—*Sol.-Gen. Rutherford—A. Dunlop.*

ARCHIBALD ARTHUR, Defender.—*Sol.-Gen. Rutherford.*

MES M'DONALD and HUGH M'KAY, Defenders.—*Keay—M'Neill.*

No. 210.

Mar. 11, 1837

Dunn v.

Hamilton.

*Nuisance—River—Jury Trial.*—1. An inferior heritor complained of a dye-  
c on the grounds of a superior heritor, as creating a nuisance to the stream,  
h flowed through both their properties, and he raised an action of inter-  
; a jury trial followed, at which a verdict was found for the superior heritor,  
a bill of exceptions to the charge of the presiding Judge was presented;—  
l, that there are primary and secondary uses of a running stream; that its  
in supporting animal life in man and beast is primary, and should not be  
ficed to its use for manufactures, which is secondary only; and, in respect  
the Judge, in charging the Jury, had not duly attended to this distinction,  
had otherwise given too large and indefinite latitude to the right of a superior  
or to pollute a stream for manufacturing purposes—bill of exceptions sustained  
ist the charge, and new trial allowed. 2. Terms of the direction to the Jury  
h were, on these grounds, held exceptionable. 3. Circumstances in which,  
that “if the water was still fitted for all common uses, and all the uses to  
h it had hitherto been applied, the pursuer was not entitled, in order to put  
the works of the defenders, to suggest some peculiar use not actually exist-  
such as that of bleaching and finishing, for which alone the said water might  
nfitted; and therefore, that on this ground of unfitness for bleaching and  
ning, considered by itself, the pursuer was not entitled to a verdict.”

*Landlord and Tenant—Homologation—Nuisance.*—1. A landlord let premises  
tenant for nineteen years, “to be used for the purpose of bleaching, dyeing,  
inting, and any other operations connected with bleaching, dyeing, or print-  
or for agriculture:” the tenant let the premises at an advance of rent, to sub-  
its; in an action against the landlord the tenant and the sub-tenants, for inter-  
alleging that the operations of the sub-tenants amounted to nuisance, the land-  
lodged separate defences, stating that the operations of the sub-tenants did no  
y to the water; or, at all events, if any injury occasionally happened, it arose  
the fault of the sub-tenants, for which he was not responsible; the tenant also  
d separate defences, stating that if any nuisance was committed, it was without  
rity from him: an issue was taken for the landlord and tenant, separate from  
for the sub-tenants; viz. “whether the landlord or tenant, by themselves or  
er, or others authorized by them, did wrongfully pollute and spoil the water,  
” at the trial the Judge directed the Jury, that, even if nuisance was proved  
at the sub-tenants, still as there was nothing but the lease to connect the land-  
and the tenant therewith, there was no ground in law for holding that they, or  
of them, had authorized, or were answerable for that nuisance; a verdict was  
t for the defenders:—Held, by a majority, under a bill of exceptions, that the  
was erroneous; and that, besides the act of granting the lease, the tenor of  
ndlord's defences, alleging the water to have sustained no injury, was a ground  
for holding him to have authorized the nuisance, if there was a nuisance;  
hat, in the circumstances, the case of the tenant could not be separated from  
of the landlord, and a new trial should be granted as to both.

1822, the late James Hamilton of Barns entered into a contract of Mar. 11, 1837.  
with Archibald Arthur, printer at Anderston, whereby he let to  
“all and whole that bleachfield, with the buildings thereon, lying  
south side of the road leading from Edinbarnet lint-mill to Faifley,  
presently possessed by Alexander Colquhoun, bleacher there, and

1st Division.  
Lord Jeffrey.  
Jury Cause.

210. that for and during the complete term and space of nineteen years, and after the term of Whitsunday, 1823, which is hereby declared the term of the said Archibald Arthur's entry thereto; declaring also that the said subjects hereby let are to be used for the purpose of bleaching, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing, or for agriculture." This tack was granted usual, with absolute warrandice by Hamilton. Arthur, on the other part, bound himself "to pay the sum of £60 yearly, in name of rent for the premises." Arthur also bound himself that he should keep the buildings and fences in good condition; crop the land contained in the lease, as there prescribed; "and leave the lands, at the expiration of the lease, fitted in all respects for the purposes foresaid, and shall not use of them in no other way than as before specified without the consent in writing of the said James Hamilton, or his assigns."

Arthur possessed the lands till 1826, in which year he granted a new tack, at a rent of £112, for the first year, and £120 for each year afterwards, to James M'Donald and others. The whole of this was paid to Arthur, who bound himself to pay the rent due to his landlord, and to it. The sub-tack was granted expressly "under the several conditions and provisions particularly specified and contained" in the principal tack. The sub-tenants were bound, within six months of their entry, either to erect additional buildings, to the value of £800, on the premises, or to find security for payment of the sub-rent. They entered into possession, and their sub-tack afterwards was acquired by James M'Donald and H. M'Kay, carrying on business under the firm of M'Donald and M'Kay. They were turkey-red dyers, the dyeing material chiefly used by them being madder. Other stuffs were also used at their work, as oil, ash, shumac, vitriol, alum, soda, soap, indigo, bullock's blood, coppers, sheep's dung. The extent to which these articles were used was different in different years. In 1827 the quantity of madder employed was 100 cwts.; in 1828, 774 cwts.; in 1829, 1832 cwts.; in 1835, 1976 cwts. and from January to August, 1836, the consumpt was 1303 cwts. A jury trial, after-mentioned, took place in autumn 1836.

The work, which was let to M'Donald and M'Kay, was situated on the Cochino or Cochney Burn, which flowed through Hamilton's estate. That burn, sometimes called the East Burn, was afterwards joined within the lands of the pursuer, William Dunn of Duntocher, by another burn, called the West Burn, and the united stream flowed down through the lands of Dunn, who had erected extensive spinning-mills and other factories on his property along the stream. There were also villages on its banks, within Dunn's property, containing a population of 3000 persons and upwards.

According to one measurement of the size of the streams, which was taken in summer 1836, when they were rather low, the discharge per minute, was of the East Burn, 49 cubic feet, and of the West Burn



ic feet. For the purpose of removing or diminishing the contamination which might be occasioned to the water, by the refuse from their works, M'Donald and M'Kay had recourse to various precautions, such as settling ponds. Some of these were not adopted until after an action of interdict had been raised by Dunn in 1834. That action was directed against James Hamilton, now of Barns, the son of the grantor of the lease to Arthur; and also against Arthur, the principal tenant, and Donald and M'Kay, the sub-tenants. The summons set forth, that, part of the property of Hamilton, there was a work occupied by Donald and M'Kay, on the side of the Cochno Burn; that, within these few years, it had been changed from a bleachfield to a turkey-dye-work; "that, from the said work, the defenders, or one or more of them, have taken upon them to discharge into the said burn great quantities of the most impure, noxious, and deleterious substances, consisting of madder roots or other substances of that description;" whereby the stream was rendered totally unfit for the use of man or beast; fish in it were killed; its colour turned to blood, and its smell rendered most offensive. The conclusions of the action were, that "the said James Hamilton, and Archibald Arthur, and M'Donald and M'Kay (as individuals and partners) should be interdicted from discharging any madder-roots, or water impregnated with the same, or other dye-stuff, or deleterious or noxious or impure stuff of any kind, into the said burn, whereby the said burn, in its progress through the pursuer's property, may be polluted or rendered unfit for domestic use, or manufacturing purposes, its amenity diminished, or the property of the pursuer in any way injured," reserving all claim for damages.

Against this action, Hamilton of Barns stated in defence that the premises had "been used as a dye-work and bleachfield for a period beyond the years of prescription, with a certain interval as to the dyeing operation,—that the present lease was granted in 1822, the purposes for which the premises were to be used being specified to be for bleaching, dyeing, printing, and other operations connected therewith—that all these operations were carried on, and considerable expense laid out on the work, to the knowledge of the pursuer, without a whisper of complaint from him, till immediately before intenting this action—that the water discharged from the dye-work passes through a filter before entering the stream—that, from the moment it passes the dye-work, it is drunk by the cattle of the defender's tenants, and those on an intervening property, without the slightest injury,—that the pursuer has himself a dye-work and a gas-work on the stream, a little below the point where it enters his property, the discharges from which are much more noxious and injurious than those complained of,—and that, in point of fact, no injury is done to the water by the operations carried on in the dye-work occupied by the defender's tenants.

At all events, if any injury occasionally happens, it must be owing to

No. 210

Mar. 11, 1835

Dunn v.

Hamilton

216. the negligence or misconduct of the tenants themselves, in exercising their powers under the lease, which are in no degree necessarily productive of injury to the water, and for this they alone are responsible; at the same time, the defender is perfectly willing to concur in any measures which may be recommended by men of skill as necessary to secure against such occasional injury, if it do occur, which the defender does not admit to be the case. In the mean time he pleads in defence—

“ 1. The operations authorized by him in his lease to the co-defendants are within the proper exercise of his powers as proprietor.

“ 2. By prescriptive usage, he has a right to discharge the matters complained of from his work.

“ 3. The pursuer is barred by acquiescence from now challenging the operations complained of.

“ 4. No actual injury is suffered, to warrant the conclusions of the court.

“ 5. The defender is not responsible for the consequence of any improper negligence or misconduct by his tenants.

“ 6. If any injury be suffered, the utmost extent of what the pursuer can demand is, that precautionary measures be taken at the sight of men of skill to prevent its recurrence.”

Arthur stated in defence that his actual possession of the premises had only been from 1828 to 1826; that he had used them only as a bleachfield during that period, and had not in the least injured the water in the burn; and that he had not granted, under the sub-tack, any broader right than he himself held under the principal tack from Hamilton. He stated that he did not know in what manner the sub-tenants, or their assignees, might have carried on their business; nor whether they had polluted the burn; but “ if these parties, or any others, have made an improper use of the water, or committed any other illegal act, it has been without authority from the defender.” He pleaded, that, in so far as regarded the right to use the burn for the purposes specified in the tack, it rested with Hamilton to defend it, under his obligation of warrantree; and that as he (Arthur) had not polluted the burn, nor authorized any pollution, he was entitled to be assolized.

McDonald and McKay stated that though the refuse from their works was necessarily, to a certain extent, discharged into the burn, they had adopted unusual, and even unnecessary, precautions to limit it as much as possible; and that though the water was occasionally tinged by such discharge, it was not rendered noxious, unwholesome, or unfit for other purposes. They denied the pursuer's allegations on that subject. They alleged that their works were not more injurious to the water than a bleachfield would be; and that they had been used as a bleachfield and dye-work beyond the long prescription. They also alleged that the pursuer had acquiesced for eight years in their use of the works, during which period they had made expensive erections for carrying them on.

pleaded (1.) that they made only a lawful use of the stream; (2.) that the pursuer was barred from challenge by acquiescence; (3.) that the general use of the stream in carrying off the impurities of the man-  
 ufactories, and of the population on its banks, justified them in their use of  
 it; and (4.) that the utmost which the pursuer could demand was the  
 taking of such precautionary measures as men of skill might suggest  
 for removing all ground of complaint, if any existed.

No. 210,  
 Mar. 11, 1831  
 Duff v.  
 Hamilton.

In preparing issues for a trial by jury, it was contended by Hamilton, the landlord, and Arthur, the principal tenant, that their position was different from that of M'Donald and M'Kay, the sub-tenants, whose operations were the subject of complaint; that even though the sub-tenants should be found to have polluted the stream, a separate question remained whether they, the landlord and principal tenant, had so sanctioned the operations by which the stream was polluted, as to be identified with the sub-tenants, or otherwise liable to interdict; and that there was a separate issue should be taken for the case of the landlord and principal tenant. The pursuer opposed this, but a separate issue was refused, and the two following issues were adjusted, the first applying to M'Donald and M'Kay alone; the second to Hamilton and Arthur alone:—  
 It being admitted that the pursuer is proprietor of the lands of Dun-  
 r and Fairley, situated on the site of the Cochney, Duntocher or  
 Muir Burn, and that one of the streams which unite to form the said  
 burn passes through the property of the defender, Hamilton.

It being also admitted, that on the said property of the defender,  
 Hamilton, there are certain premises and buildings erected, of which the  
 defender, Arthur, is or was tenant, and the defenders M'Donald and  
 M'Kay, are sub-tenants.

Whether, during the year 1826 and subsequently, or during any part  
 of the said period, the defenders, M'Donald and M'Kay, did, by certain  
 operations carried on in the said premises and buildings, wrongfully pol-  
 lute and spoil the water of the said burn, so as to injure the quality of  
 the water of the same, to the nuisance of the pursuer, as proprietor of  
 the lands aforesaid?

Whether, during the said period, the defender, Hamilton, or his  
 predecessors, or the defender, Arthur, by themselves, or another, or  
 authorized by them, did wrongfully pollute and spoil the water of  
 the said burn, so as to injure the quality of the water of the same, to the  
 nuisance of the pursuer, as proprietor of the said lands?"

The cause was tried on Circuit at Glasgow, before Lord Jeffrey and a  
 special Jury, and a verdict was returned in favour of the defenders on  
 both issues. Exceptions were taken to the charge of the presiding Judge,  
 and a bill of exceptions was presented, in which six exceptions were sta-  
 ted. In charging the Jury his Lordship observed, in regard to the law  
 applicable, "that the difficulty of all such cases arose from the apparent  
 conflict of two plain principles; one, that every man had a right to use

216. his own property in the way most for his own advantage ; the other, that  
 1837. no one should so use his property as to hurt his neighbour ; and that  
 though at first sight it might appear that the latter maxim ought always  
 to prevail, where it seemed to be in competition with the former, this was  
 far from being the case universally ; and that, though it might be stated  
 as the rule, it was liable to many considerable exceptions. Thus a man  
 might, in many cases, build so as to shut out the prospect from his neighbour's house, or even the light from his windows, to the great diminution  
 of its value, or by forming or extending a town and common manufactory  
 beside it, entirely destroy its privacy, and render the air less pure and  
 agreeable. There were similar exceptions to the right of an inferior  
 heritor to receive the water of a stream, in a state absolutely as pure, and  
 in as great quantity as those on its upper course. The upper heritors  
 were obviously entitled to diminish its quantity, by taking from it what  
 was necessary either for their own drinking, or that of their cattle, as  
 well as for cooking, washing, &c. ; and they were as clearly entitled to  
 impair its purity, by manuring their lands on the banks (with substances  
 not poisonous), or other necessary operations : and the said Lord Jeffrey  
 did proceed accordingly to direct the said jury in point of law—(last  
*Exception*),—" That, for all the necessary purposes of the occupation  
 of land and of ordinary life, not only was the abstraction of the water of  
 a running stream permitted to the proprietors on the banks of that stream,  
 as it passed their property, but also such deterioration of the water, as  
 might be ultimately fatal to its use by the inferior heritors : That one of  
 the natural uses of a running stream was to remove the mass of impurities  
 necessarily accumulated from the houses of persons living on its banks,  
 and which impurities the superior proprietors were entitled to let into it,  
 either by leaving them on the surface, or by the use of common sewers  
 or drains ; and that the soil might thus be sent down, not only in small  
 quantities, and to the lesser injury of the lower heritor, but, by the progressive  
 accumulation of inhabited houses, in very large quantities, and  
 to the entire destruction of any domestic use of the water by such lower  
 heritor, without any right on his part to object : That human society  
 could not go on, if this accumulation of unavoidable pollutions could be  
 prevented by an inferior heritor ; and any such attempt was illegal, be-  
 cause each party on the banks of a stream was entitled to let into that  
 stream those impurities which that stream was destined by nature, as a  
 common sewer, to receive."

The first exception was taken to the direction beginning with the words  
 " That for all the necessary purposes," &c.

In support of the exception the pursuer pleaded that the direction was  
 erroneous, especially in stating that an upper heritor might lawfully occasion  
 " such deterioration of the water as might be ultimately fatal to its  
 use by the inferior heritors." There were primary and secondary pur-  
 poses to which a running stream was subservient. The primary one was

port of life in man and beast by furnishing them with water, as much a necessary of life as food. Every running stream so far, the common property of all the heritors through whose it flowed. They had a right to apply it to this primary use, no upper heritor was entitled to render it unfit for such primary use of his operations, particularly such as those relating to manu-

N6: 211  
Mar. 11, 18  
Dunn v.  
Hamilton

And, in general, a lower heritor had a right to object to any use of the water by an upper heritor, which either hurt the quality or diminished the quantity of the stream; or unfitted it for any purpose to which in its natural state it would have been applied or injured its amenity. On these grounds, the remaining part of the declaration to the jury was also erroneous as it laid down, in general, that it might be used to carry off the mass of impurities accumulated by houses on its banks; a position which might be true in respect of considerable size, such as the Clyde, but not to minor streams like the Cochno.<sup>1</sup>

Defenders, M'Donald and M'Kay, answered, that, at this part of the charge, the attention of the jury was called only to that species of pollution which arose from using the water "for all the necessary purposes of the occupation of land and of ordinary life," as distinguished from pollution arising from manufactures, which was subsequently adverted to. Only under that limitation that the pollution was stated to be necessary; and, as so limited, the doctrine was well-founded. There were cases<sup>2</sup> directly sanctioning the use of a minor stream for carrying off impurities from dwellinghouses, and, unless running streams were to be so used, an upper heritor would be deprived of the legitimate use of his property, and the natural advantage inherent in his position.

GILLIES.\*—This is a case which deserves the most serious consideration of the Court, and which has been very carefully considered by us. I am of opinion that this exception is well-founded. The doctrine laid down goes so far, that, for all the necessary purposes of the occupation of land, and of life, deterioration of the water might lawfully be made by an upper heritor, though carried to such extent "as might be ultimately fatal to its use by the lower heritors." I cannot assent to the doctrine thus broadly and unqualifiedly. In the case of Russell,<sup>3</sup> it was held by Lord Justice-Clerk Braxfield that there was a certain order, according to which the several uses of water might

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Glenlee, March 10, 1804 (12834); Ogilvy, Nov. 24, 1781 (12824);  
Dunn, March 5, 1793 (12824); Miller, Nov. 1791 (12823); Russell, Nov.  
1823; Mason, Jan. 31, 1832 (3 Barn. & Ad. 304).  
Dunn, Nov. 12, 1826 (ante, IV. 167; or 169, new ed.); Russell, Nov.  
1823).

1791, Bell's 8vo Cases, 338.

Opinions of the Court were delivered at once on all the exceptions, but for the sake of greater distinctness the Reporters have inserted the Opinions applicable to each exception immediately after the pleadings thereupon.

210. be classed, as primary or secondary; and that when these came into collision with each other, the right of an inferior heritor to apply water to its primary uses was not to be sacrificed to the right of a superior heritor to apply it to its secondary uses. The primary uses of water were those by which it was applied to the support and aliment of animal life in man and beast. That is a distinction of essential importance in disposing of such a question as this, but it is not duly adverted to in the charge which is under review. It is only said, in general, that the abstraction of the water, or such deterioration of it, may be permitted to the superior heritor for necessary purposes, "as might be ultimately fatal to its use by the inferior heritors." To this doctrine, as it is laid down in the charge, I cannot give my assent. The charge then proceeds to lay it down that one of the natural uses of a running stream, was to remove impurities from houses on the banks, and the such soil, whether sent through sewers, or along the surface, might be sent down where there was an accumulation of dwellings, in large quantities, "and to the entire destruction of any domestic use of the water by such lower heritor without any right on his part to object." This doctrine is too broadly laid down to be supported. There may, in some circumstances, be questions of difficulty and nicety connected with this branch of the law of nuisance; and a question belonging to this class was considered by the Court in the case of *Downie*, where the right of sending soil from dwellinghouses on the banks of the Water of Leith was maintained in favour of the upper heritors. But the Water of Leith was a considerable stream, though it had suffered diminution from an opus manufactum, of old date, the mill-lead for supplying the large mills near the spot where the question arose. And the water had been previously polluted before reaching the point where the soil from the dwellinghouses fell into it. These were some of the specialities in that case which distinguished it from the present. And indeed nothing is here said as to the size of the stream at the place where the alleged nuisance occurs. But that is a circumstance of the utmost moment in the determination of its fitness for carrying off impurities without nuisance. The quantity of pollutions which might be altogether immaterial in such rivers as the Tay or the Spey, might in a small rivulet, create a nuisance altogether intolerable. And, on considering the unqualified terms in which the doctrine on this subject was stated to the jury, I am of opinion that it cannot be sustained, and that the exception against it is well founded.

LOrDS PRESIDENT, MACKENZIE, and CORNHORSE, concurred.

2d Exception.—The presiding Judge "did farther direct the said jury, in point of law, that there was a distinction between the intentional pollution of the water of a running stream by the establishment of manufactures, set on foot for the purpose of gain, on the banks of such stream, and that pollution, which necessarily arose from the ordinary occupancy of land, and the common incidents of domestic life: but that this distinction did not go so far as that any pollution occasioned by carrying on a manufacture for gain, however small the extent of that pollution might be, was in itself absolutely illegal, or could be complained of by a lower heritor; and that though statements had sometimes been made that might appear to countenance such a proposition, it was his opinion that there was no law for so rigid a doctrine: That it was not easy to define the

nits within which a due regard to the interest of the upper  
 ry might justify such pollutions, but he thought he was safe in  
 em, that if a person established a useful manufactory on the  
 stream, and if this manufactory did not pollute the water more  
 gle large family might have done, by sending down ordinary  
 , such use of the water on the part of the owner of the manu-  
 uld not be objected to by an heritor who had built, or meant to  
 ouse on the banks of the stream below." His Lordship at the  
 : warned the jury that they were not to be influenced by the  
 ion that manufactures were entitled to favour; and that if they  
 fied that the pursuer's private rights were invaded, they were  
 protect them without regard to the consequences.

No. 210  
 Mar. 11, 18  
 Dunn v.  
 Hamilton.

ort of this exception the pursuer pleaded that it laid down no-  
 gible in regard to the law of nuisance, and, in particular, that the  
 hat a large manufactory was not a nuisance so long as it did not  
 stream "more than a single large family might have done, by  
 own ordinary pollutions," could not be sustained. There was  
 stated by which the jury could form any definite idea of the  
 pollution which a large family might create; this was a subject  
 efinite that each of the jurymen, in applying the standard laid  
 the judge for testing the nuisance, might be applying a very  
 test, while all were believing that they followed the direction  
 hem. And, in truth, there were no elements of comparison be-  
 e pollutions occasioned by the domestic uses of a large family  
 occasioned by the uses of a manufacture; so that the doctrine  
 down, even if it had been capable of being followed and acted  
 jury at all, was an erroneous doctrine.

fenders, M'Donald and M'Kay, answered, that this part of the  
 ast be taken in connexion with that which preceded. In laying  
 ically, that it was too rigid a doctrine to hold any pollution,  
 r small," to be a nuisance, there was nothing stated which was  
 . In regard to the vagueness of the doctrine, that was inherent  
 w of nuisance, and inseparable from it. And although there  
 something indefinite in the comparison between the pollution  
 ght be created by a manufactory and that which might be occa-  
 a large family, it was a method of giving as much definiteness  
 ject admitted of; and no exception against it could be sustain-  
 the Court were to hold that the ordinary pollutions sent from  
 family into a stream running past their dwelling were always  
 e.

HILLIES.—I entirely concur in that part of the charge which points out  
 on between the pollution arising from manufactures and that arising  
 ordinary occupancy of land, or the common incidents of domestic life.  
 gard to what follows, as the doctrine is qualified by the condition that



1837. it would be too rigid to say that any pollution, from a manufactory, "however small the extent of that pollution might be," was a nuisance, I cannot dissent from that general position. There is no stream in the whole world which is in a state of absolute purity; and as the case of pollution which is put in the charge, might be one where the pollution was inconceivably small, it is impossible to dispute that it would be too rigid a doctrine to hold such pollution a nuisance. At the same time I do not see how a direction which is so qualified could materially aid the jury in making up their minds whether there was a nuisance in the case under their consideration. But then the charge proceeds to say that the same amount of pollution which would not be a nuisance, if created by a large family living on the banks of the stream, would not be a nuisance if created by a manufactory. To that doctrine I cannot acquiesce. It loses sight of the essential distinction between the primary and secondary uses of water, which must be kept in view. The pollution arising from this manufactory, where the process of turkey-red dyeing was carried on, cannot be considered less than a nuisance, if it renders the water unfit for its primary uses when it reaches the ground of the inferior heritor. It would be a sacrifice of the primary uses of water to its mere secondary uses, if this were not held a nuisance. If the pollution arose from the vicinity of a family, perhaps the inferior heritor might have complained on the ground of nuisance: but I have no doubt of his right to complain where such pollution arises from a manufactory, as there is a difference, in principle, between the effect of pollution, springing from the latter cause, and that which springs from the former, so far as the law of nuisance is concerned.

LORD MACKENZIE.—I am of the same opinion.

LORD COREHOUSE.—I concur entirely. The canon which has been laid down in this cause for trying whether the pollution amounted to a nuisance is altogether new to me. It was stated to the jury that if the amount of pollution coming from the manufactory was no greater than a single large family, living on the banks, might have created in sending ordinary pollutions down the stream, there was no nuisance. I am at a loss to understand what gauge was to be applied in order to ascertain the extent of pollution which would thus be admissible short of nuisance. Nothing is said as to the size of the family, which might vary very much according to the notions which different people entertain as to the term "a large family." And no reference is made to the size of the stream, though it is evident that ten of the largest families in Scotland living on the banks of the Tay, would create less nuisance by sending down all their ordinary pollutions into it, than one small family would occasion to a minor rivulet by using it for the same purpose. I think the doctrine overlooks the old canon upon this subject, which has been already adverted to by Lord Gillies, and which considers that the uses of water are primary or secondary, and that the former must not be sacrificed to the latter. To use water for drinking, for domestic purposes, and for sustaining animal life, is to apply it to its primary use. And if any manufactory on the ground of an upper heritor unfit the water for these primary uses, to the lower heritors, they may complain of it as a nuisance. This doctrine was distinctly recognised in the cases of Russell and Stein, which are fully reported in Bell's Octavo Cases. Some

<sup>1</sup> Russell, Nov. 1791 (Bell's Octavo Cases, 338); Miller, Nov. 1791 (Id. 384).

rence of opinion prevailed among the Judges as to the facts; but the doctrine expressly laid down by Lord Justice-Clerk Braxfield and Lord Eskgrove, and stated to by all the other Judges. And as it appears to me that the doctrine, No. 210.  
Mar. 11, 183  
Dunn v.  
Hamilton. that part of the charge against which the second exception was taken, is not consistent with this well-established rule of law, I think the exception ought to be sustained.

LORD PRESIDENT.—I am entirely of the same opinion.

*2d Exception.*—“ And the said Lord Jeffrey did further observe to the jury, that though the issue was merely, whether the defenders’ operations were ‘ to the nuisance of the pursuer,’ the conclusion of the action was, interdict only; and that there was no claim for past damages before them, though such a claim might have been competently combined with the conclusion for interdict de futuro; and also pointed out to them, that appeared from the record, that, before the issue was taken, certain improvements and precautions had been adopted by the defenders, with a view to prevent any injury to the pursuer from their works; and that they averred that such precautions were sufficient to prevent such injury, while the pursuer denied that they were sufficient; and with reference to these observations, the said Lord Jeffrey did thereafter direct the jury, in point of law—That if, after the period when the complaint upon the part of the pursuer in this case had been made, as to the use of the water, but before the issue was taken, precautions had been taken upon the part of the defenders, which had reduced the pollution below what amounted to a nuisance, although that pollution had formerly amounted to such nuisance, these precautions formed a defence against the complaint of nuisance, and would entitle the defenders to a verdict; and further, that if the precautions employed at the date of the trial of the said issues were greater than they had been at first, and that the jury were satisfied, in the exercise of a sound discretion, that, on looking at the case as it then stood, and the state of the water at the period of the said trial, there was no reason for putting down the works of the defenders, which was substantially the object of the action; that, with reference to the conclusions of the action, and the terms of the issues, they were entitled to take this also into their consideration.”

The exception taken commenced with the words, “ That if, after the trial,” &c.

The pursuers objected to this direction, (1.) because it was beyond the province of the jury to look to the conclusions of the action, whether they were merely for interdict, or otherwise; or to look to the consequences of the action, such as putting down the works, which the pursuer denied would result from it. The sole province of the jury was to give an answer, upon the evidence, to the issues under trial. (2.) If there were grounds to justify a complaint for nuisance, at the date of raising the action, and prior thereto, the jury were bound to find for the pursuer, notwithstanding

219. any subsequent precautions; both, because the issue, by its expression, drew back to the year 1826; and because, it was enough to justify an action for interdict if a nuisance existed when the action was raised; otherwise, the nuisance might only be abated during the dependence of any such action, and immediately revived as soon as it was over.

The defenders, M'Kay and M'Donald, answered, (1.) that the reference to the conclusions of the action was competently made, in the circumstances, by way of aiding the judge in construing the import of the issues, in doing which it was necessary to keep in view that they had been taken in an action concluding for interdict, and not for damages; and (2.) that, as the issues drew back to 1826, and interdict as at present time, and for the future also, was concluded for, the jury were bound to keep in view, not merely the state of the water as in 1826, but any subsequent alterations in the works which might have abated the nuisance, because the jury were bound to answer as to the nuisance only in 1826, but at any part of the subsequent period, until the date of trial.

LORD GILLIES.—I entirely dissent from that part of the charge which is under this exception. It assumes that, although a nuisance had existed at the time, so that the action as raised, was well-founded, yet if the precautions which were actually employed at the date of the trial, were sufficient, to abate the nuisance, the defenders were to have a verdict in their favour. So that even although the pursuer's action was well-founded when raised, and when the defenders entered into the contract of litiscontestation with him, yet if the defenders afterwards, before settling the issues, were so sensible of their being in the wrong, that they made an alteration in their works, and thereby abated the nuisance, the result would be that the defenders should have a verdict in their favour, and the pursuer's action would be defeated. The consequence of this might very likely be that, as soon as the verdict was gained by the defenders, they would recommence the nuisance; and, if the pursuer were to attempt again so abortive a process as an action for interdicting a nuisance, the defenders would once more remove the nuisance before coming to the jury, and once more would gain a verdict in their favour. At least they would be as well entitled to gain such a verdict the second time as the first; but I think they were not entitled to gain a verdict either on the one occasion or the other. I think this exception ought to be sanctioned.

LORD MACKENZIE.—I am of the same opinion; and as the issue expressed embraced a period antecedent to the action, it was impossible that any operation subsequent to the action, could entitle the defenders to a verdict as to the existence of a nuisance anterior to it.

LORDS PRESIDENT and CORRIHOUSE expressed their concurrence.

4th Exception.—It had appeared in evidence, at the trial, that the amount of pollution or deterioration of the water, varied at different periods, and in reference to this circumstance, the following direction was given:—

"And the said Lord Jeffrey did further direct the said jury, in point

law, that it was matter for the consideration of the jury, that the pollution of the water in this case was not constant but fluctuating, and that they were satisfied this truly was so in point of fact, that, in point of law, there might be cases in which, although the intensity of the offence might be such as, if permanent, would amount to an intolerable nuisance, the long intervals at which it occurred, or the shortness of its duration at each return, might still protect the establishment, to which it was essential, from being interdicted as a nuisance; and that, if they were satisfied that, in this case, there were fluctuations and intermissions of character and extent, then that they should find a verdict for the defenders."

No. 210.

Mar. 11, 1888

Dunn v.  
Hamilton.

The pursuer objected to this part of the charge, both on account of being altogether vague, in regard to the kind of intermissions which might render the pollution less than a nuisance; and also, because he was not bound to submit to a pollution, recurring at any intervals which might suit the convenience or pleasure of the upper tenant or heritor. It was implied, in the charge, that, if permanent, such pollution would be a nuisance; and if so, the pursuer was not bound to submit to it for any period whatever; nor was there even any guarantee, as to the duration, that these arbitrary periods would continue the same as in time past.

Donald and M'Kay answered, that every nuisance was a question of circumstances, and of degree. One of the elements to be considered was the intensity of the pollution of the water; but another was its permanency. The same pollution, whether of smoke in the atmosphere, or in the stream, which would not be a nuisance, though occurring once a-year, might be a nuisance if of hourly occurrence. The charge had adverted to the circumstance of permanency, as one element in the definition of nuisance, deserving the attention of the jury; and it was not objectionable in doing so. In regard to the alleged vagueness, that was inherent in the nature of the subject.

LORD GILLIES.—In regard to this exception, I certainly feel considerably at a loss to know what was the law actually laid down by it. Nothing is said which gives the smallest clue to what is to be understood by the "long intervals" at which the pollution might recur, or the "shortness of duration" at each recurrence.

Whether it was to be considered as occurring at long intervals, if it happened once a-year, once a-month, or ten times a-day, is not said; nor what is to be considered length of duration. But although I feel, therefore, that this part of the charge is too loose, and on that account is objectionable, I am not prepared to make any other observation upon it than this.

THE PRESIDENT, MACKENZIE, and COREHOUSE expressed their concurrence.

**Exception.**—"And further, the said Lord Jeffrey did direct the jury, in point of law, that, although the water of the stream in question

had, in the opinion of the jury, in point of fact, been rendered unfit for the operations of the defenders, for the purposes of bleaching and finishing; yet, if the water was still fitted for all common uses, and uses to which it had hitherto been applied, the pursuer was not entitled in order to put down the works of the defenders, to suggest some peculiar use not actually existing, such as that of bleaching and finishing, which alone the said water might be unfitted; and, therefore, this ground of unfitness for bleaching and finishing, considered by the pursuer was not entitled to a verdict."

The pursuer pleaded, that this direction was erroneous, as he was entitled to receive the water from the upper heritor, not only fit for purposes to which it had hitherto been applied, but fit for every purpose to which water, in its state of natural purity, could be applied. Its commercial value was instantly affected, if it was rendered unfit for any purpose to which it would otherwise be applicable; and, in point of amenity, the pursuer had also a right to object to any deterioration.

M'Donald and M'Kay answered, that every question of nuisance was a question of circumstances. The pursuer had large manufactures on the stream; the water was only used by them (defenders) in the way as the pursuer himself used it; and if it remained fit for all common uses, and for all the uses to which the pursuer at present applied, he had no ground of complaint, although it was possible to establish a manufacture for which it might prove unfitted.

**LORD GILLIES.**—I think this exception should not be sustained, and the doctrine laid down in charging the jury was well founded.

**LORD MACKENZIE.**—I am of the same opinion. Where there is no abatement actually existing, in the present state of things, it is not enough for the pursuer to put a hypothetical case, and say that there may possibly be an abuse if it ever happens.

**LORD COREHOUSE.**—I concur. It is not enough for the pursuer to say he afterwards shall erect a bleachfield, the state of the water will then be a nuisance. We do not know what may be the nature of any such work erected—we know nothing at all about it; and the pursuer is not entitled to an interdict in respect of the mere possible erection of a work, which may be built.

**LORD PRESIDENT** concurred.

**6th Exception.**—"And the said Lord Jeffrey did further direct the jury, in point of law, that with respect to the liability of the landlord and the principal tenant, under the second issue,—assuming that it had been actual nuisance proved—as there was nothing to connect the defenders with the supposed nuisance, but the lease and sub-lease, granted by them respectively, there was no ground in law for holding that either of them, had authorized, or were answerable for that nuisance. That the other defenders, the persons in occupation, did not stand liable."

of agents or servants of the landlord or principal tenant, and that **No. 214**  
 if they might have misused the manufactory, the landlord was not **Mar. 11, 18**  
 or a nuisance by the tenant in occupation, unless that nuisance **Dunn v.**  
 was sanctioned by him. That as the lease in this case said nothing **Hamilton.**  
 of turkey-red dyeing, but simply related to dyeing, which did not  
 constitute the establishment of any dye-work poisonous to the water, this did  
 not imply a license to carry on the dye-work in such a way as to be a  
 nuisance. That the question then was, Whether it was possible to carry  
 on dye-work on this stream at an ordinary profit, without committing a  
 nuisance? That the pursuer having led no evidence that this could not  
 be done, the defenders, in this second issue, were entitled to a presump-  
 tion in their favour, and that if the jury were satisfied, in point of fact,  
 that dye-work might be carried on in these premises without a nuisance,  
 no injury might be prevented without much expense, then the land-  
 lord was not liable for any negligence in the carrying on of the work;  
 there was no proof to connect him or the principal tenant with  
 carrying on dye-work except the lease, they were not responsible in  
 the carrying on of that work, or for any nuisance thereby occa-

exception related solely to the landlord, Hamilton, and the prin-  
 cipal tenant, Arthur.

The pursuer, in support of the exception, pleaded, that these defenders  
 were fully identified with the sub-tenants. When the action was raised,  
 they had disclaimed the operations of the sub-tenants, and admitted  
 the operations to be a nuisance, and unwarranted by the lease, they  
 have raised the pure question, whether the operations were sanc-  
 tioned by the lease or not; and, if unsanctioned by the lease, they might  
 maintain that no interdict should apply to them. But, in place  
 of this, so, they had taken an opposite course. Hamilton had specially  
 in his defences that "no injury was done to the water by the opera-  
 tions carried on in the dye-work;" and Arthur, who drew twice as  
 much sum in name of sub-rent as he paid in name of rent, and took the  
 tenants bound to erect additional buildings to the extent of £800,  
 would not be allowed now to separate his interests from theirs. But, in-  
 stead of these circumstances, if, on the one hand, the operations of  
 the sub-tenants were not sanctioned by the lease or sub-lease, then  
 Hamilton and Arthur had no interest to oppose an interdict which  
 prohibited them from doing, or authorizing to be done, an unlaw-  
 ful operation; and if, on the other hand, the operations were sanctioned  
 by the lease and sub-lease, then they had no right to oppose an interdict  
 which was not merely justifiable, but necessary, against them, as well as  
 against the tenants. There were, therefore, no just grounds on which the  
 landlord and principal tenant could be separated from that of  
 the tenants, in the event of it being proved that the operations of  
 the tenants amounted to a nuisance.

210. Hamilton answered. His predecessor had let a lease of the premises "to be used for the purpose of bleaching, dyeing, or printing, and any operations connected with bleaching, dyeing, or printing, or for any other purpose." To enter into such contract of lease was a lawful exercise of the right of property, provided that such operations could be carried on without nuisance. Arthur had occupied the premises, until 1826, without any allegation of nuisance; and there was no evidence led to prove that the whole powers conferred by the lease could not be used without any nuisance. But unless this was proved, the actual abuse of power by the sub-tenant if they had abused it, could no more expose the landlord to an interdict than the mere act of signing the lease could have done; for the landlord was in no way connected with these operations except by having granted the lease, and he did not reap any benefit whatever from the increase payable under the sub-lease. At the date when the action was brought, therefore, the pursuer had no ground for claiming interdict against defender Hamilton, who was entitled to object to any interdict granted against him, if not warranted by his having either done, or threatened to do, what was unlawful. In regard to what happened after the action

<sup>1</sup> Henderson and Thomson v. Shaw Stewart, June 23, 1818. This case has not hitherto been reported; a short report of it is now subjoined, which has been prepared from the Session papers:—

No. 211.

HENDERSON and THOMSON, Pursuers.—*Greenshields*.  
SIR MICHAEL SHAW STEWART and OTHERS, Defenders.—*Shaw Stewart*

*Lease—Reparation.*—A proprietor granted a lease of a mill and mill-lan to a tenant, his heirs and assignees, for a period of 99 years; the lease empowered the tenant "to erect dams for collecting the water" in certain lands, "he always paying damages to the tenants and possessors of the adjacent lands occasioned thereby." The tenant erected a dam of great extent, and afterwards assigned away the lease. Some time after the new tenant was in possession, the embankment of the dam gave way, and the water rushing out, occasioned extensive injury to some inferior property; the parties injured, raised an action of damages against the tenant, and against the representative of the granter of the tack, as liable jointly and severally with the tenant, or at least subsidarily for him; they alleged that the injury was occasioned by the culpable negligence of the tenant in failing to keep the dam in a state of sufficient repair:—Held, that, assuming this to be true, the injury had resulted solely from the fault of the tenant, which was not authorized by the lease, and for which, therefore, the landlord was not responsible.

June 23, 1818. BY a lease dated January 29, 1796, Sir John Shaw Stewart of Greenock, James Boyle and Co., merchants in Greenock, and "their heirs and assigns" granted all and hail that mill called the Easter Mill of Greenock, with the mill-lan and mill-lan lands, ascribed mill-lan, dues, services, and sequels of the same, with the mill-lan and mill-lan belonging to the said mill, with the pertinents, as the said mill and mill-lan were formerly possessed by Robert Bain and now by the said pursuers, and that for the full time and space of 99 years, to be peaceably bruiked and enjoyed by the aforesaid company, &c., with liberty also to the tacksmen and assigns of the said company to erect dams for collecting the water in the burn of Crawford's Burn in the Muirs of Greenock, they always paying the damages to the tenants and possessors of the adjacent lands occasioned thereby." Power was given to the



ed, in framing the landlord's defences, that could not justify the action, otherwise unfounded. But besides, there was nothing in the defences to

No. 210

Mar. 11, 1816  
Dunn v. Hamilton.

take down the mill and houses, "and to convert them into any use they pleased," condition of always having buildings on the mill-lands, of equal value. The party let was part of an entailed estate. The rent due for the first eight years to be £6. 5s., and thereafter, in money, £4. 9s., and in oatmeal, eight bolls and a firloot. The landlord bound himself to warrant the tack "at all hands and inst all deadly."

No. 211

June 23, 1816  
Henderson v Stewart.

This lease was afterwards vested, by assignation, in Matthew and James Bryce. The rights of the cedents were conveyed to them, "together with the buildings and others erected upon the site of the foresaid mill, damhead, and inlair thereto adjoining, and embankment by us at the back of the Whin hill, together with the water-wheel," &c.

The cedents of Messrs Bryce, had erected an earthen embankment, forming a reservoir for collecting the water in the Muirs of Greenock, belonging to Sir John Shaw Stewart. This erection was not made on the premises contained in the tack, but on a distinct part of the estate of Sir John, in virtue of the power granted, to erect dams and collect water. The reservoir extended over three Scots acres; the depth of water, at the centre, was twenty feet; and the average depth, from six to eight feet. The site of the reservoir was several hundred feet above Cartsdyke, where Messrs Henderson and Thomson had a tan-work.

In the night of March 15th, 1816, after a heavy fall of rain, the embankment gave way; and the water rushed down, and injured or destroyed the property of Henderson and Thomson and others.

Henderson and Thomson raised an action of damages against Sir Michael Shaw Stewart, who was now the landlord under the tack, and the representative of Sir John Stewart, as heir of entail. The amount concluded for, in their action, and in a similar action raised by another party, was £1258. Both actions were also directed against Messrs Bryce the tenants; the pursuers maintaining that Sir Michael was either liable jointly and severally with his tenants, or at least subsidiarily after they were discussed.

The pursuers alleged that since the tack was acquired by Messrs Bryce they had neglected duly to repair the embankment, and had failed to keep a servant there for the purpose of permitting the escape of any excess of water, by means of sluices constructed for that purpose, or otherwise to open the sluices when necessary; and, in particular, that, on the night when the embankment gave way, the sluices were not opened. They alleged also that Sir Michael had failed to cause attention to be paid to the repair of the embankment and opening of the sluices, although all this was necessary for the security of the pursuers and others.

Sir Michael pleaded separate defences from the tenants, and contended, in substance, that "it was implied in any permission which his predecessors granted, that the dam should be sufficient and kept in proper repair; and if it was not, the reservoir was just as unauthorized by him, as any act from which injury or violence could result to the pursuers or the public."

Memorials were ordered, and the pursuers pleaded, that, in exercising any of the rights of property, a proprietor was bound to have regard to the security of his neighbours and the public. He was equally liable in damages for injury done by his own culpable negligence, and for that done by the culpable negligence of his tenants. And when, in place of exercising the rights of property directly, he, for numerous cause, conferred on tenants the right to exercise them, he could not oblige by shift from himself the responsibility resulting from their being exercised by a tenant, with such culpable negligence, as to occasion injury to third parties.

*See* *Black*, Dec. 14, 1866 (13974); *Brown*, Feb. 5, 1813, F.C.; *Lord Keith*, June 10, 1812, 2 *Black*, Feb. 9, 1804 (13905); *Innes*, Feb. 6, 1798 (13189).

210. show that Hamilton had ever sanctioned any one unlawful operation of sub-tenants. He had no personal cognizance of their actual operations and was entitled, if not even bound, to believe them lawful, till the contrary was proved. And if the whole defences were taken together they must be, they amounted precisely to this, that the premises were let, for similar purposes to those in this lease, for a period exceeding prescription; that, no injury was done to the water, but that, "at all times if any injury occasionally happens, it must be owing to the negligent misconduct of the tenants themselves, in exercising their powers under the lease, which are in no degree necessarily productive of injury

211. In the present instance it must be assumed, *hoc statu*, that the embankment way, in consequence of the culpable negligence of the tenants; and the landlord's responsibility was the more apparent, as the operation of making the dam was expressly sanctioned by the lease, and it was foreseen to be so hazardous, that an express obligation was inserted, binding the tenant to pay damages to the owners of the adjacent lands. In this case the landlord was bound, in an unusual manner, to a vigilant superintendence of the mode in which the operation of embanking was carried on, because, from the magnitude of the operation, it necessarily involved the interests of third parties to a very great extent, and it was therefore more than ordinarily hazardous.

Sir Michael pleaded, that, by the terms of the lease granted by his predecessor, all the powers conferred on the tenant were lawful in themselves, if exercised in a lawful manner. If the tenant exercised any of them in an unlawful manner, he acted under no authority derived from the landlord, but committed a fault of his own, acting with himself alone. The common rule, *culpa tenet suos auctores*, applies to this case, so as to exempt the landlord, as effectually as any third party, from responsibility for a fault in which he had no share or participation. And if any other rule was to be followed, the responsibility of landlords would be without limit, and one might be ruined, by the fault of one of his tenants, however impossible it might have been for him to prevent it from being committed. In the present case the hardship would be peculiarly apparent as the tenants possessed a right of way for 99 years, granted by Sir Michael's predecessor, and transmissible to his assigns, so as altogether to exclude any defectus persone.

In regard to the clause binding the tenants to pay damages to "the tenants and possessors of the adjacent lands," it merely referred to the surface damages which might be occasioned in forming and feeding the dam. But even if it had a wider application, it could not have increased, though in some views it might have diminished, the landlord's responsibility. In England, the law affecting the landlord's responsibility placed it on the same footing as the defender now occupies.

LORD GILLIES, Ordinary, "sustained the defences pleaded for the tenant, Michael Shaw Stewart, absolved him from the hailable conclusions of the Lords decessors." His Lordship also subjected the pursuers in expenses.

The pursuers presented a reclaiming petition, which, on June 23, 1811, the Court refused without answers.

J. GRAIG, W.S.—W. PATRICK, W.S.—Agents.

<sup>1</sup> Balmagowne, July, 1611; Smith, March 8, 1810, F.C.; Dig. l. 9, t. 3.

<sup>2</sup> Blackst. 4, 14; Tenant, June 30, 1791, 4 T. R. 318; Payne, Nov. 15, 1794, 1 Blackst. 350.

ter, and for this they alone are responsible." There was nothing in these defences which could in any way affect the separate defence of the landlord; and besides, the objection to the charge, so far as regarded the readings, resolved into an objection to an observation on evidence, and was not an exception to the law laid down by the judge, which, looking at the lease and sub-lease as the only evidence against the landlord and principal tenant, was incontrovertible.

The fact that a separate issue had been taken, as to the landlord and principal tenant, showed that their case was viewed as distinct from that of the sub-tenants. In the charge at the trial the presiding judge was therefore well-founded in the direction he gave, which was, merely, that nothing connected them with the operations complained of, except the lease and sub-lease, the verdict must be in their favour on the second issue, if the purposes specified in the lease, for which the premises were let, were such as they could be applied to without committing a nuisance; and that no operations of the nature of a nuisance were to be presumed to be in the contemplation of any landlord in letting a lease for purposes on its face lawful.

Arthur made a similar answer, but with this difference, that, in his defences he had made no allegation whatever as to the operations of the sub-tenants, except that if they injured the water, they were not authorized by him.

LORD GILLIES.—This exception requires particular attention from the Court, and it is perhaps attended with more difficulty than the others. The charge to the jury stated that "the lease said nothing as to turkey-red dyeing, but simply related to dyeing, which did not mean the establishment of any work poisonous to the water," and was no license to carry on a nuisance. If this were a question merely of interpretation of the terms of the lease, I think they do not authorize a nuisance, and had the landlord simply rested upon this, and disclaimed the operations of the sub-tenants, and admitted the nuisance, or merely said they were authorized to act according to the terms of the lease and not otherwise, I might have been satisfied that his case was separate from theirs, and his defence well founded. It was clearly proper to call him for his interest, however free he might personally be from connection with the nuisance; because, in asking interdict against the sub-tenants as to their use of the stream under his lease, he is the party having the permanent interest in the subjects let, and it was proper to call him. But, when so called, he was not content himself with the defence to which I have referred; and of course was open to him to take whatever line of defence he chose. So far from admitting the nuisance, he specially alleges that there is none; for his defences bear "in point of fact, no injury is done to the water by the operations carried on in the dyework occupied by the defender's tenants." And he subjoins a distinct plea in law, that "no actual injury is suffered to warrant the conclusions of the jury." By this conduct he does necessarily imply an approbation of the uses which the dye-work had been put. By maintaining that the sub-tenants have committed a nuisance in their mode of exercising the powers contained in the lease of the premises, I think he has identified his case with theirs, in a question of

No. 21

Mar. 11, 18  
Dunn v.  
Hamilton.

2216. nuisance and interdict, which turns altogether upon the use to which I actually put the work. I would, therefore, incline to sustain this excepti

1897. LORD MACKENZIE.—In regard to this exception I am rather inclined that the direction given at the trial was right. The second issue was during the said period, the defender, Hamilton, or his predecessors, or others, Arthur, by themselves, or another, or others authorized by them, did fully pollute and spoil the water of the said burn, so as to injure the quality of the same, to the nuisance of the pursuer, as proprietor of the said The question, therefore, was, whether the landlord and principal tenants selves, or by others authorized by them, did wrongfully pollute the water this means whether the pollution was made by persons authorized by them period when the pollution took place, and that any thing stated in the after the action was brought into Court, would not warrant a verdict against if they had not previously authorized that pollution.

LORD COREHOUSE.—I concur with Lord Gillies as to the sixth exception appears to me to involve the only difficult point in the case. I am clear opinion that no man is entitled to ask an interdict against another, merely because says that that other has no interest to object to be interdicted from whatful. A man must show either that he has actually suffered, or has such cause to apprehend the risk of suffering, at the hands of another, before entitled to ask an interdict against him. The question here is whether Hamiltonized these operations. The learned judge who presided at the jury trial he did not, because the terms of the lease do not authorize them. But somewhat different view of this question. I think that we are entitled to view the terms of the defence along with those of the lease. The defender that he authorized all operations under the lease which did not amount to a and in the defences he states that the operations of the sub-tenants did not to nuisance. This, by fair implication, imports that he authorized the operations of the sub-tenants. I, therefore, feel much doubt as to the direction given at trial; and I think the exception should be sustained.

LORD PRESIDENT.—This exception is the only one as to which I have experienced any difficulty; but I am of the same opinion with the majority of Lordships. I rather think that the learned judge at the trial had omitted to order, at this part of the charge, that the action was for interdict only and damages. His Lordship observed to the jury, that the pursuer had led to that it was impossible to carry on the dye-work at an ordinary profit without committing a nuisance (which, by the by, was laying rather more upon the defender than he was bound to perform); and then his Lordship afterwards observed "the landlord was not liable for any negligence in the carrying on of the dye-work." Now it appears to me that this consideration would have been proper in a case of an action of damages, but not in this action, which only concluded for interdict. And, on the whole, I think this exception also should be sustained.

The LORD PRESIDENT also observed, that, if a party only asked an interdict against what was unlawful in itself, no other party had a right to object to the interdicted from doing what was unlawful; and that this general rule applied to the party opposing the interdict had committed the thing complained of. Now it appears to me that this consideration would have been proper in a case of an action of damages, but not in this action, which only concluded for interdict. And, on the whole, I think this exception also should be sustained.

**No. 210**

May 11, 193

M'Whic v. McWhell.

Maxwell, 1971

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**No. 212**

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11, 18

**2d Divisio**

## Jury Cause

212. new trial should not be granted, on the ground of the verdict  
 11, 1837. against evidence, but the Court, after hearing parties on the i  
 Sir v. the evidence, holding that sufficient cause had been shown why  
 Hall. dict should not be set aside, refused the motion.

LORD JUSTICE-CLERK.—The sole ground of the rule which has been is that the verdict was against evidence, and on that ground alone the motion be disposed of. The principles on which such application is to be determined fully explained in the valuable work of the Lord Chief Commissioner of jury in civil causes. I had occasion, at an early period of our new system my views as to the principles on which we ought to proceed in such a case have been approved of by his Lordship, and I trust are conformable to the and authorities of the law of England. (His Lordship here referred to *Jury Trial*, p. 249, et seq.) The sound judicial discretion to be exercised Court will not warrant a new trial on this ground, merely because a verdict has been disapproved of by the judge who tried the case, or because the Court argument, are disposed to differ from the jury; and certainly not where there has been a contrariety of evidence, and where those who afterwards hear the fully discussed are not satisfied that upon the evidence adduced at the trial a different verdict ought not to have been returned. Now to apply these principles to the present case, it is impossible for me to hold that the verdict in question is against evidence. That there was a contrariety of evidence is certainly true, and especially by opposite sets of scientific witnesses adduced by the parties, differing of maps, &c. But there was a strong body of witnesses giving evidence as to knowledge and general understanding and belief, which Lord Gifford held to be of importance in reference to such an investigation, and as to the acts and intentions of individuals, all in favour of the defender in the issue, and in support of the verdict. Keeping in view the evidence afforded by the maps, &c., it is a grave consideration how far mere scientific opinions, from however skillful witnesses they have come, ought to overrule all other evidence in regard to the facts here put in issue. We all know that in the case of the Tay fishings the evidence of the same engineer who is here adduced, which fixed the position of the Tay I believe above Newburgh, was entirely disregarded, and the limit of the Tay and its estuary fixed at Abertay, the natural bar of that river, on which the Court, acting as a jury, held to be sufficient. (His Lordship here referred farther to the evidence.) On the whole, in the exercise of that discretion with which we are intrusted, I do not feel warranted in granting a new trial being one thing to grant a rule to show cause, and quite another thing to grant that rule absolute.

The other Judges having concurred,

THE COURT discharged the rule.

WILLIAM MARTIN, S.S.C.—ALEXANDER GOLDIE, W.S.—Agents.

<sup>1</sup> Dec. 20, 1836, ante, p. 299.

No. 213

WILLIAM ANDERSON, Complainer.—*D. F. Hope—Ivory.*JOHN HARVEY, Respondent.—*Keay—M'Neill—Marshall.*

Mar. 11, 18

Anderson v.

Harvey.

*Public Officer—Interdict—Stat. 7 and 8 Geo. IV. c. 112, and 2 and 3 Will. IV. c. 77.*—In an application at the instance of a Town-Clerk, acting as clerk of police court, to have a party who had been appointed to the latter office by Police Commissioners for the town, interdicted from discharging its duties,—instances in which interdict granted, and bill of suspension passed to try question as to the right of appointment.

By the Leith Police Act, 7 and 8 Geo. IV. c. 112, appointing Commissioners of Police for the burgh, it is provided in sect. 35, “that it shall be the duty of the said Commissioners, and they are hereby authorized and empowered to appoint a clerk, collector, treasurer, assessor, and all other persons necessary towards the execution of this Act &c., “and generally to execute the whole matters by this act committed to their charge.” By sect. 137, it is enacted “that the town-clerk of Leith appointed by the said Lord Provost, Magistrates, and Town Council of the city of Edinburgh, shall be clerk to the courts of police to be held under the authority of this act, and shall have such suitable salary as may be fixed by the said Commissioners, provided that nothing contained in this clause shall be construed to apply to the clerk of the court of the sheriff-substitute.” And by sect. 138, it is farther enacted, “that if the said town-clerk shall neglect or refuse to discharge his duties of clerk to the police court, a representation to that effect shall be made to the said sheriff-substitute, or by the said magistrates to the said Lord Provost, Magistrates, and Council of Edinburgh, and the said Lord Provost and Magistrates shall, after due inquiry, make due provision for the discharge of the said duties, by appointing a proper person to perform the same; or if the said Lord Provost and Magistrates shall neglect or refuse to take the necessary steps for the said purpose, within twenty-one days after such representation, it shall and may be lawful for the commissioners to appoint a proper person to discharge the said duties.”

By the Burgh Reform Act, 2 and 3 Will. IV. c. 77, providing for the municipal government of various towns, including Leith, it is enacted, “that it shall be lawful for the magistrates and council of any such burgh or town to elect a town-clerk for such burgh or town, for the period of one year, without prejudice to his re-election, and also without prejudice to the lawful right of any existing town-clerk, in any such burgh or town, to hold the office of town-clerk, or clerk to the magistrates and council ad idem aut culpam.”

By the Leith Police Acts prior to the 7 and 8 Geo. IV., the Commissioners were empowered to appoint clerks and other officers. In the case of successive appointments of a clerk to the board, including that of

March 11, 18

2D DIVISION

Bill-Chamberlain

Lord Cunningham

same.

T.



1837. the late Mr Hugh Veitch in 1809, the choice of the Commissioners fell upon the person who happened at the time to be town-clerk of Leith. Mr Veitch was the town-clerk of Leith at the time of the passing of the act of Geo. IV., holding his appointment from the Magistrates of Edinburgh, and discharging at the same time the duties of clerk of police. The complainer Anderson held for some years a commission from him as town-clerk depute, and in June, 1836, when Veitch's health totally failed, was conjoined with him in the office of town-clerk by the Magistrates and Town Council of Leith, in virtue of the powers conferred upon them by the 2<sup>d</sup> and 3<sup>d</sup> Will. IV. c. 77, and he thereafter discharged the whole duties of the office, including those of clerk of police. Mr Veitch died on the 15th January, 1837, and on the 21st Anderson was appointed town-clerk by the Leith Magistrates and Council, and in right of this appointment assumed the office of clerk of the police court, officiating regularly as such, and receiving possession of the records of court. On the 27th the Commissioners of Police held a meeting, and, by a majority, passed a resolution to the effect that they alone had the right to appoint their clerk. They accordingly appointed the respondent Harvey, who had been formerly named as the clerk for keeping their books and authenticating extracts, &c.

In these circumstances, Anderson presented a bill of suspension and interdict, founding on the 137th and 138th sections of the existing police act, stating the circumstances of his appointment, and praying for letters of suspension, and in the mean-time for an interdict prohibiting and discharging Harvey from acting or attempting to act as clerk of the police court of Leith.

Interim interdict having been granted, the Police Commissioners sided themselves as parties in name of their clerk, Harvey, and contended in answer:—

The complainer has, in the circumstances, no right or title to make the present application. By the existing as well as previous police acts, the Commissioners are expressly authorized to appoint their clerk, whose office is perfectly distinct from that of town-clerk of Leith, and requires and has hitherto received a separate appointment from the Board. The two offices are not so identified that the appointment of town-clerk carries with it the appointment of clerk of police, for if such were the case, the party appointed town-clerk might be compelled to discharge the duties of clerk of police or be removed, which is an impossible supposition. By the sections founded on of the act 7 and 8 Geo. IV., provision was made for "the clerk appointed by the Magistrates and Town Council of Edinburgh" being continued in the clerkship of police; but that provision must now fail entirely, since the right of appointing the town-clerk of Leith is no longer in the Magistrates of Edinburgh, and the complainer was in point of fact appointed by the Magistrates of Leith under the 26th section of the Burgh Reform Act. This section, however

infer upon these parties the appointment to the separate and entirely No. 213.  
ent office of clerk to the Police Court of Leith. While, therefore, Mar. 11, 1831  
Magistrates of Leith acquired no power to appoint, the Magistrates Anderson v.  
Edinburgh confessedly had no longer such power, consequently the Harvey.  
ntment to the office in question came to be vested in the Commis-  
rs, and fell to be made by them under the 35th section of the Police

Though the bill should be passed, yet, as the complainer has ex-  
no regular appointment from parties entitled to give it, while the  
ndent holds his appointment from the Commissioners, who are  
essly authorized by the Police Act, the interdict ought not to be  
ted.

he complainer replied—

is clear that the bill ought to be passed to try the question as to the  
t of appointment to the clerkship of police, which under the 137th  
ision of the act, must be held to be with the Magistrates of Leith,  
ccessors of the Magistrates of Edinburgh in the right of naming the  
-clerk of Leith, this provision importing a restrictive and not a de-  
strative quality in the appointment to that office. The complainer,  
ever, is also entitled to the interdict prayed for, in virtue of his ap-  
tment as town-clerk, both prior and subsequent to the death of  
ch, and in respect of his having officiated as clerk of police and  
g in possession of the office.

he Lord Ordinary passed the bill and continued the interdict, adding  
s interlocutor the subjoined note.\*

“ It is not disputed that the complainer is at present the lawfully elected and  
acting town-clerk of Leith. No doubt he is chosen by the Town Council of  
; but the Magistrates and Town Council of Edinburgh do not now elect any  
-clerk of Leith; they have abandoned or acquiesced in the Parliamentary  
fer of the patronage of this office to the Town Council of Leith.

The present case then depends on the proper construction that falls to be put  
e 137th section of the Leith Police Act, which provides that the town-clerk  
ith, ‘ appointed by the Lord Provost, Magistrates, and Town Council of the  
of Edinburgh, shall be clerk to *the courts* of police,’ &c. &c.; and the ques-  
comes to be whether the derivation of the clerk’s appointment, set forth in  
clause (corresponding with the state of the office at that time), is to be held as  
trictive quality in his appointment of clerk to the police-court, or merely as a  
nstrative addition, pointing out more clearly the legitimate and acting town-  
for the time as the party who was to officiate in the police-court.

At present, the Lord Ordinary’s impression is, that the latter is the sound  
pretation of the clause. At the date of the Leith Police Act, in 1827, the  
istrates and Town Council of Edinburgh appointed the Magistrates of Leith as  
the town-clerk. But that was altered by one of the Scots Municipal Acts  
in 1833 (3 and 4 Will. IV. cap. 77). The Parliamentary electors then  
ight in Leith to choose their Councillors, and the latter were authorized to  
the Magistrates, while the new Town Council were also empowered by  
26 to choose the town-clerk, ‘ without prejudice to the lawful right of any  
ing town-clerk in any such burgh or town, to hold his office of town-clerk,  
rk to the magistrates and council ad vitam aut culpam.’

Now, it can hardly be questioned that the Magistrates of Leith, as now chosen,  
1833/4

**213. The respondent reclaimed.**

**1837.** **LORD MEADOWBANK.**—I have some difficulty. Under the former statutes, there was a clerk who assisted in the police duties who was not appointed by the Magistrates of Edinburgh, but by the Commissioners of Police, pointed the town-clerk of Leith, but not necessarily so, to that office. I want to show that there was no inability in the town-clerk to act as police clerk. Then came the act of 7th and 8th George IV., wherein certain matters were settled by arrangement between Edinburgh and Leith. (His Lordship recited sections 137 and 138 of the act.) The subsequent Burgh Reform Act contains special reference to the Police Act. It merely gives the right of naming a police clerk to Leith as a newly created burgh, and are we by implication to take away the right of naming not only the town-clerk, but also the clerk of police? If such power was transferred to the Magistrates of Leith. Have any other cases been decided on this double right contended for? In regard to the question of possession, Harvey appointed by the Commissioners; and a suspension is brought by Anderson, who is here in petitorio. The question is, who has the prima facie title? Under the words of the public act, under which alone Anderson can pretend, I think Harvey has the better title, and am for refusing the interdict against him.

**LORD MEDWYN.**—This is certainly a question of possession. Anderson some time past had been acting as police-clerk, under a commission from the Commissioners, though holding no commission in his own name, and was then appointed town-clerk. On Veitch's death he was made town-clerk, continuing to act in the police court. A bill of suspension has been brought, and most

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have all the police powers transferred to them which their predecessors had. They were appointed by the Magistrates and Council of Edinburgh. The powers given to magistrates by the police statute are held as bestowed on the Magistrates of Leith holding that office according to law, for the time.

"On the same principle it would rather appear that a similar construction is applicable to the right given to the town-clerk to be clerk to the police court. The privilege of acting as such must be presumed to have been bestowed on the town-clerk for the time; and although the town-clerk was described in the act as appointed by the Magistrates of Edinburgh, it is not to be inferred that the privilege of officiating in the police-court was not transferable to any party holding the office of sole town-clerk when the nomination passed from the hands of other patrons than the Magistrates of Edinburgh.

"The concluding words also of the 26th clause of the general Municipal Act rather lead to this construction, as it saves the rights of existing town-clerks, *vitam aut culpam*, thus sanctioning an inference, that after their death, town-clerks shall have all the public and statutory rights and privileges of town-clerks.

"Farther, if the present town-clerk has not a legal right to act as clerk to the police-courts, it is very doubtful if the Commissioners have any right to appoint a clerk for these courts. The 35th and 44th sections of the act relate only to the proper administrative business of the Commissioners, for which a clerk is necessary, and not to the police-courts, where the Commissioners do not officiate.

"These views may very possibly be liable to question; but even if it is proper that such a case as the present should be discussed *deliberate*, expedite letters and a completed record. If so, it is apprehended, that in the time possession should be given to the clerk appointed by the judges of the court where he is to officiate."

ed to try the question, and the matter for determination by the Court now is **No. 213**  
 ely as to the interim possession. (His Lordship referred to the provisions of  
 act 7 and 8 Geo. IV.) I am satisfied that the 137th section was not meant **Mar. 15, 18**  
 apply to the sole case of Veitch. The next section seems to me to show that **Potts v.**  
 appointment of clerk of police was to be a permanent one, and that the town-  
 k of Leith was to be the person to discharge its duties; and I cannot but hold  
 effect of this clause to be the same when the town-clerk is elected by the Ma-  
 rates of Leith instead of the Magistrates of Edinburgh. In the circumstances  
 the case, I think that Anderson, being town-clerk of Leith, is *prima facie* en-  
 ed to act as clerk of police, and indeed has been acting as such. By continuing  
 interdict against Harvey we shall not be inverting the possession.

**LORD JUSTICE-CLERK.**—It has not been established that Harvey is in such  
 session of this office that by continuing the interdict against him we are turning  
 a out. Anderson is really in possession, and I think we ought to refuse the  
 claiming note.

**LORD GLENLEE** concurred.

**THE COURT** adhered.

**ALEX. ROBERTSON, S.S.C.—JOHN HARVEY, S.S.C.—JAMES STUART, S.S.C.—Agents.**

## JURY SITTINGS.

**WILLIAM POTTS and ROBERT SCURFIELD, Pursuers.—Robertson—** **No. 214**  
**Moir.**

**OLLOCK, GILMOUR, and COMPANY, Defenders.—M'Neill—Marshall.**

**Proof—Scientific Witness—Ship—Liability of Owners.**—1. Witnesses to the  
 and practice of sailing, such as captains in the navy, &c. allowed to be in  
 rt while evidence was leading of the facts as to the bearing of which they were  
 speak, but not during the speeches of counsel. 2. Question as to the liability  
 the owners of a vessel beyond the value of their ship and freight for loss or  
 large sustained by any other vessel or its cargo through collision with it.

**This** was an action at the instance of the owners of a vessel called the **Mar. 15, 18**  
 wing against the owners of the Oxford, setting forth that the Red-  
 while homeward bound from Quebec and in the middle of the **2d Division**  
 had been run down and destroyed by the gross negligence, mis- **Lord Justice**  
 management, and non-adherence on the part of the master or others who **Clark.**  
**R.**

1837. were in charge of the Oxford, to the established laws and sailing, whereby the pursuers sustained loss and damage to the £2470, as the value of the Redwing, and of the freight of her cargo, concluding for payment of the said sum.

The defence was, that the pursuers' claim was groundless, in that the collision was not occasioned by any negligence or error on the part of those in charge of the Oxford; and that it was an unavoidable accident, or was occasioned by the negligence and error of the persons in charge of the Redwing.

The following issues were sent for trial:—

“It being admitted that on the morning of the 12th day of 1835, a vessel called the Redwing, the property of the pursuer and Scurfield, came in collision with a barque called the Oxford, property of the defenders, in consequence of which collision the Redwing became a total wreck, and was abandoned;—and

“It being admitted that the said vessel and freight were insured by the other pursuers to the extent of £2300 sterling, and that the said sum has been paid to the pursuers, Potts and Scurfield, by the insurers;—

“Whether the loss of the said vessel Redwing was caused by fault, negligence, or want of skill of the master or mariners on board the said barque Oxford, and was to the loss and damage of the pursuers or any of them?

“Sum claimed £2470, 9s., or,

“Whether the said barque Oxford was not of the value of £9s.? And whether the cargo on board of the Redwing at the time said collision was of the value of £550, or part of the said sum?”\*

Robertson, for the Pursuers, requested that certain captains of navy and shipmasters, who were to give evidence as to the law practice of sailing, should be allowed to be in Court during the trial, which he stated to have been done in the case of *Innes v. Tutein*.<sup>1</sup>

LORD JUSTICE-CLERK.—I think such witnesses should not be in Court during the opening speech, but if they are to be asked in regard to evidence in the trial they ought to be in Court to hear that evidence, as in the case of *the witnesses*.

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\* This issue has reference to a provision in the 53 Geo. III. c. 159, whereby it is in substance enacted, that the owners of a vessel shall not be liable for loss or damage sustained, through any act or neglect to which they are not liable, by any other vessel or the cargo thereof, beyond the value of their own cargo, the freight due, or to grow due, for and during the voyage which is in question. In the course of the trial the Lord Justice-Clerk intimated that the law involved in this issue would be reserved; and no evidence or argument was laid before the jury.

<sup>1</sup> 4 Murray, 161.

witnesses in question sat in Court accordingly during the leading evidence as to the situation, &c. of the vessels. No. 214.

appeared that the only matter really in dispute was, whether, when the vessels first came in sight, the Redwing was to windward or to lee of the Oxford. Individuals of the crews of both vessels were examined by the parties respectively, but their evidence was directly contradictory. The case was settled without being put into the hands of the jury on the footing that the pursuer should allow the defender to take the first issue, while the latter withdrew any claim for damages.

Mar. 16, 1835  
Russel v.  
Shirreffs.

W. POLLOCK, S.S.C.—THOMSONS and ELDER, W.S.—Agents.

JAMES RUSSEL, Pursuer.—*D. F. Hope—Sol.-Gen. Rutherford*. No. 215.  
LUMSDEN SHIRREFFS, Defender.—*Robertson—M'Neill—Moir*.

*Declaration—Agent and Client.*—In an action of damages against a country gentleman for posting as a calumniator and coward a client of the firm of which he was a partner, for having made certain statements regarding a business transaction with the firm alleged by the defender to be calumnious, and having refused him personal satisfaction therefor—Verdict for the pursuer with £500 damages.

The defender Shirreffs was an advocate in Aberdeen, and was the partner of a firm which was employed in business by the pursuer Russel. Statements in regard to a transaction with the firm were made by the pursuer, which were alleged by Shirreffs to be calumnious, and for which he demanded personal satisfaction. This satisfaction being refused, he thereafter posted Russel as a calumniator and coward. Founding issue, proceeding, Russel then pursued Shirreffs for damages. The defence was, the fact of the posting being admitted, that the pursuer, under the circumstances, was not liable in damages.

Mar. 16, 1835  
2D DIVISION.  
Lord Justice-  
Clerk.  
R.

The following issue was sent to the jury:—

It being admitted, that at Mintlaw, on the 14th December, 1835, the defender did put up and publish a placard, containing the following words, viz.—‘James Russel of Aden, &c. Esquire, having indulged in calumnies against me, and having, after correspondence betwixt us, refused to see my friend (who accompanied me from Aberdeen to Old Deer, or to receive any communication from me upon the subject, I publish and post him as a calumniator and a coward.—Old Deer, 14th December, 1835;’ And on the 15th day of the said month and year did put up and publish, in each of the following places in the city of Aberdeen, viz. in the Newsroom of the County Buildings in Union Street, in the Newsroom called the Athenæum in Castle Street,—and in the shop of Mrs Laing, perfumer in Union Street, a placard containing the following words, viz.—‘James Russel of Aden, Esquire, having

215. indulged in false calumnies against me, and, having, after a  
 47, 1837. correspondence with me upon the subject, refused to apologize my  
 friend (who, in consequence, accompanied me yesterday even  
 Aberdeen to Old Deer), or to receive any communication in  
 regard to it, I now publish and post him as a calumniator and  
 (Signed) Jn. L. Shirreffs.—Union Street, Aberdeen, 15th I  
 1835 :—

Q. Whether the said words, or any of them, contained in the cards, are of and concerning the pursuer, and are false and to the loss, injury, and damage of the pursuer?

" Damages laid at £5000."

LORD JUSTICE-CLERK.—I have no doubt, in point of law, that the one individual by another, in such terms as appear in the admission pro-  
cess, establishes on the face of it a heavy injury. The language is un-  
injuriously to the party to whom it is addressed. It is no doubt com-  
person who is brought to answer for such a proceeding in a court o-  
justify or palliate it by evidence; and you have to say here whethe-  
dence has been adduced by the defender. (His Lordship then ref-  
evidence in the case.) If you think the proceeding cannot be justify-  
have the question of the amount of damages. It is not the province o-  
visit any party with vindictive damages, but looking to the nature of d-  
situation of the parties, and to what has led to the proceeding in ques-  
portion such rational and fair damages as the party may be entitled to-  
party who has found himself injured by the proceedings of professio-  
gives his opinion with reference to these proceedings, he is not to be m-  
immediate threat of being made personally responsible. Thus, if you  
pursuer, as I rather think you must do, you will have to find certai-  
though not vindictive.

**Verdict for the pursuer, with £500 damages.**

H. INGLIS and DONALD, W.S.—GORDON and BARRON, W.S.—Agents.

No. 216.

ANDREW M'GILL, Pursuer.—*D. F. Hope—Robertson*  
CHARLES FERRIER and OTHERS, Defenders.—*M'Neill—An*

*Meditatione Fugæ Warrant—Reparation—Diligence—Landlord*  
—1. In an action of damages for wrongous imprisonment by a tenant of  
against the trustee thereon under a voluntary trust-deed, and two agents  
by him, where it appeared, inter alia, that the trustee had applied for  
incarcerate the pursuer as in meditatione fugæ, till he found security for  
certain arrears and current rents, but for the prospective rents under a lease  
fifteen years to run—Held that this application was irregular. 2. In a  
—Verdict for the pursuer, with £200 damages against the principal de-  
fendant, and £100 each against the other two defendants.



This was an action of damages for wrongous apprehension and detention in jail, brought by M'Gill, sometime tenant on the estate of M'Neill Gallochoilly, against Charles Ferrier, trustee on that estate, and Lean and Colville, writers in Campbeltown, his agents. The defence was that the proceedings complained of were legal, and warranted by the circumstances.

No. 216.

Mar. 17, 1835

2<sup>d</sup> Division

Lord Justice-Clerk.

R.

M'Gill v.  
Ferrier.

The following issue was sent to the jury :—

“ Whether, on or about the 24th day of April, 1835, the defenders, any of them, wrongfully apprehended or incarcerated the pursuer, or wrongfully caused him to be apprehended or incarcerated, and detained in the jail of Campbeltown from the said day till on or about the 12th day of June, 1835, or during any part of the said period, to the loss, injury, or damage of the pursuer ?

“ Damages laid at £3000.”

It appeared, inter alia, from the pursuer's evidence, that M'Gill was tenant on the estate of Gallochoilly in Argyleshire, under a lease, commencing at Martinmas, 1831, which the defenders asserted to be for years, but the term of endurance whereof was disputed by M'Gill: after three years of the lease had run, there being an arrear of £122 at Martinmas, 1834, M'Gill intimated his intention of giving it up, and emigrating to America, whereupon Ferrier, in April, 1835, made an affidavit to the effect, that M'Gill and his co-tenants were indebted to him, as trustee on the estate of Gallochoilly, in the sum just mentioned as due at Martinmas last, and also in the sum of £111 as the rent due at Martinmas, 1835, and also the like sum of £111 yearly, “ for the fifteen years consequent to the said term of Martinmas, 1835,” that is, for the remainder of the 19 years' lease; and, farther, that M'Gill was in meditation of doing so.

Thereafter Ferrier caused the defender, Colville, to present, at his instance, a petition to the Sheriff of Argyle, setting forth, that M'Gill and his co-tenants were owing the arrears of rent, the current rent, and prospective rents above-mentioned, and praying as follows :—“ May it therefore please your Lordship, on considering this petition and the said affidavit, to grant warrant to bring the said Andrew M'Gill before you for examination, and thereafter to grant warrant for imprisoning him in the tolbooth of Campbeltown till he find sufficient caution to the amount of the said debts, acted in your Lordship's court-books, de jure sibi, in any action for payment of said debts already brought, or to be brought, against him at the petitioner's instance in a competent court within six months of the date of said warrant of imprisonment, and find him liable in expenses.”

On advising this petition and affidavit, the Sheriff granted warrant to bring M'Gill to jail, “ there to remain till he finds caution acted in the books of court to the amount of the debts mentioned in the petition, de jure sibi, in any action for payment of the said debts,” &c. There-

216. upon McGill was incarcerated during 49 days, in the course of various procedure took place, and thereafter he was liberated. 217. 1837. of suspension and liberation which was passed by the Court of Session. The defenders led no evidence, but contended, with reference to Ferrier's demand for caution to the extent of the whole rent of fifteen years to run of the pursuer's lease, that he was entitled to make such demand in security of the prospective rents of the lease.<sup>1</sup>

LORD JUSTICE-CLERK, in charging the jury, observed :—The main point in the pursuer's case is founded on the prayer of Mr Ferrier's petition in requiring caution to the amount of fifteen years' rent prospectively. I have case pointed out to me warranting such a proceeding, and indeed the difficult one. Should it be decided in favour of the legality of this point there would be the absurdity involved of making tenants absolutely liable for rents during all the years of a lease to run, notwithstanding that the crop in a sterile season is a good defence. I therefore direct you that this point in so far as it regarded caution for the rent of the subsequent years of the lease was irregular, and the defender, Ferrier, is consequently responsible for the result.<sup>2</sup>

THE JURY returned a verdict for the pursuer, with £200 damages against the defender Ferrier, and found for the other two defenders.

E. and A. McMillan, W.S.—W. and J. B. Douglas, W.S.—Agents.

No. 217.

WILLIAM DUNLOP and Co., Pursuers.—*D. F. Hope—Neave*  
GEORGE ANTHONY LAMBERT and OTHERS, Defenders.—*Sol.*  
*Rutherford—Robertson—Logan.*

*Carrier—Ship—Insurance—Jettison—Title to Pursue—Proof.*—1. In Newcastle ordered a puncheon of spirits from a dealer in Edinburgh, who packed the puncheon on board a steamer plying from Lenth to Newcastle, obtained a bill of lading which he transmitted to the purchaser along with a charging him with price, freight, and insurance; the seller, at the same time, a bill for the amount, which the purchaser accepted; the puncheon was on the deck; during the voyage a violent storm arose, and the puncheon was overboard, along with almost the whole of the cargo in the hold, for the purpose of lightening the vessel; the seller immediately afterwards sent another puncheon of spirits to the purchaser at Newcastle, intimating that no farther price was charged, except in so far as the second puncheon exceeded the first in value; the seller then raised an action against the purchaser, for the value of the first puncheon, alleging it to have been lost by improper stowage; at a trial before a jury,—Direction by the presiding Judge

<sup>1</sup> Cameron v. Stewart, Nov. 18, 1823 (ante, II. 497; new ed. 439); Ward v. Wilson, March 10, 1829 (ante, VII. 566); Dick v. Stewart, 1836 (ante, XIV. 218).

<sup>2</sup> A Bill of Exceptions was tendered by the defender Ferrier to this effect:—  
law.

jury should not find the shipowners liable for the value of the puncheon to the pursuers, because, if, on the one hand, it was lost by the fault of the shipowners, they were liable to the purchaser at Newcastle, at whose risk the puncheon was, at the date of shipment; and if, on the other hand, it was lost by a peril of the sea, the shipowners were not liable for its value to any party whatever. 2. Where a contract is proved scripto—Held incompetent to qualify it, in reference to the interests of a third party, by allowing one of the parties to the contract to ask the jury what was his understanding of its import.

No. 217

Mar. 21, 1834

Dunlop v.

Lambert.

WILLIAM DUNLOP and Co., wine and spirit merchants in Edinburgh, sued an action against George Anthony Lambert and others, owners of the Ardincaple steamer, which plied between Leith and Newcastle, claiming for payment of £75, 9s., as the value of a puncheon of whisky shipped on 31st August, 1833, on board the steamer, to the address of Matthew Robson, Newcastle, and not duly delivered. The summons were that the defenders “undertook by their agreement, and were answerable to the said Matthew Robson, for the safe delivery of the said puncheon:” that the puncheon was improperly left on deck, in place of being stowed in the hold, and that “it was washed or thrown overboard, or otherwise lost or destroyed, in consequence of the improper stowage or other fault or neglect of the defenders, or their servants for whom they were responsible;” that the pursuers had reshipped another puncheon of equal value to Robson “in lieu or payment of the one so lost by the defenders;” and that the defenders were liable to them for the value of the cask which was lost.

1st Division

Ld. President

The defenders denied that the cask had been lost through improper stowage, or through any fault of theirs, and alleged it to have been thrown overboard along with almost the whole of the cargo, for the safety of the vessel, in a violent storm; and that its value, along with the rest of the goods thus jettisoned, must form the subject of a general average on the ship, freight, and cargo. They pleaded, separately, that the pursuers had no title to insist for the value of the puncheon, as it was at Robson’s risk at the date of shipment, and he alone was entitled to call them to account for the value of it. The subsequent shipment of a second puncheon to the pursuers to Robson, neither increased nor diminished the liability of the defenders to Robson in regard to the first puncheon.

The following issues were sent to trial:—

1. Whether, on or about the 31st day of August, 1833, the pursuers shipped a puncheon of spirits on board the Ardincaple of Newcastle, a vessel belonging to the defenders, for the purpose of being conveyed to Newcastle, and delivered to Matthew Robson, Newcastle? and,

2. Whether the defenders wrongfully failed to deliver the said puncheon to the said Matthew Robson, and are indebted and resting owing to the pursuers in the sum of £75, 9s., or any part thereof, with interest thereon, as the value of the said puncheon of spirits?”

At the trial it appeared that part of the Ardincaple’s cargo consisted of three puncheons of spirits, three of which were stowed in the hold, and the

Newcastle, 10s., insurance,  $\frac{1}{2}$  per cent, 8s." Robson had directed insurance to be effected.

The pursuers also put in the deposition of Robson, taken on oath, to which no objection was made; but when one of the interrogatories was read in Court, which was to the effect, Whether the pursuers undertook the risk of the puncheon during its transit to the castle?—the defenders objected, that by the written evidence in process the nature of the contract and the relative risk was plain. Soon as the pursuers shipped the puncheon at Leith on board of a sailing ship, the risk was thereafter that of the purchaser, as owner of the goods; and accordingly he had been charged with the cost of it, which would not have attached to him had they not been at his instance. It was true that by competent written evidence, if such had been produced, the pursuers might have proved that their contract with Robson was such that the risk remained with them; but no such evidence was produced, and it was incompetent, by parole proof, to qualify the tenor of the contract. The pursuers answered, that, as Robson was one of the parties to the contract, it was competent to ask him what was his understanding as to its import; so as to prevent a third party from coming in to an effect different from that which was understood by the parties themselves.

**LORD PRESIDENT.**—The question is, at whose risk the puncheon was during the voyage. The understanding of one of the parties, cannot affect the nature of the agreement itself, which is proved scripto. The question is therefore, incompetent.

owing goods on board of steamers, the evidence given, was liable to the observation that the greater part of the witnesses had experience regard to sailing vessels only; and that, while it appeared to be common to ship goods on the decks of steamers than of sailing vessels, it was thought by the witness who had had most connexion with the navigation, that the deck of a steamer was safer than that of a sailing vessel, because it was surrounded by higher bulwarks, and because there was less free room required on deck for the navigation of a steamer, by machinery playing under the deck, than for the navigation of a vessel propelled by sails, which could not be duly worked where the deck was encumbered with goods. But nothing appeared on the proof to establish an actual distinction as recognised in trade between the risk of goods deck-laden in a steamer, and goods deck-laden in a sailing vessel.

No. 21

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 Mar. 21, 1  
 Dunlop v.  
 Lambert.

It appeared on the proof that the *Ardincaple* was well found and fitted for sailing from Leith, but that on her voyage to Newcastle she encountered a violent tempest which exposed her for a considerable time to imminent peril. At one time, a sea broke over her larboard side with such violence as not only to do great injury to the rigging, paddle-boxes, and various parts of the deck, but also to sweep overboard every man on deck but the man at the helm. Nine persons were thus washed overboard, including the master, were drowned. When the vessel, with above 30 passengers on board, was labouring in great distress, she was obliged to heave the cargo overboard and lighten her, for the safety of the passengers and the ship. The two puncheons on deck were thrown over, as well as the whole cargo in the hold, excepting the puncheons stowed there. It was the intention, at one time, to run the contents of these puncheons, and let them mix with the water in which they were, which was six feet deep, so that the whole might be pumped out, and the bungs of the puncheons were started for that purpose, but this attention was abandoned, either because the sailors refused to pump if the spirits were mixed with the water, which they said would kill them while at the pump; or else, because it was found expedient to run the puncheons forward in the ship, and depress her towards the bow, to draw the water towards the most effective pump; or, on both of these considerations united. In the end, the wind drove the *Ardincaple*, after having had her mainmast and funnel carried away by the board, and losing her anchors, besides sustaining great damage, was towed into Shields harbour by two sailing smacks.

Of the witnesses deposed that the risk of the two puncheons on being exposed to be thrown overboard would have been just the same if they had been in the hold.

Regarding the loss of the puncheon, the pursuers sent off another to Robson; its price was higher, by a few pounds, than that of the first puncheon, and Robson was only charged with the difference of

117. The defenders led no evidence. They pleaded that it was established, by the proof, that the pursuers had no title to demand the value of the puncheon, whether it was lost through the fault of the defenders or not. The puncheon was at the risk of Robson, the purchaser, from the moment of shipment, and he had, accordingly, been charged by the pursuers with freight and insurance. Assuming the pursuers' statement to be true, that the puncheon was lost through the defenders' fault, it follows that no claim could lie against the insurers, as it was not lost through sea-risk; and, therefore, even if the pursuers were themselves the insurers, they had no title, in that character, to claim the value of the puncheon. But if, on the other hand, the puncheon was lost without any fault of the defenders, still the loss was to Robson, the purchaser and proprietor of the spirits, and not to the pursuers; and besides, the defenders in that case, were not liable to any party whatever. Though the pursuers had subsequently sent a second puncheon, without charging a second price, that might have happened from some private circumstances, not disclosed in the proof; or it might have arisen from an erroneous idea of their liability, or from other causes; but, from whatever cause it arose, it could not affect the liability of the defenders for the first puncheon, which remained the same as before. And thus it was Robson alone who was entitled to call them to account. But, separately, it was proved that the puncheon was lost, not from defective stowage, or any fault imputable to the defenders, but in consequence of having been properly jettisoned along with almost the whole cargo for the safety of the passengers, and the ship. The puncheon would equally have been sacrificed if it had been originally in the hold; and the pursuers had no more claim on them for a puncheon so thrown into the sea, to save the ship, than they could have had, if the ship containing the puncheon, had gone to the bottom. For the whole goods jettisoned, a proportional liability attached to the ship, freight, and cargo; but that was not the species of liability founded on in these issues, and, therefore, on the second issue, there ought to be a verdict for the defenders as they had not wrongfully failed to deliver the puncheon.

LORD PRESIDENT in charging the jury, made the following observations.—

The first issue appears to be substantially admitted by the defenders, to the effect that the puncheon of whisky was shipped on board their vessel for the purpose of being conveyed to Newcastle and delivered to Matthew Robson. The second issue is that which is contested, whether the defenders wrongfully failed to deliver the puncheon to Robson, and are indebted to the pursuers for the value of it?

In answering this question, you will keep in view, in the first place, that after the pursuers had shipped the puncheon on board of the *Ardincaple*, a regular carrying vessel, addressed to Robson, and had procured a bill of lading bearing that the puncheon was deliverable to him or his assignees, which they forthwith transmitted to him, the risk of that puncheon during the voyage was Robson's and not theirs. They had fulfilled their order from Robson, and if the puncheon was lost

of the sea, the loss was his and not theirs. Their responsibility as the No. 217.  
 the puncheon was at an end.

A point to be noticed is the manner in which the puncheon was stowed Mar. 21, 1887  
 of the Ardincaple. It can scarcely be said to have been stowed at all, as Dunlop v. Lambert.

secured in the hold, but merely placed upon the deck of the vessel. It  
 tly proved to be the practice of trade that goods which are placed on  
 ad of being stowed in the hold, are at the risk of the owners of the ship,  
 e has been a special agreement authorizing them to be deck-laden. This  
 isistent with common sense, as such goods are evidently exposed to  
 ard on the deck than in the hold; so much so, that a policy of insurance  
 old if goods were deck-laden, without that being specially agreed to in

And of all goods which could be placed on deck, there are scarcely  
 ere less fit for that exposed situation, than a puncheon of spirits, which  
 nt temptation in the way of the sailors.

npt has been made to establish a distinction between steam vessels and  
 sels as to the practice of carrying goods on deck, and as to the under-  
 trade in regard to the risk of goods so carried. It does not appear to  
 y such distinction has been made out. And, therefore, in so far as con-  
 mproper stowage of the puncheon, and any responsibility resulting from  
 towage, it appears to me that there was improper stowage by the defend-  
 at the relative responsibility attaches to them.

does not solve the question whether the defenders wrongfully failed to  
 puncheon to Robson; and still less, whether they are liable for the  
 e puncheon to the pursuers. It rather appears to me on the evidence  
 mcheon was lost, not from improper stowage, but from a peril of the sea,  
 oned along with almost the whole of the cargo for the safety of the ship  
 gers. But even supposing that the puncheon was lost from improper  
 he value of it appears to be due not to the pursuers, but to Robson. The  
 after it was shipped and the bill of lading transmitted to Robson, was  
 y and at his risk. The pursuers had no more right or interest remain-  
 puncheon, than they had in any other part of the cargo. And accord-  
 son was charged by them with the cost of insurance, which could only  
 the footing of its being his property and at his risk. In these circum-  
 hink the pursuers have no title to recover the value of the puncheon. If,  
 hand, you think that their statement is proved, that it was lost owing to  
 stowage and not owing to a peril of the sea, then, although the defenders  
 or the value of it, it is to Robson alone that they are liable, and not to  
 rs. The pursuers cannot claim its value as proprietors, for they were  
 the proprietors. And even if they were themselves the underwriters who  
 e puncheon, they cannot claim its value in that character, because no lia-  
 shed to them as underwriters, if the puncheon was lost through improper  
 ad not through any peril of the sea. But if, on the other hand, you hold  
 ent of the defenders to be sufficiently proved, that the puncheon was  
 y improper stowage, but by a peril of the sea, then the defenders are not  
 ts value to any person whatever.

whole circumstances, it does not appear to me to be of importance whe-  
 puncheon was lost by a peril of the sea, or by improper stowage, as in  
 the pursuers appear to have no right to recover the value of it.

And to the second puncheon which was sent by the pursuers to Robson,



"On the last point of the second issue, we find that the defenders are to the pursuers for the value of the spirits, because they were not, at the loss, the rightful owners of the goods in question, their invoice shewing their right in the whisky ceased at the time of shipment."

J. MURDOCH, S.S.C.—SARGENT AND ADAM, W.B.—Agents.

No. 218. ALEXANDER MURRAY, Pursuer.—*Sol.-Gen. Rutherford*.  
ROBERT DUNCAN DOUGLAS (Clerk to the Road-Trustees of the  
of Peebles), Defender.—*D. F. Hope—Anderson*.

*Road-Trustees—Reparation.*—In an action of damages by the tacksmen of the toll-bar, against the road-trustees, for wrongfully shutting up one of the roads after letting the toll-duties thereon to him,—Verdict for the pursuer, and assessed at £30.

Mar. 21, 1837. ALEXANDER MURRAY, tacksmen of the Craighurn toll-bar, in the district of the county of Peebles, raised an action of damages against the road-trustees, alleging that, on April 21, 1835, they had let to him the toll-duties on the road from Whitsunday, 1835, to Whitsunday, 1836, the tolls leviable on that road, one of which was the old Kingside-Edge road, and that, in the following, they had wrongfully shut up that road, so as to cause damage in the proceeds of the toll-bar, amounting to £60. He asked for payment of £60 in name of reparation.

The trustees pleaded in defence, that the toll-duties on that road were not let to the pursuer, the road having been shut up for a period

“Whether, on or about the 21st day of April, 1835, the defenders **No: 218.**  
to the pursuer the toll-duties leviable during the said period at the **Mar. 28, 1835**  
bar on carriages, cattle, and sheep passing along the old Kingside- **Falconer v. Cochran**  
lge road, leading from said bar to Howgate; and on or about the 1st  
y of September, 1835, wrongfully shut up or obstructed, or wrongfully  
actioned the shutting up or obstruction of the road last aforesaid, to the  
is, injury, and damage of the pursuer?”

The defenders led no evidence, and

**THE JURY** found for the pursuer; damages £30.

**R. KENNEDY, W.S.—W. MACKENZIE, W.S.—Agents.**

**JOHN FALCONER, Pursuer.—Maitland—Penney.**

**JOHN COCHRAN, Defender.—D. F. Hope—Shand.**

**No. 219.**

*Reparation—Assault—Jury Trial.*—1. Circumstances in which a sum of £20  
as awarded in name of damages and solatium for a personal assault, committed  
der the influence of verbal provocation. 2. It is not admissible for an opening  
unsel to make a statement to the jury, of a fact which he could not be allowed  
prove, in respect of its not being in the record.

**JOHN FALCONER**, surgeon, near Lasswade, raised an action of damages **Mar. 23, 1835**  
account of a personal assault committed on him by **John Cochran**, **1st Division**  
mer, at Roslin. The damages were laid at £300. **Ld. President**

**Cochran** alleged in defence, that **Falconer** had truly received no in-  
y; or at least that he had given so gross provocation that a sum of  
s and expenses, was ample compensation, which sum he accordingly  
dered.

The following issue went to trial:—

“Whether at Loanhead, in the house of the pursuer, and near the  
ne; or at either of the said places, and on or about the 8th day of June,  
36, the defender assaulted and struck the pursuer, to the loss, injury,  
a damage of the pursuer?”

Evidence was led on both sides at the trial, from which it appeared  
Falconer and Cochran, with other two persons, had been drinking  
ether in a public-house from about a quarter of an hour past 9 o'clock  
the evening of Wednesday the 8th of June, till about 12 o'clock.  
ey drank about 9 gills of whisky, and 9 bottles of strong ale, and were  
much intoxicated. Some indecent conversation passed among them,  
is rather appeared that **Falconer** had taken the chief share in this, and  
he made reflections on **Cochran**, as if he were the father of a bastard, and  
which had irritated him considerably. **Cochran** had also got  
an altercation with another of the party, which at one time threat-

1837. 219. oned to lead to violence, but this was prevented. At length Falconer left the party, apparently at the request of one of the number, who was apprehensive of a "disturbance" between him and Cochran. He went to his own house, which was within a dozen yards of the public-house, and he was preparing to go to bed, when a knock was heard at the door. The assault occurred almost within a minute, or at least within a very short time indeed, after he had reached home. Falconer's servant opened the door, and Cochran, who had knocked, asked if Falconer was in. Falconer, hearing Cochran's voice, asked him to come in, which Cochran refused to do, but asked Falconer to come out, which Falconer declined. Cochran then went into the house, and, being a powerful man, he seized Falconer by the collar of the coat, and dragged him out into the street, where he knocked him down into the kennel, and kicked him down. After Falconer got to his feet, Cochran struck him again; but with some difficulty, Falconer got back into his own house and shut the door, against which Cochran kicked for some time, and demanded admittance. During the assault Cochran repeatedly made use of very violent and abusive language, saying, among other things, "if it was not to vex me the morn, I would take your life." The latter part of the assault on Falconer's person was committed in presence of his wife, who was agitated by it. Falconer was bleeding at the nose and mouth, and below the left ear, when he got to his own house. He had sustained no serious personal injury, however, being perfectly well next day, and taking a full share of exercise as usual.

When the *Dean of Faculty* was opening for the defender, Cochran, he was stopped when proceeding to state to the jury that Cochran had been fined for this same assault in the sum of £5, under a prosecution at the instance of the fiscal.

*Maitland*, for the pursuer, objected to the competency of opening on this subject at all, as it was not stated on the record, and no proof of it could be permitted; but it was irregular to open on that which could not be put in proof.

LORD PRESIDENT.—It is not admissible to make the statement, as no proof of it can be allowed.

LORD PRESIDENT, in charging the jury, observed, that no verbal provocation could entirely justify blows, either in a criminal or a civil court, though gross provocation would, in the former court, alleviate the punishment, and in the latter would diminish the damages. His Lordship considered it a case in which gross verbal provocation and insult had led to a drunken brawl; and after pointing out these alleviating circumstances, his Lordship left it in the hands of the jury to deal with the question of damages in the exercise of a sound discretion.

THE JURY found for the pursuer, and assessed the damages at £20.

JAMES BAILLIE and JOHN GRINDLAY, Pursuers.—*D. F. Hope—Patterson.*

No. 220

WILLIAM YOUNG and OTHERS, Defenders.—*M'Neill—Cheape.*

Mar. 23, 18  
Baillie v.  
Young.

**Bankrupt.—Fraud.**—A creditor, who was ranked on a sequestrated estate, concurred in discharging the bankrupt on a composition of 3s. per pound, and granted receipt for the composition on his own debt at that rate, and discharged it; the bankrupt afterwards raised an action against him for payment of a debt due by him to the bankrupt prior to the sequestration, but which was not given up by the bankrupt among the debts due to him; the creditor then raised a reduction of the discharge under the composition contract, and the receipt for the composition on his debt, as having been fraudulently obtained;—Verdict found, in the circumstances, that the discharge and receipt were obtained by fraud, or fraudulent concealment, on the part of the bankrupt.

In January, 1827, the estates of William Young of the Omoa Iron Works, were sequestrated, and Edward Bailton, agent in Glasgow, was appointed trustee. In June, 1827, the sequestration was wound up under a composition-contract for payment of 3s. per pound, and Young was, in common form, discharged, except as to payment of the composition. In 1831, James Baillie, surgeon in Motherwell, holder of a bill for £76, 14. 6d., and John Grindlay, writer in Hamilton, holder of a bill for £50, obtained respectively from Young the sums of £13, 3s. and £7, 10s., as a composition on their debts, and granted receipts and discharges to Young. Soon afterwards Young raised an action against Baillie for payment of £84 as the price of iron-rails furnished by him, in June, 1826, to Baillie, which were never paid. Baillie denied the debt, but it was proved under a jury trial at the Glasgow Circuit in October, 1827, that the rails had been furnished and had never been paid for. Young did not give up this debt of £84 in the state of affairs shown to his creditors in 1827, upon which state the offer of composition was made and accepted, and in reference to which he had undergone the requisite examinations and taken the relative oath, before obtaining his discharge. One of the books, called a foundry-book, which contained, inter alia, entries relative to the furnishing of the rails, was not exhibited by Young to his creditors. After the verdict in favour of Young, a reduction was moved by Baillie, and also by Grindlay, for the purpose of setting aside the discharge under the composition-contract as having been unduly procured by Young whilst he knew and recollected the existence of the debt of £84, but refrained from giving it up in the state of his affairs, by defrauding his creditors, and particularly Baillie, whom he induced to agree to a composition of 3s. per pound on the debt due by Young to him, while he afterwards claimed 20s. per pound on the debt due by him to Young. The reduction also struck at the receipts and relative discharges granted at obtaining payment of the composition, and

Mar. 23, 18  
1st Division  
Ld. President

220. also at a restriction of one of the debts which had been marked in terms of diligence. The trustee and all the creditors ranked; were called parties along with Young.

Young alleged that the omission to give up the debt of £84 was merely from the confusion of his affairs, and was an inadvertent oversight, and he contended that Baillie must have been all along perfectly aware that he was owing £84 to him (Young), and had acted fraudulently, claiming any composition on the bill for £76, 14s. 6d., and afterwards denying the debt of £84. He alleged Grindlay to be merely the agent of Baillie, and this, apparently, was admitted.

The following issue went to trial:—"It being admitted that on 19th January, 1827, the estate of the defender was sequestrated, and that on the 9th of June, 1827, the defender obtained his discharge under a composition-contract:

"It being also admitted that the pursuers held two promissory notes for the sum of £76, 14s. 6d., and £50 sterling; and on the 9th May, 1831, the pursuer, John Grindlay, drew the sum of £7, 10s., under the said contract, and granted the receipt, No. 9 of process; and on 18th May, 1831, the pursuer, James Baillie, drew the sum of £13, 10s., and granted the receipt, No. 7 of process, and the note of restriction, No. 1 of process:

"Whether the said discharge, and the said two receipts and note of restriction, or any of them, were obtained by fraud, or fraudulent concealment, on the part of the defender?"

The case was of a special nature. No evidence was led by Young, who rested his defence on the plea that nothing was proved which showed he had committed any thing but an inadvertent omission in failing to give up the debt of £84 under the sequestration.

THE JURY found for the pursuers.

J. ROSS, S.S.C.—T. LEHURN, S.S.C.—Agents.

No. 221. HON. MRS MARIA HAY MACKENZIE, and HUGH MUNRO, Suspenders.—*D. F. Hope—Keay—H. J. Robertson.*  
ARCHIBALD HORNE (Judicial Factor on Cromarty Estate), and OTHER Respondents.—*Sol.-Gen. Rutherford Ivory—M'Neill—A. Wood—Anderson—Tait.*

*Salmon-Fishings—River—Sea.*—Verdict finding that certain parties wrongfully fished for salmon in the Frith of Cromarty, with stake-nets, &c., in respect that the position of the nets was in a situation prohibited by statute.

Jan. 28, 1837.

1st DIVISION. THE Hon. Mrs Maria Hay Mackenzie of Cromarty, was heritably infeft in the salmon-fishings of the river Conon, and craves of the

and Hugh Munro of Teaninich was her tacksman. They presented **No. 221.**  
 bill of suspension and interdict against Archibald Horne, judicial factor **Mar. 28, 1837.**  
 the estate of Cromarty, and others, alleging that these parties practised **Collins v. Hamilton.**  
 mode of fishing which was illegal, being carried on by means of stake-  
 nets, &c., placed along the shores of the Cromarty Frith, which was just  
 continuation of the river Conon, and therefore were in situations prohi-  
 bited by statute. The respondents maintained that their nets were not  
 prohibited situations. The following issue went to trial, in the ques-  
 tion with Archibald Horne, and a similar issue was tried at the same time  
 with each of the other respondents. "Whether the defender, or his  
 predecessors in office, have or has wrongfully fished for salmon in the  
 frith of Cromarty, opposite the lands and estate of Cromarty, and others,  
 during the years 1824, 1825, 1826, 1827, and 1828, or during any part  
 thereof, by means of stake-nets, bag-nets, yairs, or other engines, placed  
 in situations prohibited by statute?"

After a trial, which lasted for three days,\* the Jury found for the  
 respondents.

BURNES, S.S.C.—J. and W. FERRIER, W.S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL,  
 W.S.—TAIT and CRICHTON, W.S.—W. MACKENZIE, W.S.—Agents.

EDWARD COLLINS, Pursuer.—*D. F. Hope—Robertson—A. M'Neill.* **No. 222.**  
 JAMES HAMILTON and ARCHIBALD ARTHUR, Defenders.—*Maitland—*  
*A. Dunlop.*

M'DONALD and M'KAY, Defenders.—*M'Neill.*

*Nuisance—River.*—1. In an action concluding solely for damages, and under an  
 issue whether certain operations of the defenders have been "to the nuisance of  
 pursuer, and to his loss, injury, and damage," unless he prove "damage," he is  
 entitled to a verdict. 2. Rule for determining questions of nuisance in respect  
 of operations by a superior heritor on a stream complained of by parties below  
 entitled to the use of the stream.

*Lease—Reparation.*—Under a lease of premises situated on a stream, declaring  
 they were to be used "for the purpose of bleaching, dyeing, or printing, and  
 other operations connected with bleaching, dyeing, or printing," if the tenant  
 establish a dyework which creates a nuisance to the injury of the proprietors or  
 tenants of inferior properties, such operations held not to be authorized by the  
 lease, so as to render the landlord responsible for the damages thereby occasioned.

THE late Mr Hamilton of Barns, father of the defender, Hamilton, in **April 14—1837.**  
 1837, let to the other defender, Arthur, his heirs and assignees, for 19  
 years, certain premises, described as a "bleachfield," and situated on a **1st DIVISION**  
 stream called the Cochno or Cochney Burn, with a declaration contained **Ld. Cockburn**  
 in the lease, "that the said subjects hereby let are to be used for the **R.**

A bill of exceptions was subsequently presented, in reporting which a fuller  
 report of the trial will be given.

222. purpose of bleaching, dyeing, or printing, and any other operation connected with bleaching, dyeing, or printing, or for agriculture." The lease contained a clause of absolute warrandice, and the rent stipulated was £60 per annua. The same subjects had previously been possessed by one Colquhoun, under a lease granted in 1802, at the same rent of £60, it being stipulated in the lease that the premises should not be used for any other purpose than a bleachfield or printfield without the express consent in writing of the landlord. Arthur occupied the subjects let in 1826, using them exclusively as a bleachfield. In that year he sublet them to the defender, M'Donald, and certain other parties, set forth in the sub tack, as "intending to carry on business as printers, at Cochno, at a subrent of £112 for the first year, and £120 for each year afterwards, thus obtaining a surplus rent of £60. The sub tack was granted under the several conditions and provisions particularly specified and contained in the principal tack; and it shortly afterwards became vested in the defenders M'Donald and M'Kay, who, after entering to possession of the premises, used them for the purpose of carrying on a Turkey-red dye-work. In this manufacture they employed large quantities of madder root. In 1827 they had used 310 cwts.; in 1828, 774, and in 1829, 1832, which was nearly as large a quantity as had been consumed in any subsequent year. At first they were in use, after the colouring matter had been extracted, to discharge the exhausted madder roots direct into the stream. In 1829, however, they constructed a settling pond, into which the grosser particles subsided, and were from time to time drawn out, and heaped upon the banks and adjacent ground. The Cochno Burn, on which this dye-work is situated, after passing for about three quarters of a mile through or amongst the lands of the defender Hamilton, enters the property of Mr Dunn of Duntocher, and shortly afterwards unites with a much larger stream, called the West Cochno Burn, or more commonly the West Burn, after which junction it receives the name of the Duntocher Burn, and the Dalmuir Burn. The quantity of water discharged by these streams was, according to one measurement—the Cochno Burn 962 gallons per minute, and the West Burn 5600 gallons per minute; and, according to another measurement—the Cochno Burn 630 gallons per minute, the West Burn 8000 gallons per minute, and another small stream which joined previously, 180 gallons per minute. The water of these united streams turns the wheels of several extensive cotton-mills belonging to Mr Dunn, passing through a considerable number of mill-dams, in which it is, to a certain extent, and for certain periods, detained. On Mr Dunn's property, and on the banks of the stream, there is situated a large village, and besides Mr Dunn's cotton-mills, five in number, there are also on the stream, below the works of the defenders, a forge-mill, a small dye-work, a clay-mill, and a grain-mill. From the defenders' works to the Clyde, into which the stream empties itself, there is a run of about three and a-half miles, with a very considerable



rent (nearly 400 feet) and at a place called Dalmuir, about three miles No. 222.  
 now the defenders' works, are certain works occupied by the pursuer April 14—19  
 Collins, as tenant under Mr Dunn, to whom they belong. The uppermost 1837.  
 of the pursuer's works is used as a mill for the manufacture of brown Collins v.  
 cartridge paper, and inferior descriptions of fine paper. Immediately Hamilton.  
 adjoining this mill are certain buildings used as a chipping and grinding  
 mill, in which dye-woods of various descriptions, including certain red  
 woods, called cam-wood and bar-wood, are chipped, rasped, and ground,  
 which last-mentioned operation (first begun to be carried on at Dalmuir  
 a few years since), the woods are reduced to a fine dust. These  
 mills are supplied with water, by separate troughs, from a dam  
 immediately above and closely adjoining them. In the chipping and  
 grinding mill the water is only used to turn the wheel, which is situated  
 inside of the mill, but separated by a wooden partition from the  
 space in which the chipping and grinding operations are conducted. After  
 turning this wheel the water passes into a lower dam, from which it is  
 run to another paper mill of the pursuer's, situated at a little distance  
 below, in which fine papers alone are made, and the water is there used  
 for setting the machinery in motion and for washing the pulp. A  
 main proportion of the water used for this latter purpose is taken from  
 the upper dam above-mentioned, and passed through filters into open  
 ponds, situated a little way from the chipping and grinding mill, and from  
 thence is conducted in pipes to the lower paper mill, the proportion being  
 one-fifth filtered to four-fifths unfiltered.

In December, 1833, Collins, under form of notarial protest, intimated  
 M'Donald and M'Kay that their operations were productive of great  
 damage to him, by the injury to his paper, caused by the colouring matter  
 discharged from their dye-work; and in September, 1834, he raised an  
 action of damages against these parties, and also against Arthur, the  
 principal tenant, and Hamilton, the landlord. The summons set forth  
 generally, "that of late the defenders, or one or other of them, have taken  
 upon them, without any right, title, authority, or warrant of law, to  
 discharge great quantities of madder-roots, or other dye-stuff, or other  
 noxious and deleterious stuff, or water impregnated with the  
 same, into the said burn, whereby it has been polluted in an extreme  
 degree; and, as the pursuer has found, to his great loss and damage, has  
 been rendered almost totally unfit for the purposes of his manufacture, or  
 domestic use, or for the sustenance of man or beast; and the paper  
 made by the pursuer has been rendered altogether unmarketable, or of a  
 inferior quality, and the character of the pursuer's works and his  
 manufacture have been greatly injured and deteriorated in the trade;"  
 and concluded against them conjunctly and severally for damages, laid  
 at £1000.

At the trial, M'Donald and M'Kay denied that their operations were the  
 cause of any damage to Collins. Hamilton likewise denied that Collins

p. 222.

p. 110.

p. 110.

p. 110.

had suffered injury from their operations, and stated further that "even if damage had been caused by matters discharged from the dye-works, could only have been in consequence of negligence or misconduct on the part of the tenant, for which the defender is not responsible;" and Arthur, while he set forth that he did not know whether M'Donald or M'Kay had or had not polluted the water, stated that "if these parties or any others, have made an improper use of the water, or committed any other illegal act, it was without authority from the defender."

A record having been made up, and a draft issue prepared, applicable equally to all the defenders, a question of law was raised by Hamilton the landlord, and Arthur the principal tenant, as to how far any liability could attach to them, or, at all events, whether they were not entitled to a separate issue applicable to their case alone. The Lord Ordinary (Fullerton) reported this matter to the Court, adding the subjoined note. Their Lordships, while they held that the question of law could not properly be determined before sending the cause to a Jury, were of opinion that the landlord and principal tenant were entitled to a separate issue, and accordingly the following issues were ordered to be tried:—

"It being admitted that the pursuer is a paper-maker on the Dalma Burn tocher burn, and that one of the streams which unite to form the burn passes from the Cochney loch through the property of the defender James Hamilton:—

"It being also admitted that on the said property there are certain premises and buildings erected thereon, let by the predecessor of the defender, James Hamilton, of which the defender Arthur is or was tenant, and the defenders M'Donald and M'Kay are sub-tenants:—

"1. Whether, during the year 1826, and subsequently, or during any part of the said period, the defenders M'Donald and M'Kay did, by certain operations carried on in the said premises and buildings, wrongfully pollute and spoil the water of the said burn, so as to injure the quality of the water of the same, to the nuisance of the pursuer, a paper-maker aforesaid, and to the loss, injury, and damage of the pursuer."

"2. Whether the said operations, so carried on by the defenders

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\* "This is an action of damages brought by the pursuer against the defenders for polluting, by their operations of dyeing, a stream on which the pursuer's paper-manufactory is situate, and rendering it unfit for the purposes of the manufactory. It is directed not only against the defenders M'Donald and M'Kay, the tenants and occupiers, by whom these operations in dyeing are actually carried on, but against Mr Hamilton, the proprietor of the premises, and Mr Arthur, a former tenant of those premises, who assigned or sub-let them to M'Donald and M'Kay. The ground of action against Messrs Hamilton and Arthur is, that by letting the premises expressly for various purposes, and, inter alia, for the purpose of dyeing work, they are necessarily liable for the consequences of the acts of the actual possessors. This liability is denied by the defenders, and the Lord Ordinary thought it expedient to afford the parties an opportunity of having the judgment of the Court on that point of law, before sending the case to a jury."

Donald and M'Kay, to the loss, injury, and damage of the pursuer, No. 222.  
 re, in whole or in part, wrongfully authorized by the defenders James  
 amilton or his predecessor, and Archibald Arthur, or either of them ?" April 14—19,  
 1837.

The cause came on for trial at the Glasgow Autumn Circuit, 1836, Collins v.  
 Hamilton.

mediately after the trial of certain issues in an action of interdict at the  
 tance of Mr Dunn the pursuer's landlord, against the same defenders,  
 reference to the same operations ;<sup>1</sup> but after it had been proceeded in  
 a day, it was broken off by the illness of the Judge. It again came on  
 trial at Glasgow before Lord Cockburn and a special jury, at the last  
 ing Circuit, and occupied five days.

The pursuer, after giving in evidence the lease to Colquhoun in 1802,  
 to Arthur in 1822, the sub-tack by Arthur, and the schedule of pro-  
 in December, 1833, all above-mentioned, with certain other documents,  
 the record, adduced a variety of witnesses to establish that he and his  
 ier, who had carried on the business of paper-making at Dalmuir for a  
 g period, had acquired a very high character in the market, as manu-  
 rers of paper excellent both for colour and quality ;—that latterly,  
 ough improvements had been made in the machinery, and equally  
 d materials used, the character of the paper had greatly fallen off ;  
 it was often of a low colour, and unequal in colour, and that consi-  
 ble quantities of it were frequently stained, chiefly with a number of  
 ll red spots ; that the water of the Cochney burn above the defenders'  
 ks was remarkable for its purity, and well fitted for the manufacture  
 paper ; that a large quantity of a dark red or purple-coloured stuff,  
 posed of particles of madder-root, was constantly discharged from the  
 nders' works ; deeply discolouring the whole stream for a considerable  
 e below the works, and that, although the intensity of the colour  
 lished in going down the stream, it was distinctly traceable the whole  
 to the pursuer's works, and was perceptible in the water even after  
 nd passed through his filters ; that the water at the pursuer's works  
 no longer fit for making the finer sorts of papers, and could not  
 up the colour required for such papers ; that quantities of chipped  
 der-roots were found deposited in different parts of the channel of  
 stream, and had been found in the flannel bags attached to the ends  
 he pipes in the paper work ; that an oily scum seen on the surface of  
 stream immediately below the defenders' works was also traced down  
 to pursuer's dam, and that the colouring matter of the red spots in the  
 was madder.

regard to this last point, Dr Thomson, Professor of Chemistry in  
 ew College, and Mr Graham, Lecturer on Chemistry in the Ander-  
 Institution, Glasgow, deponed, that they had cut out from certain  
 of the damaged paper several of the spots and tested them, and  
 had ascertained that the colouring matter was madder.

<sup>1</sup> See ante, p. 853.

222. In regard to the amount of damage suffered, the pursuer, bridle  
 16-19. proving that on one or two occasions parcels of paper had been  
 returned, and that certain parties who had been in use to deal with  
 him had ceased to do so, led evidence to show that, in 1825, the  
 market price of his finest paper, of the kind called superfine  
 foolscap, bore a certain proportion to the prices of the same descrip-  
 tion of Kent paper, which are the standard prices of the trade, and  
 that this proportion had since that constantly fallen, till now, when  
 it was 38 per cent below the Kent prices, the decrease having been  
 chiefly within one or two years, and the average prices since 1825 being  
 as follows:—1825, £1, 3, 9½d. per ream; 1826, £1, 1s. 1½d.; 1827,  
 £1, 0s. 11½d.; 1828, £1, 0s. 7½d.; 1829, £1, 0s. 2½d.; 1830, 18s. 10d.;  
 1831, 17s. 4d.; 1832, 17s. 1½d.; 1833, 17s. 4d.; 1834, 16s. 1d.; 1835,  
 14s. 9½d. He farther proved that the defects in certain specimens of  
 paper produced by him, and manufactured at his works, would be  
 reduced the selling price 10 per cent, and the defects in other specimens  
 20 per cent below what paper of the same kind without these defects  
 would have brought. He also gave in evidence the amount of fine  
 superfine paper, manufactured and sold, between 1825 and 1836 at  
 lower mill, which averaged for these years about £20,000 per annum,  
 being a considerable increase on the average of the previous years, when  
 for the six years immediately preceding was about £15,500 per annum.  
 No damage was claimed in regard to the paper manufactured at  
 upper paper-mill. No proof was given of any complaint having been  
 made to the occupying tenants of the dye-work earlier than 1833,  
 when a verbal complaint was deponed to have been made to them, and  
 no intimation of any injury was proved to have been given to the landlord  
 till after the service of the notarial protest on the tenants in December  
 1833.

The defenders, M'Donald and M'Kay, on their part, adduced a  
 number of witnesses, who deponed, that they had occasion repeatedly  
 to see the stream while the defenders' works were in full operation, and  
 that while, immediately below the works, it was very deeply coloured  
 by the discharge therefrom, the discolouration began very soon to  
 subside—almost entirely disappeared at about 50 yards below the works,  
 and was totally imperceptible after the junction with the West Burn. For  
 samples of the water were produced, taken from different parts of the  
 stream; that the West Burn was, to a certain degree, tinged with  
 brownness, which rendered water peculiarly unfit for paper-making, as it  
 could not be removed by filtration; and that considerable quantities of  
 water, and other impurities from the village, were discharged into the  
 stream, which alone were sufficient to render the water unfit for manu-  
 facturing the finer papers, and incapable of raising a high colour in  
 paper manufactured with it. Two scientific witnesses, Dr Christison,  
 Professor of Materia Medica in the University of Edinburgh, and

No. 222.

April 14—19,  
1837.Collins v.  
Hamilton.

regory, Lecturer on Chemistry in Dublin, had analyzed the water of the stream at various points, and found that there was no vegetable matter in solution, other than the usual ingredients of that description common to all the streams of the country, and existing in the Cochney burn before reaching the defenders' works. They deponed, that the matter discolouring the stream immediately below the defenders' works consisted of the finer particles of the exhausted madder-root used there, held in mechanical suspension in the water, but which entirely subsided by the time it had flowed down to the uppermost of Mr Dunn's dams, about three quarters of a mile below the defenders' works, and before it joined the West Burn, when it was as pure as above the works. These gentlemen also tested the red spots on the damaged paper (but without cutting the pieces), and were decidedly of opinion that the colouring substance was not madder; that it possessed the characters of cam-wood, bar-wood, and that, whatever it might be, there could be no doubt that it was a substance retaining all its original colour, while the madder-roots, being used at the defenders' works, had the colour so effectually extracted, that the strongest chemical agents were necessary to detect its existence, which they could only do in a very slight degree. No questions were put on either side to the respective chemical witnesses as to the tests employed by them. Another witness deponed, that the substance causing the spots was on the surface of the paper, and so could not have been imposed after the pulp had assumed the character of a pressed sheet; and it was proved that no such spots had ever been detected on the paper made in the upper paper-mill above the grinding-mill, though the papers were such as to have shown such stains, had these occurred.

It was admitted by the pursuer, that his books, taking every thing into account, including prices of materials, from 1826 to 1836, showed a profit never increasing than otherwise.

The defenders, Hamilton and Arthur, led no evidence, but rested their case on the plea in law, that the lease and sub-lease only authorized legal use of the premises, and that they were not responsible for any illegal use to which the occupying tenants might have put the premises.<sup>1</sup>

The pursuer, besides submitting an argument on the respective rights of upper and lower heritors in regard to the use of a stream, and contending on the evidence that he had established his case, specially pleaded in law, and craved a direction from the Judge on the point, that, even if the jury should not be satisfied that he had proved actual "damage," he was entitled to ask from them a verdict finding that the defenders' opera-

<sup>1</sup> For the argument on this plea, see the case of Dunn v. Hamilton, ante, p.

222. tions had been wrongfully conducted to his "nuisance," the  
 18-19, put to the jury in the issue being distinct as to "loss and damage,"  
 "nuisance," and admitting of a verdict as to one, though the jury  
 not be satisfied as to the other.

On the second issue, he contended that the lease and sub-  
 the pleadings of the defenders, Hamilton and Arthur, gave  
 authority to carry on the operations complained of, which rendered  
 liable for the damage suffered in consequence.

Lord Cockburn charged the Jury as follows:

After this most protracted discussion, I shall endeavour to bring my charge  
 within as narrow a compass as is consistent with the duty I have to perform.  
 I shall take first the case of the sub-tenants under the first issue. The  
 issue is, "Whether, during the year 1826, and subsequently, or during  
 of the said period, the defenders, McDonald and McKay, did, by certain  
 carried on in the said premises and buildings, wrongfully pollute and  
 water of the said burn, so as to injure the quality of the water of the said  
 nuisance of the pursuer as a paper-maker aforesaid, and so the loss, or  
 damage of the pursuer?" There may be works which would be held  
 nuisance though no damage had actually been produced, as it may be  
 damage will be produced. On the other hand, things which are nuisance  
 own nature, and are doing damage, may not be wrongful, because they  
 protected by prescription, acquiescence, &c. Here we are free of all go  
 that kind. The pursuer undertakes to prove loss by nuisance, and  
 wrongfully done. He must establish the three qualities of nuisance, dam-  
 wrong. If he do not prove damage, then I state to you in point of law  
 this action of damages he is not entitled to a verdict. Again, if there be  
 proved, the parties creating it must show on their part that it is not  
 done. The only defence here against the alleged wrongfulness is that it  
 nuisance, and the question is, whether the dye-work as conducted has  
 been productive of damage to the works below. What will be held to  
 differs in different circumstances. In regard to rivers there are differ-  
 in which the results will be different. 1. The river may be a public  
 immemorially abandoned to public works; 2. It may be a private river  
 for the primary purposes to which water is applicable. These two cases  
 as in the one scarcely any thing would be a nuisance, and, in the other  
 scarcely any thing which would not be a nuisance. 3. There is, how-  
 intermediate case, which on the facts you may consider to be that be-  
 ring, where the stream has been partly appropriated to manufacturing,  
 and is in part applicable to the primary uses. Such a case is regulated  
 rule, that no person is entitled to destroy or materially impair any  
 manufactures previously existing, either by establishing a new process  
 carrying on one already existing to a greater extent than formerly. On  
 other hand, a party complaining of being injured is not entitled to his  
 liability to injury by giving up precautions previously used, or by neglecting  
 warning to the party injuring him. It is always for the Jury to apply.  
 It is often of great difficulty to do so, but the rule can never be dis-

about violation of law and infringement of private rights. Manufactories grow under the protection of that rule, and it must inviolably be observed. It is for a alone to say if, in point of fact, these defenders did create a nuisance. His Lordship then went generally over the evidence, stating his opinion that the pursuer had not made out his case, and proceeded—) If you are satisfied that

No. 222  
April 14—1  
1837.  
Collins v.  
Hamilton.

injury has been done by the operations of the defenders, that settles the whole matter. If, again, there be pollution, the question of damage I leave entirely to you. But I must state to you that it is the duty of a pursuer who comes into court demanding damages, which is the only action here, to prove his loss. I do not say he is bound to give it a name in pounds, shillings, and pence. But he must make out some actual loss. Now I have never seen a pursuer of an action for damages do so little to show direct loss as has been done here. The giving out of paper, and the drawing in of money and of profit, are both increased. It is very true if he can say, But for you I would have made more profit, that is loss. But has he established that? It seems to me that he has not given the means of estimating damages, and a jury should avoid giving damages when not sustained.

On the second issue I shall merely trouble you with a single word. The question there is, "Whether the said operations, so carried on by the defenders, Donald and M'Kay, to the loss, injury, and damage of the pursuer, were, in whole or in part, wrongfully authorized by the defenders, James Hamilton, or his predecessor, and Archibald Arthur, or either of them?" If you are of opinion, after the first issue, that no wrong has been done, you must of necessity find for the defenders here. If, on the other hand, you think damage has been proven, then you are called on to consider this second issue. In so far as the pursuer rests his case upon this, viz. that in law the mere granting of the lease, or of the sub-lease, makes the granters liable respectively for the damage occasioned by the tenant, I lay it down to you that no such liability is implied in these acts. In addition to granting the lease and sub-lease, you shall be satisfied either that pollution of the stream down at Dalmuir was intended by Mr Hamilton or Archibald Arthur, or that it was the necessary consequence of their letting or sub-letting, and they are responsible. But if you be not satisfied that the pollution was intended, but that it was the necessary consequence of what they did, so that nothing can be proved against them except the mere granting of the tack or sub-tack, then I say that in law this act does not make them liable. Now on the evidence what do we have here? Except the lease and sub-lease I see nothing whatever. By that, however, there was only given the legal use. If I let a house to a tenant to do anything he likes with it, that only means to do any thing legal he likes. The rights here were necessarily limited to the legal use of the premises. A landlord will no doubt authorize his tenant to commit nuisance otherwise than by his lease, and if the pursuer here had shown that Hamilton and Arthur had been guilty of engaging M'Donald and M'Kay to pollute the stream so as to create a nuisance, he would be entitled to succeed against them, assuming nuisance to be proved. What are they said to have done? Only that they did not put the work down, and that they say they do not believe that it is a nuisance. Neither do I. They are not wrong, but is that a ground for finding for the pursuer? Quoad these two points, I think the claim perfectly absurd.

The pursuer took an exception to the above charge in so far as the



**HC 222.** Jury were directed that, unless he had proved damage, he was not entitled to a verdict,\* and in so far as regarded the liability of the landlord as principal tenant.

1919, 1837.  
Hutton v.  
Hutton's  
Executors

THE JURY returned a verdict for the defenders on both issues.

W. B. CAMPBELL, W.S.—PATRICK and CRAWFORD, W.S.—J. BOWMAN, W.S.—  
CAMPBELL and M'DOWALL, W.S.—Agents.

### SUMMER SESSION,

1837.

**No. 223.** WILLIAM JOHNSTON, Pursuer.—*Sol.-Gen. Rutherford—Forryth*  
DUNDAS'S TRUSTEES, Defenders.—*M'Neill—W. Bell.*

*Arrestment—Agent and Principal.*—A merchant consigned to a commission agent a certain quantity of oil for sale and return; the agent sold the oil in his own name on the merchant's account to two different parties; a creditor of the merchant thereafter used arrestments in the hands of the agent, the price of the oil not having been recovered from either of the purchasers at the date thereof.—Held that the arrestments were ineffectual, and that the circumstance of the agent having taken a bill from one of the purchasers, and discounted it prior to the arrestment for his own accommodation, made no difference in regard to the efficacy of the arrestment.

**May 12, 1837.** IN November and December, 1818, William Gallaway, then merchant in Leith, consigned to Archibald Newall, commission-agent in Glasgow, for sale and return on the ordinary footing of mercantile agency, certain quantities of oil, the bills of lading pertaining to which were transmitted at the same time indorsed over to Newall. He held no *del credere* commission. On the security of these consignments Gallaway obtained various advances from Newall.

2<sup>d</sup> DIVISION.  
Ld. Moncreiff.  
T.

Sales of oil were thereafter made on Gallaway's account, and particularly to two parties named Aitken and Brown. A quantity was sold to Aitken on open account for a price of £78, 4s. 5d., to become due on 17th April, 1819, the transaction being entered in Newall's journal as follows:—

“ 1818. December 14.

“ Robert Aitken To sales account, William Gallaway—For four casks  
whale-oil, . . . . . £78 4 5”

\* This exception was abandoned when the bill was prepared.

In the ledger the sale was not entered in name of Gallaway. Newall had a certain quantity of barilla, the property of Aitken, but whether in security of the price or not did not appear from the ledger. No. 228  
May 12, 1822  
Johnston v.  
Dundas's  
Trustees.

Another quantity of oil was sold on 29th April, 1819, for the sum of £102, 10s., to Brown, on whom Newall drew a bill for the price, payable 1st August, four months after date, which bill he immediately thereafter discounted with a bank, for his own accommodation, not charging the discount against Gallaway.

Up to 17th June, 1819, no settlement of accounts had taken place between Gallaway and Newall. Of that date, William Jeffrey, accountant Glasgow, on the dependence of an action raised by him against Gallaway, arrested in the hands of Newall "the sum of £1500, more or less, due and addebted by him to the said William Gallaway, or to any person or persons for his use and behoof, together also with all and sundry moveable goods, &c. pertaining, or in any manner of way belonging, to the said William Gallaway." Exclusive of the transaction regarding the oil, Newall was due Gallaway, at the date of the arrestment, the sum of £52 by account-current, subject to certain deductions, and he also held a quantity of casks belonging to Gallaway in value about £60.

In order to relieve Gallaway's funds from the nexus thus imposed on them, the late Mr James Dundas, Accountant-general of Excise, in September, 1819, became cautioner in a loosing of the arrestment. Thereafter the action at Jeffrey's instance proceeded, and in November, 1824, a decree was obtained against Gallaway for a sum of £295. Jeffrey thereupon brought an action of forthcoming against Newall, and Dundas the cautioner, which was afterwards insisted in by the pursuer Johnston, as trustee on Jeffrey's sequestrated estate, against the present defenders, the testamentary trustees of Mr Dundas, who pleaded in defence—

1. Mr Dundas's trustees are not liable except for the funds belonging to the common debtor which were in the hands of the arrestee Newall at the date of the execution of arrestment.

2. In ascertaining the amount of the sum covered by the cautionary obligation, the trustees are entitled to claim deduction of all sums contracted to be paid by the arrestee out of the funds of the common debtor prior to the date of the arrestment, although not actually paid when the arrestment was used.

3. The trustees are not liable for the sum of £78 as the price of the barilla sold by Newall to Aitken, in respect it was not in the arrestee's hands at the date of the arrestment, and there is no legal evidence that the barilla referred to in Newall's ledger was impledged in security of that debt, or, supposing it had been so impledged, that it was a security in which the common debtor had an arrestable interest.

4. Nor are they liable for the sum of £102, 10s. as the price of oil sold by Newall to Brown, in respect that it likewise was not in the hands

1836. of the arrested, and not put to the common debtor's credit until  
 1837. months after the arrestment, when the bill became payable. The  
 circumstance of Newall having taken a bill for the price was insufficient  
 to make the proceeds of the bill subject to the diligence of arrestment.  
 The Lord Ordinary pronounced the following interlocutor, adding,  
 "subjoined note:"—"Finds, 1mo, That the defenders are entitled to

"1. The Lord Ordinary thinks that the deduction of £12, 10s. 6d. must  
 be allowed, for the reasons assigned by the accountant, that the value of all the  
 being stated in the duly evidence referred to as £60 at the date of the loss,  
 the pursuer cannot take from Newall both the value of all the casks, and the  
 of part of them.

"2. The question as to the £12, 12s., claimed as paid on account of demurrage  
 is not quite simple, chiefly from the awkward state of the record. It is clear  
 from the letters quoted by the accountant, that, in December, 1818, Gallaway  
 while he denied that the claim was just, expressly authorized Newall to grant  
 obligation in security of it, and to resist any action that might be brought. In his  
 first revised answers for Mr Dundas (referred to by the accountant) it was said  
 that an action having been brought, Newall consigned the money, defended the  
 action, and obtained absolver, but that the consigned money was exhausted  
 the expenses, to which clearly it might be applied, and this statement was not  
 terminis denied by the pursuer. Very awkwardly the same statement is now  
 tained in the record as last closed; but the Lord Ordinary decides the point  
 the ground that, at the date of the arrestment, Newall was under the obligation  
 Gallaway's authority, and that it has not been shown that he ever was released  
 from it so as to set the money free.

"3. The Lord Ordinary thinks it clear that the sum of £10, 6s. 9d. allowed  
 by the accountant for cellerage to the date of the loosing, must be sustained as a  
 deduction. He thinks that from the terms of the account-current it might be  
 presumed that any prior claim on that account had been settled, and though the  
 question is not free from difficulty, he is, on the whole, of opinion, that after the  
 arrestment was loosed on caution, no farther enquiry can be instituted as to the  
 situation of the casks, and no deduction can be allowed on account of their  
 remaining in Newall's hands. Gallaway might have removed them if he pleased,  
 and Newall was not bound to keep them. Mr Dundas was cautioner for Gallaway  
 that their value at the date of the bond should be made forthcoming. The  
 case of the ship arrested, Anderson, Child, and Company v. Pott,<sup>1</sup> &c. February  
 4th, 1825, is not the same with this. But there are some principles in it which  
 do seem to apply.

"4. The Lord Ordinary has very little doubt, that in so far as the question as  
 to the price of the oil sold to Aitken depends simply on the sale made, but the  
 price outstanding, it was not covered by the arrestment, and the defenders are not  
 answerable for it. The goods were consigned to Newall simply for sale as an  
 agent. He was under no del credere guarantee. There might be arrangements  
 by which the purchaser would have acted incorrectly if he had paid otherwise than  
 through Newall. But the debt was due by Aitken to Gallaway, and only due to  
 Newall as Gallaway's agent. It is apprehended that an arrestment by a creditor  
 of Gallaway in Aitken's hands would have been good, unless something else  
 appeared than what is shown in this process. But if Newall really held property

<sup>1</sup> Ante, III. 497 (new ed. 317.)

duction from the sum of £52, 5s. 9d., claimed as a sum due by the arrestee Newall to Gallaway, at the date of the arrestment, by an account-current previously stated, of the following sums, viz. £12, 10s. as the value of a quantity of oil-casks paid for by Newall on account of Gallaway; £12, 12s. paid by Newall on account of a claim for demurrage, for which he was authorized by Gallaway before the arrestment to grant his obligation; and £10, 6s. 9d., on account of cellar-rent of certain empty casks up to the date of the loosing of the arrestment: Finds, 2dō, That the sum of £78, 7s. 5d., the price of a quantity of oil consigned by Gallaway to Newall, and sold by him to Aitken on Gallaway's account, which price had not been paid at the date of the arrestment, cannot in the present question be considered as having been funds of Gallaway in

No. 1  
May 12,  
Johnston  
Dundas  
Trustee

of Aitken, expressly deposited in security of that price previous to the arrestment, the Lord Ordinary sees that the question might be different. It would be a singular case of arrestment, but it might have relevancy. He gives no opinion upon it at present, because the fact is positively denied; and he does not think that the general words in an extrajudicial certificate by Newall is any evidence at all against the representatives of Dundas the cautioner; and the entry in the books, as to the freight of the barilla, rather leads to the inference that it was not received till long after the arrestment. But it is a fact which admits of evidence if it be true.

“The question as to the £102, 10s. 2d., the price of oil sold to Brown, is not without difficulty. If it were the simple case of goods consigned for sale, and sold by Newall to Brown on a credit of four months, the Lord Ordinary should have little doubt that the price could not be taken as in manibus of Newall when the arrestment was laid. But Newall took a bill at four months for nearly the precise sum from Brown. The bill bears no reference to Gallaway, or to his affairs; but Newall discounted it, and it appears clearly that he applied the proceeds in payment of a debt of his own; he did not charge the discount against Gallaway, and, in fact, never brought either the bill or the proceeds of it into any account with Gallaway. In this state of the matter the pursuer says, that when Newall got the bill, and raised the proceeds of it in consequence of the sale of the oil, he must be taken to have become debtor to Gallaway for that amount. There may be some doubt in the question, whether, by taking the bill, he did not make it necessary for Brown to settle the debt with him, and so interpose himself as direct debtor to Gallaway. But the Lord Ordinary is inclined to think that the taking of the bill made really no essential difference on the transaction, and that, at the date of the arrestment, Newall was not debtor to Gallaway for the money. The bill was taken to Newall himself, and it is said merely for his own accommodation. It might never have been paid; and though Newall got the proceeds by discounting it on his own account, he must have replaced the money if it had not been paid, and the transaction as to Gallaway would have been exactly as it would have been if no bill had been granted. Then who would have sustained the loss if Brown was unable to pay? Evidently Gallaway, as the owner and vender of the goods, Newall being under no guarantee; from which it seems to follow, that the money still in the hands of Brown was a debt by him to Gallaway, and that Newall did not hold it as a price received and payable by him. In short, till the bill was paid the price was not paid, and consequently Newall did not hold it at the date of the arrestment.

“The last point in the interlocutor requires no farther observation. The Lord Ordinary thinks that the value must be taken at £60, and that it cannot be diminished by any thing which occurred after the loosing.”

the hands of Newall at that day: Finds it averred, that Newall held a quantity of barilla, the precise value of which is not condescended on, in security of the price of the said oil; but finds it not legally instructed that such barilla was so held in security of the said price at the date of the arrestment; but in respect of the averment, and that the pursuer's counsel did in the debate point at some further evidence being taken in this matter, before farther answer on this part of the accounting, allows the pursuer to state in a minute whether he will undertake to prove the fact, and by what evidence: 3<sup>do</sup>, Finds, That the sum of £102, 10s. 2d., being the price of oil consigned by Gallaway to Newall, and sold by Newall to Brown before the arrestment, but which price was not then payable, ought not to be considered in this question as funds of Gallaway in the hands of Newall at that date; and finds, That the circumstance of Newall having taken a bill for £102, 10s. from Brown, and discounted the same, and received the proceeds, is not relevant for establishing that he then held the price of the said oil as funds of Gallaway: Finds, 4<sup>th</sup>, That the pursuer is entitled to the sum of £60 as the fair value of the empty casks admitted to have been held by the arrestee at the date of the arrestment, such value being taken as at the date of the loosing thereof, after giving allowance for the cellar-rent till that time, and for the price of a part of the casks paid by Newall as above found due; and finds, That the defenders are not entitled to any abatement from such value either for cellarge or depreciation posterior to the loosing of the arrestment; and, with these findings, appoints the cause to be enrolled, and in the mean time reserves the question of expenses."

The pursuer reclaimed against the second and third findings of the interlocutor, viz. in so far as it found that the two sums of £78 and £102, being the prices of oil consigned by Gallaway to Newall, and by Newall sold to Aitken and Brown, cannot be considered as having been funds in the possession of Newall at the date of the arrestment, and so not arrestable in his hands.

At the advising (November 19, 1836) the Court, considering the question to be one of difficulty, ordered cases.

*Argued for the Pursuer—*

Although Newall was originally employed merely as a mercantile agent to make sales for Gallaway, he obtained an *ex facie* absolute title of property in the oil in question by the indorsation to himself of the bills of lading, being subject, however, to an equitable obligation to account to Gallaway. And the indorsation was for value, in so far as advances were made to Gallaway on the credit of these bills of lading. The sale to Aitken was made in Newall's own name, in whom was vested the *ius exigendi*. In these circumstances, what was attached by the arrestment was Gallaway's right to claim an account from Newall of the price of the oil; and this obligation to account, like other personal

ations, was an arrestable interest at the date of the arrestment, **No. 223**  
 igh the price had not then become payable.<sup>1</sup> In the case of **May 12, 1883**  
 il sold to Brown, the arrestment was equally effectual; for here **Johnston v.**  
 Newall acted as a trustee formally and lawfully vested with the **Dundas's**  
 erty of the oil by the indorsement of the bills of lading. He was **Trustees.**  
 intable to Gallaway for any balance recovered by him, which obli-  
 n was effectually arrested; and this is a still stronger case than the  
 ; as Newall may be said, on taking a bill for the price, to have  
 Gallaway's money in his pocket, an accepted bill being in law pay-  
 ; of the debt due to the holder. Even if Newall should be consider-  
 erely as a mercantile factor who has made advances on the security  
 ods consigned to him for sale, in that character he held a lien over  
 goods, in consequence of which neither his constituent nor the  
 itors of his constituent, had any right to come between him and the  
 hasers, or to make any farther claim than for an accounting after  
 fying the lien; which claim of accounting, and nothing else, could  
 ttached by their diligence.<sup>2</sup>

*argued for the Defender—*

he principle contended for by the pursuer, and recognised in the  
 of Gordon v. Innes, cannot apply to the present case. Newall was  
 the trustee of Gallaway, who was never denuded, but a mere mer-  
 ile factor or agent empowered to sell the oil for him; and, although  
 wall might be authorized to make the sales in his own name, this  
 ld not prevent Gallaway from interposing whenever he pleased, and  
 only demanding payment from the purchasers of the oil, but repay-  
 Newall his advances, and superseding him entirely in the agency.  
 ollows, therefore, that the arrestments in question, used in the hands  
 Newall, must be ineffectual.<sup>3</sup> The only distinction between the trans-  
 on with Aitken and that with Brown is the granting of the bill.  
 v, conceding that this bill was granted to Newall as the price of Gal-  
 ay's oil, the aspect of the case does not seem to be altered. It can-  
 be held that a mercantile arrangement, such as the present, should  
 e the legal effect of denuding the consigner, and vesting the consig-  
 with goods consigned, and with the bills taken as their price. The  
 ignee may be entitled to draw bills in his own name for the price of  
 goods sold, and even, as in the present instance, to discount those  
 for his own accommodation, or to relieve himself of advances made  
 is principal; but the latter, whenever he pleases, may require the

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<sup>1</sup> Gordon v. Innes, Feb. 13, 1740 (M. 715).

<sup>2</sup> Bell II, 114 and 116; Drinkwater v. Goodwin, May 12, 1775, 1 Cowper, 251;  
 us v. Amber, 2 Espinasse, 493; Hudson v. Granger, 5 Barnwell and  
 rson, 27.

<sup>3</sup> See Cross v. Moir, 1775, (M. 757); Lothian v. McCree, Nov. 27, 1828 (ante,  
 32).

agent to close accounts with him, and on paying the advances and commission, may demand delivery of the unsold portion of the goods, and the bills which have been taken for the rest; and this demand he has right to make directly against the purchasers, even after they have accepted bills for the price to the factor or agent.<sup>1</sup>

The cause was this day again put out for advising.

LORD JUSTICE-CLERK.—Upon reconsidering this case, I have come to the conclusion that the Lord Ordinary's interlocutor ought to be adhered to. The great point endeavoured to be made out by the pursuer is, that Newall is to be viewed as an ordinary trustee liable to account to Gallaway; and, as it has been settled, that arrestment is competent in the hands of such a trustee, so it ought to be found here. But the question is, *quo effectu*, or in what manner was Newall bound to account to Gallaway? He held no *del credere* commission. As a factor employed in the usual way, he was bound to render an account to the individual for whom he sold the oil; but an arrestment in his hands was not available at the time when no part of the price of the oils sold had been paid to him. Under the circumstances, there does not appear to me to be any peculiarity in the fact of a bill having been granted by Brown and discounted by Newall, to distinguish the transaction with him from that with the other purchaser.

LORD GLENLEE.—I am of the same opinion. The Lord Ordinary proceeded on the principle, that there existed no debt till the money was received by Newall from the purchasers. It was a contingent debt, and an arrestment of it premature. In this case not only *dies non venit*, but *nec cessit nec venit*. Supposing Newall to act correctly, there was no debt in his hands till the money was received. There was no existing claim against him till the contingency occurred. Where no debt has existed at the time of using the arrestments, I can see no principle for holding them good; and I think this is the view on which the Lord Ordinary has decided.

LORD MEADOWBANK.—I am of the same opinion.

LORD MEDWYN.—My difficulties have not been removed. There is no dispute about the facts. Newall was a mercantile agent and factor for Gallaway; and I agree that the circumstance of a bill having been taken from Brown makes no difference on his case. Certain goods are sent to Newall, and sold for behoof of Gallaway; but the money is not recovered from the purchasers till after the date of the arrestments. What then are the obligations thence arising? Gallaway had, at that date, a direct action against the purchasers, and also against Newall, for recovery of the price of the goods. In these circumstances, as Gallaway had no claims, might not arrestments of either of those claims take place at the instance of a creditor of his? If I could view this as a contingent debt, I would entirely

<sup>1</sup> *Dunlop v. Jap*, Feb. 21, 1752 (M. 741); *Pewtress v. Thorold*, July 13, 1786 (M. 756, Note); *Haddow v. Campbell*, Dec. 7, 1796 (M. 763); *Dick v. Goodall*, June 1, 1815 (F.C.); *Lothian*, supra; *Kyle's Trustees*, Nov. 14, 1827 (ante, VI. 40); *Cameron*, Feb. 4, 1830 (ante, VIII. 410), *Cullen v. Maclean*, June 18, 1833 (ante, XI. 733), *Bell*, II. 71.



h Lord Glenlee; but this is not the same case as that of *Cunningham*. No. 223  
 to come under the ordinary principle, that when a person has sold goods, May 12, 183  
 he is bound to account, this obligation is arrestable. The case of *Grier-Clyne v.*  
*amsay* was the first in which it was fixed that an obligation to account is Clyne's Trust  
 After that came the cases of *M'Cree*, of *Cameron*, and *Kyle's Trust*  
 rred to by the parties. I should have great difficulty in holding the in-  
 the present case not arrestable. In *Innes v. Gordon*, arrestment was  
 competent, because diligence was not due.

E COURT, by a majority, adhered, and remitted to the Lord Ordinary,  
 reserving the question of expenses.

D. FISHER, S.S.C.—MACLEAN and GIFFEN, W.S.—Agents.

DAVID CLYNE, Pursuer.—*D. F. Hope—Steele—R. Robertson*. No. 224  
 E'S TRUSTEES, Defenders.—*Sol.-Gen. Rutherford—Moncreiff*.

bed—*Clause*.—In an action to have a deed reduced on the head of death-  
 ns of certain previous settlements which held to show that, at the date of  
 bbed deed, they were to be held as not subsisting, and as insufficient to  
 claim of the heir insisting in the reduction.

ugust, 1815, the late David Clyne, S.S.C. executed a mortis causa May 12, 183  
 ion of his whole property, setting forth as follows:—"I, David 2D DIVISIO  
 solicitor in the Supreme Courts of Scotland, in the event of my Ld. Cockbur  
 asing my parents without leaving lawful heirs of my own body, T.  
 by give, grant, assign, dispo, convey, and make over, to and in  
 of William Clyne, merchant in Thurso, my father, and Margaret  
 n, his spouse, my mother, during their mutual lives, and to the  
 liver of them two, and after the death of the longest liver, to and  
 ar of any person or persons, or for such uses, ends, and purposes,  
 y name and appoint, by any deed I may execute at any time of  
 , and even on deathbed; and in case of my dying without having  
 d such deed, then to and in favour of such person or persons as  
 named and appointed in any deed that shall be executed (accord-  
 law or agreement between themselves in such deed) by my said  
 ; and for the same uses, ends, and purposes, with the same  
 , and under the same provisions and declarations that may be  
 d, and, contained in any such deed that may be so executed by

1834. them; which deed of theirs, when so executed, I do hereby declare  
 1837. form a part hereof, and that this my deed shall be as effectual for  
 1838. conveying my whole means and estate, and regulating the succession of  
 same, in the same way and manner as shall be appointed by the  
 deed of my parents, as if their said deed were already executed  
 herein copied verbatim, any law or practice to the contrary not  
 standing. All and Whole the estate, heritable and moveable," &c.  
 deed farther bore:—"I do hereby nominate and appoint the said  
 William Clyne and Margaret Swanson, and longest liver of them,  
 after their death the foresaid persons to be named by myself; and in  
 such nomination, the persons to be named and appointed by the said  
 William Clyne and Margaret Swanson as aforesaid, to be my sole executors  
 and intromitters with my whole moveable and personal estate, with power  
 to intromit with and dispose of the same, to pursue for and receive  
 same, to grant discharges thereof, and to complete titles thereto, &c.  
 cords; declaring that the present disposition is granted under the value  
 of payment of all my just and lawful debts, with my funeral expenses.  
 Reserving full power and liberty to me, at any time of my life, and  
 on deathbed, to revoke, alter, or innovate these presents, in whole or  
 part, as I may think fit; but declaring that the same, in so far as  
 altered, shall be valid and effectual, though found lying in my own  
 private custody, or in the custody of any other person for my behoof, at  
 death."

In September of the same year, Mr Clyne's parents executed a last  
 disposition and settlement, setting forth as follows:—"We, William  
 Clyne, merchant in Thurso, and Margaret Swanson, his spouse, for  
 love and affection which we have and bear to each other, and to David  
 Clyne, solicitor in the Supreme Courts of Scotland, our only surviving  
 child, and for other causes and considerations hereunto moving us,  
 hereby with consent severally give, grant, assign, dispoise, convey, and  
 make over to and in favour of each other during all the days of the life  
 time of the longest liver; and after the death of the longest liver to  
 in favour of the said David Clyne and the heirs of his body and his assigns;  
 whom failing, to and in favour of George Miller, Esq. of Whitehead  
 &c., as trustees, for the uses and purposes after-mentioned—All of  
 sundry our heritable and moveable estate," &c. The deed then directed  
 the trustees, after payment of debts, and of a certain legacy, to divide  
 the whole estate into ten equal shares, and to make over these to certain  
 parties therein specified, including one share to the children of Alexander  
 Clyne, father of the pursuer, David Clyne. The granters respectively  
 nominated and appointed the survivor, whom failing, their sons, David  
 Clyne, and his foresaids, whom failing, the other trustees, to be their  
 sole executors and intromitters, "reserving full power and liberty to  
 and to the survivor of us, but only with the express advice and consent

and David Clyne and not otherwise (and it is hereby declared, No. 224. said Margaret Swanson, in case she shall survive her said husband the said David Clyne have predeceased her, shall have no power to make any alteration upon this present deed, except by and with the concurrence and consent of the trustees, or their quorum), at any time of his life, and even on deathbed, to revoke, alter, or innovate these provisions whole or in part.”

May 12, 1837  
Clyne v.  
Clyne's Trustees.

A codicil to this deed was executed in October, 1826, whereby the said David Clyne, “with the express advice and consent of our son, David Clyne,” appointed two additional trustees, and altered one of the provisions of the deed. This codicil was subscribed by the granters and by the said David Clyne “in token of his consent thereto.”

David Clyne's parents predeceased him in 1829, without making any other settlement, and, on 1st November, 1833, he executed a deed, conveying to certain defenders, as trustees, for certain purposes, his whole heritable and moveable property (including a house in Albany Street), amounting to the value of £17,000. The trustees were directed, inter alia, to pay an annuity of £10 to his relation and heir-at-law, David Clyne. The deed contained the following clause of revocation:—“And I do hereby revoke and recall the foresaid settlement executed by myself on 22d October, 1815, and another settlement executed by me in voluntary conjunction with my parents upon the 30th day of October, 1826 years, and all other deeds and settlements, if any, in so far only as they interfere with the present deed.”

On the same day on which this deed was executed, Mr Clyne died. His heir-at-law, David Clyne, the annuitant above-mentioned, brought an action against the trustees to have the deed reduced on the head of the annuity. Against this action the following preliminary defences were

1. The pursuer is barred from challenging the deed under reduction, in consequence of the settlements executed by Mr Clyne and his parents. These settlements were not absolutely revoked by the deed under reduction, but only in so far as they interfered with the last deed, and if this settlement could be reduced by the pursuer, the former settlements would revive.

2. The pursuer has no legitimate interest to reduce the deed now under reduction, as his interest is much greater under the last settlement than it is under the former deeds, which would necessarily regulate Mr Clyne's succession if the settlement now under reduction were reduced. The deed under reduction having been executed agreeably to the powers in the settlements of 1815, the defenders have, in their possession, a sufficient title to exclude the challenge here brought forward on the part of the pursuer.

3. The defenders having been appointed to lodge a condescendence of the

224. grounds of these pleas, a record was made up and closed on the ordinary defences,<sup>1</sup> whereupon the Lord Ordinary ordered cases.

*Pleaded for the Pursuer—*

1. The deed of August, 1815, was made operative only in the Mr Clyne predeceasing his parents without issue; and on his death of them, it lapsed and became null. Looking to the terms of the deed of September, 1815, it likewise was exhausted by Clyne's death under it on the death of his father in 1829, and can form no basis of the pursuer's challenge of the deed under reduction. The settlement cannot be received as a nomination by Clyne under his deed of 1815; it has been long settled that a liege postule disposition executed in the name of the disponent cannot be filled up on deathbed;<sup>2</sup> and on that principle heirs cannot be named on deathbed, when without such nomination the succession would fall to the heir-at-law.

2. Supposing the deeds of 1815 to have been subsisting at the time of the execution of the deathbed settlement, they must be held to have been recalled and annulled by the clause of revocation in that settlement.

*Pleaded for the Defenders—*

1. The deeds of Mr Clyne and his parents, in 1815, and the deed of 1826, form a complete and effectual settlement of the property in question so as to exclude the pursuer's claim, on the deed of 1833 being produced; and in this view they are to be considered both in connection with each other, and by reference to the particular clauses of each. A deed made on deathbed can only be reduced when it is strictly a conveyance of heritable estate made to the heir's prejudice; a deed relative to heritable estate made on deathbed, and yet not come within the heir's challenge; the form of conveying heritable estate is fixed by law, and consequently any deed requiring that form, and effectual without it, may be validly executed on deathbed. Now it has been settled that the purposes of a trust constituted by disposition may be declared by testament, or by any deed not requiring dispositive words, if a reservation to that effect is inserted in the conveyance;<sup>3</sup> but the declaration of the purposes of the deed, by the nomination of the party having the substantial interest in the deed, is more essential to the disposition than the nomination of a trustee, which is a mere form;<sup>4</sup> therefore, a fortiori, in the present case Mr Clyne was entitled to make the nomination of trustees on deathbed, and this nomination is effectual to exclude.

2. The doctrine by which a clause of revocation in a deathbed deed

<sup>1</sup> See ante, XIV. 31.

<sup>2</sup> *Birmies*, June 22, 1678, (M. 3242); *Pennycook*, Jan. 18, 1687, (M. 3).

<sup>3</sup> *Coutts v. Crawford*, (June 12, 1795) as reversed, March 12, 1806, &c.

<sup>4</sup> *Willoch v. Ochterlony*, Dec. 14, 1769 (M. 5539); *Brack v. Hogg*, Nov. 1827 (ante, VI. 113), &c.

<sup>5</sup> See *Fordyce v. Cockburn*, July 5, 1827 (ante, V. 897, new ed. 832).

and effectual where the heir challenges and sets aside the deed itself, was No. 224.  
 reluctantly recognised, and is not to be stretched; the present case differs May 12, 1837  
 materially from the case of Coutts, and others of a similar description, in Clyne v.  
 the terms of the deed and the clause of revocation, the previous settle- Clyne's Trustees.  
 ments having in particular been revoked only in so far as they interfered  
 with the last deed, and is therefore not to be ruled by these cases.

The parties were not at one as to the value of the heritage conveyed by the deed of 1833, but as the determination of this matter of fact was not essential to the disposal of the dilatory defences, it was reserved.

The Lord Ordinary pronounced the following interlocutor, with the unjoined note:—"Repels the dilatory defences, and decerns, but without prejudice as to any question which may arise respecting the amount of the heritage claimed by the pursuer, which is hereby reserved to be discussed with the defences on the merits, or otherwise, hereafter: Finds the defenders liable in expenses."

The defenders reclaimed.

**LORD GLENLEE.**—If it had been distinctly made out that the pursuer was barred by a subsisting deed, which would have prevented his claim on the reduction of a deathbed deed, the defenders might have succeeded in their argument; but it has not been made out that such deed was in existence at the date of the last settlement, and therefore the pursuer is not prevented from claiming.

The other Judges having concurred,

THE COURT adhered, finding the defenders liable in expenses.

L. M. MACARA, W.S.—D. MANSON, S.S.C.—Agents.

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"It is stated by the defenders that there is no heritage except a house in Albany Street, Edinburgh, and that this is not so valuable as the annuity of £10, which the deathbed deed gives the pursuer, though he be about fifty years old. The Lord Ordinary wished this matter of fact to be fixed before deciding any thing else, but both parties were averse to this; and therefore, as its determination is not necessary for the disposal of the dilatory defences, it, or any such matter, has been reserved."

1837. **MRS MARION SCOTT OF M'MILLAN, and HUSBAND, and OTHERS, S**  
penders.—*Whigham.*  
**JAMES PRICE and MANDATARY, Chargers.—D. F. Hope—Mackenzie**

*Fee and Liferent—Trust—Clause.*—A testator left one son and two daughters the son was insolvent, and the testator conveyed his whole estate, heritable and moveable, to trustees, directing them to pay an alimentary annuity to the son: the conveyance contained a clause "excepting always the liferent use and possession of the house in M., &c., now occupied by myself, and which I hereby give and bequeath to my said son, in liferent, during all the days of his life, if he choose to fix his permanent residence at M., he being always bound to pay my said trustees the sum of £20 of yearly rent therefor; as also excepting household furniture, &c., which are hereby given and bequeathed to my said son in liferent, so long as he shall continue to reside in the said house at M., and which shall thereafter, or upon my said son dying without lawful issue of his body, then belong to my daughters, Mrs S. and Mrs K. equally between them: fee:" the children of either of these daughters, predeceasing the son, were to take their mother's share: the son had no issue up to the period when one of his creditors used diligence for attaching the furniture: a bill of suspension and interdiction was presented by the daughters:—Bill passed; in respect that the fee of the furniture was not in the son, but in the trustees.

*Reputed Ownership—Fee and Liferent.*—The liferenter of furniture does not, by possession of it in virtue of his liferent, subject it to the diligence of his creditors, on the ground of reputed ownership.—Question whether a creditor, whose debt was contracted before the debtor's possession of the moveables began, could found on the reputed ownership of these moveables, as a ground for attaching them, although he had not contracted on the faith of such ownership.

13, 1837. **THE late Thomas M'Millan of Shorthope, had one son, Thomas M'Millan, jun., and two daughters. In 1830 he executed an entail of Shorthope, in**  
Division. **favour of his son, and, of the same date, he also executed a trust-disposition**  
Cunningham. **and settlement, embracing all his other means and estate heritable and move-**  
B. **able. The trust was for paying his own debts, making provisions on his**  
**other children, and other purposes. The trust-deed disposed and conveyed to**  
**the trustees, "all lands and heritages, &c.; as also, all debts and sums of**  
**money, &c., together with the whole moveable goods and gear of every**  
**denomination that may belong to me at the time of my death, excepting**  
**always the liferent use and possession of the house in Musselburgh, offices,**  
**garden and tail of land adjoining thereto, which are now occupied by**  
**myself, and which I hereby give and bequeath to the said Thomas**  
**M'Millan, my son, in liferent, during all the days of his life, if he choose**  
**to fix his permanent residence at Musselburgh, he being always bound**  
**to pay my said trustees the sum of £20 of yearly rent therefor, and which**  
**sum my said trustees shall be entitled to retain out of the annuity herein-**  
**after mentioned to the said Thomas M'Millan; as also excepting the**  
**household furniture or plenishing, including silver-plate and heirship**  
**moveables which shall pertain and belong to me at the time of my de-**  
**cease, which are hereby given and bequeathed to the said Thomas**  
**M'Millan, my son, in liferent, so long as he shall continue to reside in**

se at Musselburgh, and which shall thereafter, or upon the No. 22:  
 s M'Millan dying without lawful issue of his body, then be- May 13, 18:  
 daughters, Mrs Scott, and Mrs Kemp, equally between them Scott v. Pri  
 children of any of my said daughters who may predecease the  
 s M'Millan, my son, coming in place of, and drawing the  
 would have belonged to their mother." The son, Thomas,  
 a state of insolvency, and the trust-deed farther directed an  
 £150 to be paid to him, which was declared to be alimentary,  
 ctable by his debts : and powers were given to the trustees,  
 proper, to apply such sum as appeared prudent, in obtaining  
 from his creditors.

died in 1832, and Thomas M'Millan, jun. entered into pos-  
 e house at Musselburgh, and continued to reside there. He  
 ossession of the household furniture, &c. In 1836, James  
 in London, and James Lindsay, W.S., his mandatary, ob-  
 ree for £35, against M'Millan, jun., being a debt contracted  
 d were afterwards proceeding with a poinding of part of the  
 hen a bill of suspension and interdict was presented at the  
 Mrs Scott or M'Millan, one of the two sisters of M'Millan,  
 'Millan Kemp and others, the children of the other sister Mrs  
 deceased. Up to this date M'Millan, jun. had had no issue.  
 ders pleaded—(1.) By the conception of the trust-settlement,  
 e furniture was conveyed to them, though under conditions  
 it contingently defeat it, but until these conditions were  
 fee was in them. And, at all events, if the fee was not in  
 it was in the trustees. It could not be in Thomas M'Millan,  
 r, both because the intention of the testator, who was aware  
 insolvency, clearly was not to give him the fee ; and also be-  
 ctual right was expressly limited to something considerably  
 liferent, as it was liable to be wholly forfeited as soon as he  
 side in the house at Musselburgh, which cost him a rent of  
 ght so narrowed as this, especially where third parties had an  
 he limitations, would not have warranted the Court in hold-  
 re was a fee in him, even had a fee to his children nascituri  
 dded to it ; and the doctrine by which such a fee was reared  
 a parent having a full right of liferent, was one which the  
 l never extend. As the fee, therefore, was not in M'Millan,  
 editors could not carry it off by diligence.—(2.) There was no  
 ver for a plea, founded on reputed ownership, on account of  
 possession of moveables, when he enjoyed that possession in-  
 of the will of the fiar ; and, in this instance, the suspenders,  
 , had it not in their power to prevent the full possession which  
 un, had hitherto had ; and such possession was fair and proper  
 and besides, the debt of the charger was contracted long be-  
 nsible ownership existed, and not on the faith of it ; so that  
 s not available to him.



Price answered—(1.) The right of Thomas M'Millan, jun. was excepted out of the grant to the trustees, and, as the clause of exception disposed both of the liferent and of the fee of the furniture, neither the liferent fee could be in the trustees. The only question, therefore, was, whether the fee was in Thomas M'Millan, or his sisters. But it could not be in the sisters, because, if M'Millan left lawful issue, their right was wholly evacuated. And as, according to the true intention of the testator, it was the effect of his leaving lawful issue, whether he continued to reside in the house at Musselburgh or not, the case was reduced precisely to this point, that it was a direct conveyance of the liferent of the furniture to M'Millan, and the fee to his children nascituri, which was just a conveyance of the fee to him, and rendered the diligence of his creditors effectual, without regard to any ulterior substitutions which might result. But (2.) as M'Millan had been in possession of the furniture for several years, and was therefore the ostensible owner, it was liable to the diligence of his creditors, on the ground of reputed ownership.\* And it was immaterial whether a debt was originally contracted by him while enjoying that reputed ownership, or whether a creditor, in an earlier debt, merely forbore for a time to use diligence, on the faith that his debtor was the owner; in either case the plea of reputed ownership applied.

The Lord Ordinary, "in respect of the terms of the settlement of the late Thomas M'Millan produced, relative to the furniture now attempted to be poulded, passed the bill, and continued the interdict."

The charger reclaimed; and it was intimated by both parties that they meant to abide by the judgment pronounced in the Bill Chamber.

\* 1 Bell, 240; Brown, June 2, 1792 (14963); Duncan, June 27, 1809 (F.C.), Lewis, Feb. 13, 1736: (Eich. voce Legacy, No. 1); M'Kay, Jan. 13, 1835 (ante XIII. 246); 3 Ersk. 8, 45.

\* 4 St. 10, 21; 1 Bell, 249, 253, and 255.

\* "NOTE.—As there is no dispute as to the facts here, and as the whole question turns on the import of a settlement produced, while the claim of the charger only amounts to £35, it may be convenient for both parties to know the grounds on which the Lord Ordinary has proceeded in passing the bill, so as the case may be brought in a summary and economical form before the Inner-House, if the charger wishes to litigate the case farther.

"The present is a case, then, in which a debtor is in possession of a house at Musselburgh, and of the furniture therein, which formerly belonged to his father. The father executed his settlement in 1830, and died in 1832, and it is material to observe that the debts founded on by the charger were contracted prior to these dates.

"By the settlement, Thomas M'Millan, senior, conveyed his whole estate and effects, heritable and moveable, to trustees, excepting only the estate of Shorrock, which he entailed on his only son, Thomas M'Millan, junior, the common debts, and the house and furniture to be immediately adverted to. The terms of the settlement in all its provisions, show that the granter was well aware of his insolvent circumstances. Thus, the trustees were directed to pay an annuity of £150 to the son, which was declared alimentary, and not affectable by his debts, and the trustees had a discretionary power to augment the annuity

THE PRESIDENT.—This is a case which requires very considerable attention by the Court. The terms of the deed are, in some respects, of a very unusual tenor. There was one extremely simple method which the testator might have adopted, of protecting the whole trust-property from the diligence of his son's creditors, by merely conveying it to trustees, and directing them to grant a lease to his son of the house and furniture for a rent of £20, or on such other terms as he chose. Instead of following this safe and familiar method, he has framed a deed, so intricate in its structure, that it is difficult to extricate the precise rights of the respective parties interested under it. In regard to the first branch of the clause of the deed, which relates to the dwellinghouse, I doubt whether there is an effectual protection, even of the liferent, to the son. The house is given to the trustees, reserving always the liferent use and possession of the house in Musselburgh,

No. 21

May 13, 1881  
Scott v. P

event, if they saw fit. They were also empowered to lay out a sum in paying his debts or procuring a discharge to him from his creditors.

The maker of the settlement, however, excepted from the conveyance to his son his house in Musselburgh, and also the furniture therein. The clause as to the subjects is not fully quoted either in the bill or answers, but it deserves to be noticed. There is a clear limitation of the son's right to the house to a mere liferent during his life, if he chose to fix his permanent residence there, as he is liable for a rent of £20 for it, to be taken out of his annuity; and in like manner the concluding part of the clause as to the furniture in its legal construction, as well as in its plain and obvious meaning, only gave the debtor the use of the furniture during his life, if he resided in this house.

At the charger, who states himself to be a creditor of Thomas McMillan, in debts contracted long anterior to his father's death, now proposes to pounce on the furniture, and in support of his right to do so, he maintains two pleas.—First, that the right of fee in this furniture is given by the settlement to the debtor; and, secondly, that, at all events, in consequence of the possession of the furniture by Thomas McMillan, a plea of reputed ownership arises, which bars the suspensory from the creditor as to the pouncing. Both of these pleas appear to be untenable.

First, The settlement being a testamentary deed, must be construed according to the obvious or presumed meaning of the granter. But it is impossible to hold that the granter intended to give the debtor more than a qualified or temporary right to the possession of the house. The debtor did not even get a liferent; no doubt it may turn out that his possession may endure for his life, but that depends on making the house his permanent residence. If he went elsewhere, the house would fall under the administration of the trustees, and the furniture would be available by the contingent fars. In this view the present case differs from all the cases founded on by the chargers.

It is said, however, that the debtor at present having possession of this furniture may sell or dispose of it at pleasure—but the latter inference cannot be admitted. Possibly he may have the power to sell or put away some of the articles if he so act dishonestly, but he certainly has no legal right to sell articles given to him merely for temporary use.

Second, The plea founded on reputed ownership, is equally untenable in the circumstances of this case. In general such a plea is only available to a creditor who has trusted and given credit to the debtor, on the faith that he was a proprietor of valuable goods, ostensibly in his possession; but that plea is excluded here, as the charger's debt was contracted years before the debtor got this furniture. He only got a qualified and temporary right, conferred on him, by his father's settlement. According to the charger's plea, no relative or third party wishing to give a little in the unfortunate situation of the debtor here, the accommodation of a little money could be any stipulation, protect it from the diligence of his old creditors. The Lord Ordinary cannot sanction that doctrine."

offices, garden, &c., which I hereby give and bequeath to the said Thomas M'Millan, my son, in liferent." I feel much doubt whether these are apt terms to convey the liferent of a heritable subject. I think a legacy or bequest of the fee of heritance might just as well be made, as a legacy or bequest of the liferent of it. But it is unnecessary to go more into this, as the question before us turns upon the structure of the second branch of the clause of exception, that which relates to the furniture. That exception is expressed in these terms:—"As also, excepting the household furniture, &c. which are hereby given and bequeathed to the said Thomas M'Millan, my son, in liferent, so long as he shall continue to reside in the said house at Musselburgh, and which shall thereafter, or upon the said Thomas M'Millan dying without lawful issue of his body, then belong to my daughters, equally between them, in fee." This clause contains an exception both of the fee and liferent of the furniture, and the question is, where are these respective interests now vested? From the latter part of the words which I have now read, it appears to be only in the event of the son dying without issue, that the daughters are to take the fee. I consider them, therefore, to be merely conditional institutes. Their fee will only emerge if the son dies without lawful issue. When then is the fee in the mean time? The son has expressly received a liferent right, if he continues to reside in that house, as he has hitherto done; and if he leaves lawful issue, the fee is, by implication, though not expressly, to go to such issue. I therefore consider that there is great weight in the argument of the chargers, that the fee in the mean time, not being in the conditional institutes, is and must be in the son. But the deed is as awkwardly framed, as any I have ever seen.

**LORD GILLIES.**—I feel this to be a very puzzling case. The pecuniary interest at stake is small; but the principles of law involved in the question, are not the less important on that account, and I have often felt much less difficulty in disposing of actions embracing large property, than in disposing of this case. It is true, as your Lordship has observed, that the testator, by framing a different deed, might easily and simply have attained his object: but it is only with the deed which he has chosen to frame, that we have now to deal. We must take that deed as it stands, and the question is, where is the fee of this furniture? If it be in the son, then the diligence of his creditors is effectual to attach it. In regard to the bequest of a liferent of the house to the son, it is quite true that no mere bequest of heritance is good by the law of Scotland. But considering that there was a general conveyance, including the house, to the trustees; that the son was the heir at law, whose interest in the heritance will be let in, wherever the trust-conveyance does not shut it out; and that the bequest was tantamount to a direction to the trustees, that the liferent of the house was meant for the son; I think there would be ground for holding that he had a right to the species of liferent there expressed, if that question was before us. But it is not as to the house that the question arises; it is only as to the furniture. It will be observed that the trust-settlement sets out with a general conveyance of the whole property of the truster, heritable and moveable, excepting only the estate of Shorthope, to the trustees. In an after part of the deed the exception occurs which has given rise to the present question, and the extent of that exception must now be attended to. In regard to the house itself, nothing is excepted out of the conveyance to the trustees, but the liferent use and possession of it; and if the same terms had occurred as to the furniture, and if it had also been conveyed to the trustees, excepting only the liferent use and possession of it, there would have been no difficulty.

**No. 225.**

**May 13, 1837**  
**Scott v. Price**

of volcanic activity.

of the clause of exception, and, although the question to be decided by the second of these, I think it material to attend also to the first, in true construction of it appears to throw light upon the true construction second. The first exception contains only something less than a life interest. It is the life interest, only on condition of the son's residing in at Musselburgh, for which he was to pay a rent of £20. Now, as the intent of the bequest to the son, so far as regards the house, I think it to every other right in the house is vested in the trustees for the purpose of the trust. It appears to me that there is no warrant for holding that it is, or that it is taken out of the trust, and thrown nobody knows where, satisfied, therefore, that the fee of the house is in the trustees, and I do not to consider the question as to the fee of the furniture. The exception in the trust-conveyance is in these terms:—"As also excepting the household or plenishing, &c., which are hereby given and bequeathed to the said Mr. Millan, my son, in life, so long as he shall continue to reside in the house at Musselburgh, and which shall thereafter, or upon the said Mr. Millan dying without lawful issue of his body, then belong to my daughter Scott and Mrs. Kemp, equally in fee;" and the children of a predeceased were to come in place of their mother. Reading this exception, with reference to the bequest which it was intended to carry into effect, what is the main intent of that bequest? It bestows the life interest of the furniture, &c., on the son, if he lives in the house specified; but if he ceases to live there, or dies without leaving lawful issue, it bestows the fee upon the daughters; and the bequest ends. There is nothing expressly stated as a bequest to the son, in any case whatever. There is a limited bequest of a certain interest to the son himself, and, in certain events, to the daughters, and nothing beyond as I apprehend, is excepted, or meant to be excepted, out of the trust. Every other right in the subject is in the trustees. Every right is conveyed which is not excepted and bequeathed in favour of the son or daughters. I consider that the fee of the furniture is not given to the children *nasciturus* to the son, but is either given conditionally to the daughters, or else it rests in and in the trustees.

But, farther, even if the fee was given to the son's children *nasciturus*, I think the common rule on that subject cannot apply to the special circumstance of this case. There is not a full right even of life interest granted to the son. It is only "so long as he shall continue to reside in the said house at Musselburgh; if he ceases to live there, the fee is given to the testator's daughters. The first disposal of the fee. It is afterwards provided, that, if the son dies without issue, the fee is in that case to be given to the daughters; any right in the children *nasciturus* of the son is only given by implication, and in case of the son's dying the condition of living in the house at Musselburgh. In these circumstances it seems impossible to hold that the son is entitled absolutely to sell the furniture, and defeat the right of the daughters, who are living persons, and not *nasciturus*; and who, moreover, are third parties as to this question. There is a life interest to a parent, and a fee to his own children *nasciturus*, has been so often held, that the life interest totally absorbs the right of fee intended for the children, and becomes a constructive fee in the parent, yet that doctrine never has been applied so as to permit the life interest to absorb a fee bestowed on living third parties. And it is perfectly clear that it was not the intention of the testator to bestow

furniture upon the son. He has limited his son to a right, which is a less than a liferent. So that, in holding the fee not to be in the son, I am holding the bequest according to the intention of the testator. And I do not think that there is any *necessitas juris* for holding the fee to be in the son, where there was no possibility of holding it to be any where else. The existence of a conditional fee in the daughters would save it from being in pendent; but there are some grounds for taking that view, I rather incline to hold that the fee is in the trustees. I, therefore, reject the first plea of the charger, which is that the fee is in the son.

I now come to the second plea, founded on an allegation of reputed ownership, which I think is quite untenable. If the right of the son be merely that of a liferenter, his possession is upon a perfectly fair and lawful title, which implies no negligence or fault of any kind against the father. Such possession does not subject the fee to be carried off by the liferenter's creditors on the plea of reputed ownership.

And I would rather repel the plea, upon the ground which I have stated, than upon the ground that the creditors' debt was anterior to the commencement of the reputed ownership. I am not sure that there is any sound distinction between the right of a creditor whose debt was contracted during the continuance of the reputed ownership, and the right of a creditor whose debt was contracted prior thereto; and I prefer to repel the plea upon the single ground which I have stated only.

**FOREHOUSE.**—I concur with Lords Gillies and Mackenzie in holding that the fee is in the trustees, and that the interlocutor ought, therefore, to be granted. But I think it a case attended with great difficulty. The settlement is of a complicated nature. It is in the form of a general conveyance of the testator's real and moveable property, heritable and moveable, to trustees, under an exception in favour of the son, first, to the house at Musselburgh, and, second, to the furniture, as well as the use of the house, providing that the son's interest, both in the house and furniture, shall fall, if he ceases to reside in that same house. The two exceptions must be viewed in their bearing upon each other. There is less than a liferent use of the house, given to the son. It is only given so long as he continues to live in the house, during which period he is to pay £20 of rent. As nothing in regard to the house is excepted out of the trust-conveyance, the fee of the house is clearly in the trustees. Then the use of exception occurs as to the furniture. It is true that the same exceptions are not used in respect to it which are used in respect to the house; but it was clearly the intention of the testator, who was aware of his son's intention, not to bestow the fee of the furniture on him. And I am of opinion, from the whole clauses of the deed, that the testator meant the exception, as to the furniture, to be merely a qualified liferent, similar to the qualified right of the son in the house, and that it is impossible to hold the fee to be in the son. I think that there is some straining necessary, in order to read the deed so that the right in the furniture is just to be viewed as equally limited with his right in the house; but the duty of construing this settlement is one which presents a choice of difficulties, and the construction which I have adopted seems to involve less difficulty than any other.

**THE COURT** adhered.

**DAVIDSON and SYME, W.S.—J. LINDSAY, W.S.—Agents.**

No. 225.

May 13, 1837  
Scott v. Price.

No. 226.

ELIZABETH CRAIGIE, Pursuer.—*Robertson.*EDWARD HOGGAN, Defender.—*Pyper.*

May 13, 1837.

Single v.

Hoggan.

Dunn v. Dunn.

*Process—Marriage.*—A reclaiming note being presented against a declarator of marriage, and a motion being made to send the note to the roll—motion refused, in respect that it was not warranted by any rule or

May 13, 1837.

2d Division.

L. Fullerton.

B.

In a process of declarator of marriage, decree having been pronounced in terms of the libel, the defender reclaimed. The pursuer moved, the note appeared in the single bills, that it should be sent to the roll, in respect of the nature of the action.

**LORD PRESIDENT.**—I am not aware that there is any rule or practice in declarators of marriage to be sent to the summar roll; it is to the short of such processes belong, and this process should now be sent there.

The other Judges concurred, and the process was accordingly sent to the roll.

DAVIDSON and SYME, W.S.—A. DUNLOP, W.S.—Agents.

No. 227. GEORGE SCOTT, Senior, and GEORGE SCOTT, Junior, Pursuers.—*Gen. Rutherford—Milne.*

ROBERT DUNN and OTHERS, Defenders.—*D. F. Hope—Mail Monteith.*

*Process—Reduction—Pleas in Law—Judicial Examination.*—1. In an of reduction where the Lord Ordinary had found that an alternative for relief could not be maintained, because there was no plea in law applicable, the Court recalled this finding, and remitted to His Lordship, with power to receive a new plea, although the record was closed.—2. Circumstances in an application to have defenders judicially examined was refused.

May 13, 1837.

2d Division.

Ld. Cockburn.

T.

THE pursuer, George Scott, senior, accepted to the defender D bill of exchange bearing to be dated 25th December, 1833, for value received, payable twelve months after date. This bill was in by Dunn to the defender James Muir, and by him to the defender bald M'Nilidge.

In April, 1834, Scott executed a bond of interdiction of himself son the pursuer, George Scott, junior, which was duly recorded.

On the bill falling due, payment being refused by the accept holder, M'Nilidge, protested it for non-payment, and thereafter to letters of horning and poinding against Scott, senior, and against and Muir, upon which he gave a charge to Scott. Of this charge, senior and junior, brought a suspension; and they also raised against Dunn, Muir, and M'Nilidge, to have the bill of exchange



est, letters of horning and poinding, and the charge and execution of No. 227.  
 ge reduced, *first*, for the reason of style; *secondly*, on the ground of <sup>May 13, 1837.</sup>  
 interdiction; *thirdly*, on the ground of facility and circumvention, the <sup>Scott v. Dunn</sup>  
 in question having been impetrated by the fraud of the defenders  
 tly from Scott, who was stated to be facile and easily cajoled with  
 or; *fourthly*, on the ground of the bill having been indorsed by Muir  
 Dunn, and by him to M'Nilidge, without valne, and merely for the  
 pose of covering their joint fraud; and farther concluding, in the  
 nt of M'Nilidge succeeding in getting decret against Scott, senior,  
 in concussing him into payment of the proceeds of the bill, then to  
 e the two defenders Dunn and Muir ordained, conjunctly and seve-  
 y, to free and relieve the said Scott of the decret, or, in the event of  
 ment, to pay back to him the sum in the bill.

n the pursuers' condescendence it was alleged generally that the elder  
 tt was facile and easily imposed upon, and circumstances were stated  
 er which the bill in question was impetrated from him by Dunn and  
 ir; it was also stated that M'Nilidge was aware of these circumstances  
 of Scott's facility, and that he took up the bill merely to act as agent  
 Dunn or Muir in recovering the proceeds, and was not a bona fide  
 rous holder. Pleas in law were stated with reference to the third and  
 th reasons of reduction, and also to show the competency of a reduc-  
 of the bill, not only in a question with Dunn and Muir, who had  
 l means for obtaining it as set forth in the record, but also in a ques-  
 with M'Nilidge, in respect that he gave no value for the same, and  
 in agreeing to become the holder and recover payment, he did so  
 ely as agent or trustee for the other defenders. There was no plea  
 a reference to the second reason of reduction, or to the conclusion for  
 ef.

Dunn, Muir, and M'Nilidge respectively made appearance, and plead:  
 inter alia, in defence against the action:

1. Interdiction is confined to heritage, and is not a lègal ground for  
 aicing the bill in question.

2. In so far as the action libels other reasons of reduction, relevant  
 ands have not been set forth; and even if such had been the case,  
 tt, junior, would have no title to pursue.

M'Nilidge pleaded separately—

1. Even assuming that the averments in the summons constituted rele-  
 t grounds of reduction, as in a question with the original parties to the  
 , they could not affect the bill or the diligence proceeding in it, as in  
 uestion with himself, who was a bonâ fide onerous indorsee.

2. The averment that he (M'Nilidge) did not pay full value for the  
 and only be proved by his writ or oath, and he is entitled to all the  
 lages of bona fide onerous indorsees.

In the course of the procedure before the Lord Ordinary, the pursuers

287. moved his Lordship to have the defenders or one or other of them judicially examined. This application was refused.

1837-38. The Lord Ordinary pronounced the following interlocutor, adding a note subjoined:—"The Lord Ordinary having considered the process and heard parties, finds that the pursuer is not entitled *hoc statu* to have the defenders judicially examined: Finds that the bill in question is not reducible under this record *ex capite interdictionis*: Finds that, under the record, the alternative conclusion for relief cannot be maintained: Annuls the defenders therefrom and decerns; *quoad* the ground of reduction founded on alleged fraud and facility, before answer, remits the case to the issue-clerks to frame, or to endeavour to frame, an issue or issues against all or any of the defenders, reserving to the pursuer any right he may have to prove the alleged want of value given by the indorsee, as a separate ground of reduction, by the writ or oath of the said indorsee, and also reserving all questions of expenses incurred *hinc inde*."

"This is a complicated case, and the Lord Ordinary cannot safely or conveniently decide more of it, in its present state, than he has done.

"1. The pursuer may renew his motion for a judicial examination in any changed state of the case; but the Lord Ordinary sees no principle and no precedent for his being found entitled to this in existing circumstances.

"2. The reason of reduction founded on the *interdiction* won't do; 1st, because there is no plea applicable to it; 2dly, because, though there were, this transaction is not struck at by the interdiction. But though this reason of reduction be disallowed, it does not follow that the interdicator must be turned altogether out of the process, because he is perhaps entitled to appear along with his ward, in relation to the bills on other grounds, and therefore this point is left open for the present.

"3. The conclusion for relief cannot be maintained, because there is no plea for it.

"4. The Lord Ordinary thinks that the defenders must ultimately get any expenses they may have incurred in discussing these two last points, but he declines from giving them now, because he thinks that adjusting this matter would obstruct the progress of the case towards its final settlement.

"5. It is doubtful whether there be a proper case raised in the record against the defender, M'Nilidge, on fraud and circumvention, because, although the pursuer charges him sufficiently with fraud, it is not clear that the summons is supported by the *condescendence*. But, as there must be a remit on this reason of reduction, in so far as the other two defenders are concerned, the Lord Ordinary thinks it better to send it to the jury clerks, *quoad* the whole three, in the first instance, and before answer, in order that the sufficiency of the *condescendence* to support the charge against M'Nilidge, may be subjected to a more minute examination.

"6. No doubt if M'Nilidge be well founded in his plea, that the fraud, though it were correctly charged, is only proveable by his writ or oath, there can be no remit *quoad* him. But the Lord Ordinary is of opinion, that this is one of the cases in which the pursuer is restricted to these two modes of proof alone. In judging of this, it must be recollected that this is an action of reduction, and the whole circumstances must be looked to; and, among others, the averment that he is only a trustee for the persons primarily guilty of the fraud, which is to have given rise to the contract, and so is liable to the objections competent against them."

the pursuers reclaimed, and contended, inter alia, that the conclusion No. 227.  
 relief had been improperly dismissed, and that it was competent after May 16, 1837.  
 record was closed to add a new plea in law with reference to this con- Forsyth v.  
 on. His Creditors

THE COURT pronounced the following interlocutor :—“ Adhere to the interlocutor submitted to review, in so far as it finds that the pursuer is not entitled *hoc statu* to have the defenders judicially examined, and that the bill is not reducible *ex capite interdictionis* ; quoad ultra, recall the said interlocutor and remit to the Lord Ordinary with power to receive a new plea in law, applicable to the conclusion for relief, upon such conditions as to him shall seem proper, and to hear as to conjoining the suspension process against the defender M'Nilidge with this process, and thereafter to remit the whole cause to the jury roll, if his Lordship shall see cause, reserving all questions of expenses.”

GREIG and MORTON, W.S.—J. CULLEN, W.S.—T. S. ANDERSON, W.S.—Agents.

— FORSYTH, Pursuer.—*A. S. Logan.*  
 HIS CREDITORS, Defenders.—*Paterson.*

No. 228

*cessio*.—When a process of *cessio* is raised under 6 and 7 Will. IV. c. 56, and statutory induciæ expire during vacation—Question whether it is competent for Lord Ordinary on the bills to hear the cause on the merits, and give decree.

DURING the Spring vacation of 1837, Forsyth raised a process of May 16, 1837  
 before the Court of Session, under the Act 6 and 7 Will. IV. c. 56. 1ST DIVISION  
 statutory intimation of 30 days expired during the vacation, and Lord Jeffrey  
 Forsyth moved the Lord Ordinary on the bills, to hear his cause pleaded Bill Chamber  
 on the merits, and to pronounce judgment, in respect, inter alia, that by  
 of the statute, all powers requisite for the purposes of the Act, which  
 competent to the Inner House, during session, were made compe-  
 to the Lord Ordinary, on the bills during vacation. The creditors  
 ended that it was incompetent for his Lordship to hear the cause, and  
 Lordship, being doubtful of the competency of entertaining the appli-  
 on, reported the point to the Court, a proceeding to which both par-  
 assented. His Lordship now brought the case before the Court, but  
 as intimated from the bar, that, as there was no doubt of the compe-  
 of making the application now to their Lordships, and this was to  
 immediately done by the pursuer in common form, the pursuer waived  
 application in the Bill Chamber.

done by the

done by the

An Act of Sederunt was this day passed for regulating the enrolment of causes  
 commencement of a Session, where the first sederunt day is at the end of a  
 See Appendix.

228. The Court therefore superseded the case, but it was observed by their Lordships that the point involved was one of much importance, that it would be proper for them to hold a consultation with the other Judges in order to lay down a rule for the guidance of Lords Ordinary during the vacation.

—Agents.

229. JAMES KERR, Petitioner.—*Mackenzie*.  
ANDREW ANDERSON, Respondent.

*Cessio—Reparation—Real injury.*—A farm-servant committed a severe personal assault on his fellow-servant, for which he was both punished with imprisonment in the criminal court, and subjected in damages in the civil court; for the civil debt, he sustained an imprisonment of above six months, in addition to penal imprisonment; he was an unmarried man:—Circumstances in which held that he was not entitled to the benefit of a decree of cessio, except on condition of obliging himself to pay to his fellow-servant 2s. per week, out of his wages, which amounted to 5s. per week, in money, besides bed and board; but limiting the obligation to such period as he should be himself in the receipt of such wages.

1837. JAMES KERR, a farm-servant, committed a severe assault on Andrew Anderson, a fellow-servant. Anderson prosecuted him for damages before the Sheriff of Edinburgh, and obtained a decree for £30, besides £13, 6s. 8d. of expenses. For this debt, Anderson imprisoned Kerr, on May 6, 1836. After detaining him in jail for two months, Anderson lodged a complaint with the procurator-fiscal, who prosecuted Kerr criminally for the assault before the Sheriff of Edinburgh, and Kerr was sentenced to four months imprisonment. He was then transferred from the debtor's ward, to the criminal's ward. When the period of imprisonment was expiring, Anderson of new arrested him as his debtor, and re-transferred him to the debtor's ward. Kerr had no funds, and, in January 1837, having been constantly confined since May 6, 1836, he presented a petition to the Sheriff of Edinburgh, for decree of cessio bonorum, under 6 and 7 Wm. IV. c. 56. His debts, besides that to Anderson, did not exceed £2. On his examination he stated that he had no funds; that his wages, before the assault, were paid to him half-yearly, but, since the assault, were paid weekly, being at the rate of 5s. per week, besides bed and board, but including washing; that the change in the mode of paying his wages arose from certain weekly payments which he had to make, for washing &c. The examination farther contained the following statement: "The declarant, that he has no objections to pay 2s. a-week to Anderson, for each week that he is engaged at the rate of 5s. a-week. And being touched by his agent, the declarant then states, that he is not able to pay anything to Anderson."

Anderson offered to consent to Kerr's liberation, on condition of agreeing to pay 4s. per week out of his wages; and maintained that

as a creditor for damages arising out of real injury, he had a right to No. 229.  
 subject to any decree of cessio which was not qualified with a condition May 16, 1857  
 of the petitioner's paying to him a weekly sum out of his wages. Kerr v.  
 refused to agree to pay any thing, alleging that, in so far as his conduct Anderson.  
 had been criminal, it had been punished in the criminal court; and, both  
 on that account, and also on account of his protracted imprisonment, he  
 was now entitled to an unqualified decree of cessio, although the civil  
 debt which he owed to Anderson had originated ex delicto; leaving it  
 open, of course, to Anderson to attach any property or effects of the peti-  
 tioner, if he should ever come to be possessed of any.

The Sheriff "found the pursuer entitled to the benefit of the process  
 cessio bonorum, as prayed for, in the petition."

Anderson presented a reclaiming note which came before Lord Mac-  
 nair, in vacation, as Ordinary on the Bills, and his Lordship "having  
 considered this reclaiming note, and heard the counsel for the pursuer, and  
 his agent for the reclamer; hereby intimates to the parties, that he will  
 report the case to the First Division of the Court, in May next, on the  
 question, whether, in the circumstances of the case, the pursuer ought to  
 remain in the benefit of the cessio, without being laid under an obligation, as  
 a condition of that benefit, that he should pay a certain weekly sum out of  
 his wages to the reclamer, the incarcerating creditor, he being a creditor  
 for damages, on account of real injury."

The pursuer was liberated under an interim application during the pro-  
 ceedings in the Bill Chamber.

The cause came to be advised, under the interlocutor of Lord Mac-  
 nair.

**LORD PRESIDENT.**—This is a curious case. The pursuer himself offered to pay  
 per week out of his wages, when he was under examination before the Sheriff;  
 immediately upon that, he got a jog from his agent, and then he stated he was  
 unable to pay any thing. He is an unmarried man, and I take his own spontane-  
 offer as a tolerably good test of his being able to pay that amount weekly. I  
 will limit his liability, however, to such period as he may be in service, and in  
 receipt of wages. It is pleaded for him that he has suffered a protracted im-  
 prisonment. Undoubtedly he has, but he committed a severe assault upon Ander-  
 son, and Anderson has got no satisfaction for any part of the debt which arose out  
 of that assault. In these circumstances, I think the pursuer ought not to receive the  
 benefit of the cessio, without imposing on him the condition of paying 2s. per  
 week to Anderson, so long as he is in receipt of wages. The petition should, at  
 least, be refused hoc statu.

**LORD CORNHILL.**—I am of the same opinion. The pursuer, being incarcera-  
 ted for a debt which originated in the perpetration of a crime, would, in former  
 times, have been denied the benefit of this process altogether. And although that  
 has been equitably and humanely relaxed, still, it is not consistent with equity  
 that the pursuer should be liberated except upon condition of being subjected in  
 payment of a portion of his weekly wages to the person on whom he commit-  
 ted the assault. It does not appear to me that the sum of 2s. per week, out

1829. of wages which amount to 5s. in money, besides bed and board, is unreasonably high. I would, therefore, *hoc statu*, refuse the *cessio* except on the condition that the decree shall be qualified with the pursuer's liability to pay this proportion of his wages.

LORD GILLIES.—My only difficulty is, whether a decree which qualifies the pursuer's liberation with this condition, does not, in truth, deprive him for the means of adequately supporting himself.

LORD MACKENZIE was understood to consider the question to be attended with difficulty, but to incline to refuse the *cessio* *hoc statu*, unless the pursuer agreed to pay the weekly sum of 2s. from his wages. His Lordship observed, that he reported the case, because it was pleaded on the one hand, that a mere labouring man was never subjected in payment of a part of his wages, under any circumstances;<sup>1</sup> and on the other, that this was always done, where a creditor for damages on account of real injury, opposed the *cessio*; and thus it appeared that a great question was raised by the parties.

The Court were about to pronounce an interlocutor, refusing the *cessio*, *hoc statu*, when the pursuer intimated that he would rather come under the obligation to pay 2s. per week out of his wages, than have the *cessio* refused.

LORD CORNHOUSE.—Then the Court are relieved from deciding the question referred to by Lord Mackenzie.

The pursuer then lodged a minute binding himself to pay 2s. per week to Anderson, so long as he enjoyed 5s. of weekly wages, besides bed and board; and the Court pronounced an interlocutor in terms of the minute.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—W. MARTIN, W.S.—Agents.

No. 230. EBENEZER JAMES LAWSON, Pursuer.—*Sol.-Gen. Rutherford*—*Thomson*  
ROBERT COLDSTREAM, Defender.—*D. F. Hope*—*Marshall*.

*Cautioner—Curator bonis*.—1. Where the curator bonis of an absent party made an illegal agreement with the person who was heir presumptive of the party, which was to the prejudice of the judicial cautioner of the curator, and the agreement was acted on for a term of years,—Held that the cautioner was thereby liberated, in any question with that person. 2. Circumstances in which this was applied.

May 17, 1837. DAVID LAWSON, youngest son of Patrick Lawson, enlisted as a soldier in 1794, and was sent abroad with his regiment, in 1795. His age was from 40 to 46 years, at the time of enlistment. He was then a party to a process before the Court of Session, under which he claimed one-third of the property of his father.

1st Division.  
Ld. Cornhouse.  
B.

<sup>1</sup> See Russell, March 11, 1834, (ante, XII. 543.)

re of the heritable and moveable property of his father, in terms of his No. 230.  
 her's marriage-contract. After going abroad, his agent in that process, May 17, 1887.  
 ter Halkerston, S.S.C., was, in May 1796, appointed curator bonis to Lawson v.  
 in his absence, and David Lawson was found entitled, in the above Coldstream.  
 cess, to one-fourth of the heritable and moveable estate. In March,  
 1796, Robert Coldstream, merchant in Leith, became cautioner for Hal-  
 kerton's curatorial intromissions. In 1797, 1799, 1808, 1809, 1811,  
 and 1812, Halkerston lodged his curatorial accounts in Court. During  
 is period several applications were made for recalling Halkerston's  
 ratory, partly by James Lawson, the brother of David Lawson, and  
 rtly after the death of James, by his son Ebenezer James Lawson.  
 enezer was a pupil at the date of his father's death. Some of these  
 applications were irregularly framed in various respects; but there was  
 presented in 1808 by Ebenezer James Lawson, and his sister-german  
 ry Lawson, and Roger Aytoun, W.S., who had been appointed their  
 for loco tutoris, which was regular in point of form. It prayed for a  
 al of the curatory, or at least an order on Halkerston to apply the  
 erest of the funds in his hands for behoof of the petitioners. It did  
 however, allege any specific acts of malversation or negligence  
 inst Halkerston, and, as there was no presumption then of David  
 wson's death, the petition, after answers were lodged, was refused with  
 enses.

The factor loco tutoris of Ebenezer, raised an action of cognition and  
 of part of the heritage left by his grandfather Patriek Lawson, under  
 ich it was sold for a price of £1375. Halkerston thereafter, in 1802,  
 ight an action against Roger Aytoun and the pupil Ebenezer, conclu-  
 g for payment of one-fourth share of that sum to him, as curator bonis

David Lawson. The Lord Ordinary, in 1810, decerned in terms  
 he libel, and, a reclaiming petition being presented for the defenders,

Court "in respect that it has been offered on the part of the  
 itioner, Ebenezer James Lawson, the apparent heir of David Lawson,  
 make the sum in question furthcoming to the said David Lawson, if  
 should ever appear, and for that effect to grant an heritable bond over  
 property of the petitioner, and to pay the interest thereof annually  
 the pursuer, as curator bonis, while he remains in that office, therefore  
 alter the interlocutor of the Lord Ordinary, and assoilzie the  
 itioner from the conclusions of this action, and decern and remit to  
 week's Ordinary in the Outer House, in place of Lord Cullen,  
 adjust the terms of the heritable security now to be granted."  
 After this interlocutor a heritable bond for £440, being the fourth  
 of the price, and relative interest, was granted in February, 1812,  
 Ebenezer James Lawson and his factor loco tutoris, acknowledging  
 to have been received from Halkerston "as curator bonis for  
 David Lawson," and binding Ebenezer James Lawson "to pay to the  
 David Lawson, and his heirs or assignees, secluding his executors,



220. the said sum of £440 sterling of principal at the term of Whitsunday next, 1812;" and farther binding "the said Ebenezer James Lawson and his foresaids, to pay to the said Peter Halkerston, so long as he should continue to hold the office of curator bonis for the said David Lawson or to any other curator to be appointed to him, and thereafter to the said David Lawson himself, and to his foresaids, the legal interest of the said principal sum of £440 sterling, from the said term of Whitsunday last, 1811, to the said term of payment," &c.

Subsequently to this, Aytoun continued to pay interest on this honorable bond to Halkerston until 1816, at which period his office fell, because Ebenezer James Lawson attained majority. Lawson paid no farther interest on the bond, and a correspondence ensued between Halkerston and him in regard to that subject, which terminated with the following letter from him to Halkerston, in 1818:—"Mr Aytoun has informed me, that you are threatening to put my bond upon record and to charge me with horning, unless the arrears of interest due upon it are immediately paid. I consider that a great deal too much interest has been paid you already, and that there is no occasion whatever to exact any more money from me. My uncle, to a certainty, is now dead, and has left no debt. If you draw this money from me, you must just let it out again to some other person, and it must come back to me as before. I see no use for this operation of drawing and redrawing, except to put a little money in your pocket; and if you stir another step upon my bond, I will direct a petition and complaint to be lodged against you, and an inquiry made as to the application of the money you have already received."

After this letter Halkerston made no farther demand for interest, but allowed Ebenezer James Lawson to retain the subsequent interest without challenge.

On the other hand, Ebenezer James Lawson took no farther steps to bring Halkerston's curatory to an end, or to call him to account until 1830. He then intimated a claim for a considerable balance on his intromissions as due by Halkerston, and also intimated this claim, in a correspondence with Coldstream as Halkerston's cautioner. During the interval from 1796 until 1830, no notice of any sort had been made to Coldstream, that any dissatisfaction was felt with the conduct of Halkerston, or that any irregularity had been committed by him, or that any balance was due by him. Halkerston alleged that if any balance was due at all it was very trifling, and he disputed Lawson's title to call him to account, as there was no evidence of the death of his uncle David Lawson, on whose estate he, Halkerston, was curator. Ebenezer James Lawson obtained himself decerned executor-dative qua next of kin to David Lawson, and raised an action of accounting against Halkerston in 1832. This action was not intimated to Coldstream. After a record was closed, Halkerston died before decree, in a state of insolvency. Ebenezer

es Lawson then raised an action as "nephew and executor qua No. 23014  
of kin decerned to the deceased David Lawson," concluding May 17, 1837.  
Coldstream, as the cautioner of Halkerston, to hold count and Lawson v.  
ing for Halkerston's curatorial intromissions, and to pay over the Coldstream.  
remaining due upon them.

fence against this action Coldstream pleaded, 1st, That there was  
ence of the death of David Lawson; and as his age was not ad-  
to exceed 77 there was no legal presumption of his death. The  
was therefore not in titulo to call the defender to account, or to  
n a valid discharge; 2d, That the balance claimed was a balance  
missions with moveable estate, and it was the pursuer's sister  
ho alone could pursue for it, as the pursuer had elected and taken  
table succession of his uncle David; 3d, That the summons was  
perly framed, as it did not set forth the date of David Lawson's  
death, though Halkerston's office subsisted till then, and it was  
l that it should be stated; 4th, That the pursuer had so conduct-  
self towards Halkerston as to liberate the defender from his  
ry obligation. Though aware of Halkerston's irregularity he  
ed duly to call him to account. And in 1816 he had made an  
greement with him, by which the pursuer, on the one hand, had  
ossession of the whole interests on the heritable bond which fell  
alkerston's curatory, and Halkerston, on the other hand, had  
l from doing his duty by enforcing his rights as curator, lest the  
should present a petition and complaint against him for past  
city. At that date Halkerston was solvent; and, as it was highly  
r and prejudicial to the defender to enter into this agreement at  
as especially so when coupled with the fact that the pursuer had  
matters to continue in this state for above fourteen years, and  
kerston had ultimately died insolvent without having been duly  
account.

pursuer answered—1. That David Lawson must be presumed to  
both in respect of his age, in 1795, when he was last heard of,  
spect of the absolute cessation of all intelligence respecting him  
at period. But, to remove all difficulty in regard to this, he, pur-  
s willing to find caution to repeat in case of David Lawson's re-  
ce. 2. The pursuer was confirmed executor-dative, qua next of  
oh entitled him to maintain the action. 3. It was unnecessary,  
he circumstances, impossible, to specify the date of David Law-  
ath; but as the pursuer was his heir, and was also confirmed as  
utor, the date of the death was immaterial in a question with the  
; and, 4. It was the duty of Coldstream, the cautioner, to take  
t Halkerston did not commit irregularities, as he was liable for  
on's faithful performance of his duty. The pursuer's entering  
possession of the estate in 1816 was not prejudicial to the interests  
rston's cautioner, but, on the contrary, limited the extent of his

236. liability thereafter, as he was exonerated, pro tanto, in any case the pursuer; and there was nothing else imputable to the pursuer, mere delay to call Halkerston to account, which could not find a defender, especially as the defender even yet disputed the pursuer's appearance. And separately, if any personal objection affected the defender, it could reach his own interests only, and not those of his sister, whom he was accountable for the moveable succession of David Lawson in so far as he should recover it; the office of executor implying that he was trustee for the next of kin.

The Lord Ordinary "repelled the first defence, in respect of which Lawson has not been heard of since the year 1795 or 1796, as being made at that period; and farther, because the pursuer offers caution, in case of David Lawson's appearance: Repelled the second defence, in respect the pursuer is decerned executor qua nearest of kin to David Lawson: Repelled the third defence as to the fact of summons: But, in respect of the agreement between the pursuer and Halkerston in 1818, by which the pursuer was allowed to retain the interest of his heritable bond, and afterwards to get possession of a part of his uncle's estate, while Halkerston was allowed to be curator loco absentis for many years, and until his bankruptcy in 1832, sustained the fourth defence, assolized the defender, and decerned the pursuer liable in expenses, subject to modification."

\* "NOTE.—David Lawson went abroad in 1795. Halkerston was his curator loco absentis in March, 1796, and the defender became his creditor. In 1808, attempts were made to remove Halkerston, but they were unsuccessful, which might have been anticipated, because some of those applications were irregular in point of form; and as to those which were regular, only fourteen years elapsed since David Lawson went abroad, and there was no distinct proof of acts of malversation or negligence on the part of Halkerston. But it was shown that Halkerston had been irregular in the performance of his duty, or at least that there was room for enquiry; and in these circumstances, the pursuer, debtor to the absentee for the interest of an heritable bond, wrote to Halkerston in 1818, in the following terms:—'Mr Aytoun has informed me, that you are threatening to put my bond upon record, and to charge me with horns for the arrears of interest due upon it are immediately paid. I consider that you deal too much interest has been paid you already, and that there is no more whatever to exact any more money from me. My uncle, to a certain degree, is dead, and has left no debt. If you draw this money from me, you must put it out again to some other person, and it must come back to me as his, and he has no use for this operation of drawing and redrawing, except to put a list in your pocket; and if you stir another step upon my bond, I will direct an enquiry and complaint to be lodged against you, and an enquiry made as to the use of the money you have already received.' Halkerston acceded to this, contrary to his duty, he allowed the pursuer to retain the interest of the bond, and to assume possession of the heritable property of the absentee, account; and, on the other hand, he was allowed to retain the office of curator loco absentis, and was not called to account for his intromissions, before his bankruptcy in or prior to 1832. It appears to the Lord Ordinary that this was a misnomer on the part of the pursuer, or rather an illegal agreement between

the pursuer reclaimed. The Court did not call on counsel in support No. 230.  
of interlocutor.

May 17, 1837.  
Lawson v.  
Coldstream.

THE PRESIDENT.—This is one of the clearest cases I ever saw. The interests of the pursuer's sister are not here, and he himself pursues as executor qua nearest. But the action cannot be maintained at his instance. Where the creditor principal debtor make a private agreement between themselves, which affects the rights and interests of the cautioner, he is no longer bound by his ordinary obligation. The pursuer and Halkerston made and acted on an agreement of that nature here, and the defender has thereby been liberated.

MR GILLIES.—The agreement following on the pursuer's letter of 1818 was, and was injurious to the cautioner. It would not have released Halkerston from a question with the pursuer, as Halkerston was a party to the agreement, and never could have pleaded it as setting him free from liability for any balance of curatorial funds in his hands. But the position of the defender, the cautioner, is altogether different. He was no party to the agreement. He was injured by it, and he has been deprived of any efficient recourse against Halkerston, and we presume, that, at the date of the agreement, he could have had an efficient remedy against Halkerston had he been certiorated that it was necessary for him to seek it. He is now here certans de damno vitando, and I think him freed from litigation by the conduct of the pursuer.

MRS MACKENZIE and COREHOUSE concurred.

The Solicitor-General, for Pursuer, submitted to the Court, in reference to an objection of the defender, that this judgment was not meant to affect any right of the cautioner competent to the pursuer's sister.

MR GILLIES.—The sister is not a party before us; her interests are not affected by this action.

MR MACKENZIE.—Our judgment does not touch her.

MRS PRESIDENT and COREHOUSE concurred.

THE COURT adhered, and awarded additional expenses.

J. MOWBRAY and A. HOWDEN, W.S.—A. SNODY, S.S.C.—Agents.

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...rator, to the prejudice of the cautioner. It was equivalent to an extra judica-  
tion of the curatory, and, therefore, a discharge of the cautioner. This is very  
different from mere taciturnity for 34 years, which perhaps might not have  
liberated the defender."

17, 1837. **REV. JOHN BURNS, D.D., and OTHERS, Pursuers.**  
*Sol.-Gen. Rutherford—Miller.*  
**JAMES EWING and MAGISTRATES of GLASGOW, Defenders.**  
*Ivory.*

*Poor—Parish—Stat. 39 and 40 Geo. III. c. 88—Consuetude.*—The lands having been disjoined by Act of Parliament from a parish adjacent to which they had been annexed to the royalty of the city, subject to city burdens, and to assessment for the poor therein—Circumstances in which the lands were acquired by the magistrates of that city, and of the buildings thereon, were such as to exempt them from their previous liability for the assessments for the poor of their original parish, but that the magistrates and town-council of the city were bound to contribute their share of the whole assessments from the common good of the city.

17, 1837. **TOWARDS** the close of last century, the property of certain lands situated in the Barony parish, in the neighbourhood of Glasgow, was acquired by the magistrates of that city. The lands were thereupon and became a populous portion of the town, continuing before to the Barony parish burdens, including the assessment for the poor. In June, 1800, an Act was passed (39 and 40 Geo. III. c. 88) extending the royalty of the city of Glasgow over these lands. The preamble stated this to be just and reasonable, inter alia, "for the better apportioning of the public burdens and benefits among all the inhabitants of the place." By the 2d section the Magistrates were empowered to levy "the same malls, duties, customs, conversion of statute-labour, and other taxes," within the extended royalty, as they already did in the original royalty. By the 3d section it was enacted, "that the said Magistrates and Town-Council shall hereafter pay, from the money raised by the conversion of the statute-labour within the said city, to the legally appointed to repair and maintain the public roads in the district of the Barony parish of Glasgow, £5 sterling yearly, as compensation for the statute-labour of the said annexed lands; and shall from the funds of the community of the said city, relieve the holders and occupiers of houses or lands in the said extended royalty, of the rates payable by them to the said Barony parish, as having been levied thereof before passing this Act." By the 8th section the Magistrates received power "to appoint stent-masters, assessors and collectors, to assess and to levy from the proprietors and occupiers or possessors of the said annexed grounds, and of all such houses as are built, or to be built, upon the foresaid grounds hereby annexed to and included within the said royalty, an equal and rateable portion of all the trades' stent, poors' rates, conversion of statute-labour, and other taxes payable by the inhabitants of the city of Glasgow, in the same manner as they are now levied within the present royalty." The 10th section provided that the lands of the newly extended royalty, besides the

No. 231

May 17, 1831  
Burns v.  
Ewing.

levied by the collectors of the town for the houses erected thereon, "shall remain liable and be subjected to the payment of a rateable proportion of the cess or land-tax, and other public burdens imposed or to be imposed on the shire of Lanark, for and in respect of the ground, which cess shall be paid by the Magistrates and Town-Council of the said city, from the funds of the community." By the 11th section it was enacted "that the said grounds hereby annexed to and comprehended within the royalty of the city of Glasgow shall be, and the same are hereby for ever separated from the Barony parish, and are hereby annexed to the parishes within the said city to which they lie most contiguous, or to which the Magistrates and Town-Council shall, by any act or acts of council, hereafter direct and appoint." The tithes payable out of the lands so annexed were by the 12th section "saved and reserved to the true owners thereof, in the same manner as if this Act had never passed." The 14th section was as follows:—"Saving always and reserving to his Majesty, and all other person or persons concerned, all rights and interest, other than the present extension of the said royalty, which they had, have, or may have, in the lands hereby annexed."

Previous to the passing of this Act, and when an extension of the royalty was in contemplation, various communings took place between the heritors of the Barony parish and the Magistrates of Glasgow with reference to the introduction of a clause into the bill providing against the lands proposed to be annexed to the royalty being freed from the burden of supporting the Barony parish poor. In the beginning of 1800, the Trades' House, who held part of these lands, passed the following resolution:—"That the said Provost, Magistrates and Council, should not only free and relieve the inhabitants of the Barony parish, whose property is to be annexed to the royalty, of the statute-labour, but also of the poors' rates in the said parish."

From the passing of the Act down to the year 1810, the heritors and Kirk-session of the Barony parish raised the sums required, over and above voluntary contributions, for the maintenance of the poor by assessing the heritors of the annexed lands according to the valued rent, the Magistrates of Glasgow paying such assessment. In 1811 it was found necessary to raise the amount of assessment and apply the mode of collecting by the real rent instead of the valued rent, whereby the householders were made liable as well as the heritors. The question as to the liability of the city to bear this increased assessment was remitted by the Magistrates and Council to a select committee, who gave in a report expressing their conviction, that, looking to the state of Parliament, the increased demand could not be resisted; which report was adopted and acted upon thereafter. The Magistrates accordingly, in relief of the individuals within the extended royalty liable to assessment, continued, down to 1831, to pay their share of the rate, the greatest sum levied in any one year, in respect of the property within the

381. royalty, being £1795. During the whole period from 1800 downwards, the annexed lands were likewise assessed for and made to bear an equal proportion of the poor's rate imposed within the city for the maintenance of the city poor.

In December, 1831, the sum collected fell considerably short of the sum demanded from the city by the Barony parish, and of that date the Magistrates intimated their intention to resist farther payments until the validity of the claim made by the Barony parish should be judicially ascertained. Arrears of the assessment affecting to the properties of the defenders, James Ewing and William Dunn, proprietors within the extended royalty, became due for years 1830, 1831, and 1832, amounting to a sum of about £26 or £27 on each.

Thereafter the Rev. Dr Burns, and the Rev. William Black, his assistant and successor, ministers of the Barony parish, for themselves and the other members of the kirk-session, and William Robertson, collector appointed by the heritors and session, raised action against Ewing and Dunn, and against the Lord Provost, Magistrates, and Town-Council of Glasgow, founding on the provisions of the Act 39 and 40 Geo. III., and particularly on the 8d section thereof, and setting forth that the legal import and effect of these enactments "was to leave the properties of the defenders and the other heritors in a similar situation within the said extended royalty with those of all the other heritors of the said Barony parish, and subject to a rateable share of the annual burden of supporting and maintaining the poor, in all time coming, reserving the right of heritors to relief of the sums from the Magistrates of Glasgow, as the burdens might arise or be imposed; or otherwise, to render the Magistrates and Council of Glasgow, as representing the community, directly liable to the pursuers, and their successors, for such assessments as might be imposed on the properties of the said heritors, in the part foresaid, of the said extended royalty;" and accordingly that ever since the passing of the Act the assessments had been imposed upon the properties of the defenders, and others within the extended royalty, in the same manner as it was upon the tenements within the other parts of the Barony parish, and that the requisite sums had been advanced and paid each year by the Magistrates on behalf of the proprietors of those subjects down to the year 1831, when they announced their intention to discontinue such payments in relief; that the properties of the defenders, Ewing and Dunn, had been comprehended within the Barony parish and were liable to the assessments, and that they were in arrear a certain sum on account thereof for the years 1830, 1831, and 1832; and concluding for payment by these parties respectively of their arrears, or otherwise in case it should be found that the Magistrates and Council were now directly liable to the pursuers in the said sum, then that they should be ordered to make payment of the sums of arrears above-mentioned.



ance against this action, Messrs Ewing and Dunn pleaded— No. 231.  
 they are not liable, in respect of their properties, for the sup- May 17, 188  
 e poor of the Barony parish, as that parish now exists, and are Burns v. Ewing.  
 , directly or indirectly, to be assessed therefor by the heritors  
 session of that parish.

, on the contrary, they are, along with the other inhabitants  
 rgh, liable for the support of the poor of the city of Glasgow

t, having accordingly been assessed for the support of the burgh  
 having regularly paid their assessments, the present action is  
 roundless, as regards them, and they ought to be assoilzied  
 r from its conclusions, with expenses.

Magistrates, referring to these defences, pleaded generally that  
 not liable in the sums pursued for or in any part thereof.

ord Ordinary pronounced the following interlocutor, adding the  
 note: \*—“ Finds, that according to the just and true construc-

Lord Ordinary cannot persuade himself that there is any difficulty in  
 and thinks that it is impossible to read attentively through the fourteen  
 ns of the Act, as they stand in their order, and entertain any doubt as  
 to meaning and effect.

defenders, at the debate, did not find it convenient to proceed in this  
 urse. They went at once to the 11th section, which provides, in gene-  
 for the *disjunction* of the annexed lands from the Barony parish, and  
 ration to the parishes of the old royalty; and then, contending that this  
 , not being in any way qualified or limited in its term, imported a *total*  
 , and consequent liberation from all future parochial burdens in the  
 m which they are disjoined, they went to the 2d section (as illus-  
 the 8th), to show that they were accordingly subjected to a new, and,  
 untained, *substituted* set of burdens, in their new connexion, and argued  
*double* liability was in no case to be presumed without express words,  
 conclusive confirmation of their views as to the effect of the absolute  
 . They then proceeded to point out the very different terms in which  
 payments of *cess* and *statute-labour* money to the county, from which  
 d lands were disjoined, are provided for in the Act, and the provisions  
 osed to be made for future poor assessments; and concluded by sug-  
 at these last provisions, which they represented as being merely for  
 contingent and imaginary claims, must have been inserted to satisfy  
 less anxiety or apprehensions of the owners of the annexed property,  
 never be held to import that the claims themselves were just or main-

Lord Ordinary takes a very different view of the object and effect of the  
 It was enacted on the petition of the Magistrates, and for the purpose  
 ing a great benefit on the city, by putting under its municipal jurisdic-  
 subjecting to its burghal assessments, a very wealthy and flourishing  
 the actual town; at the same time, it was obvious that if this rich as-  
 strict was to be entirely withdrawn from the parish, and the county to  
 formerly belonged, and exempted from all future contributions to *their*  
 ions, a great loss would be sustained by these communities, and a pro-  
 heavier burden laid on what remained of them. It was necessary,  
 to provide for this by special enactments, and it is impossible to read the  
 have any doubt as to the *principle* on which these are framed. That

tion of the Act of the 39th and 40th of Geo. III. c. 68, the lands thereby annexed to the royalty of the city of Glasgow, and disjoined from the

principle is, beyond all question, that the *annexed lands* shall be liable to a double assessment, but that the *owners or occupiers* shall only pay those chargeable for the city, and be relieved of such as continued due to the county or parish, from the *public funds*, or some particular branch of the public funds of the city. That this is the case as to the *cess* and *all the other proper county burdens*, and the *statute-labour*, cannot possibly be disputed; and as there were obviously as strong, if not still stronger, reasons for applying the same principle to the assessments for the poor, the Lord Ordinary would not have hesitated to construe any doubtful or ambiguous words in the provision as to these assessments upon that assumption, and according to the analogy of the kindred provisions, as to which there was no doubt. But, in fact, it does not appear to him that the words, even if they stood by themselves, are in the least degree doubtful or ambiguous. The provision as to the *cess* &c. (sect. 10), is, that *besides* the cess to be levied from the annexed lands for the town, they should *also remain liable* to their rateable proportion of the county *cess and all other county burdens*; 'which cess,' &c., it is added, 'shall be paid by the Magistrates and Town-Council of the said city, from the funds of the community.' Then, as to the *statute-labour*, it is specially provided (and obviously in terms of a previous agreement), that an annual sum of £5 shall be paid by the Magistrates and Town-Council to the heritors of the Barony parish, 'as a conversion for the statute-labour of the said annexed lands;' and then immediately after, and as the sequel of the same section, follows the provision as to the *poors' rates*, in these words:—'And they (the Magistrates and Council) shall also, from the funds of the said city, relieve the owners and occupiers of lands and houses in the said extended royalty, of the *poors' rates payable by them to the said Barony parish*, as having been a part thereof, before passing this Act.' If this does not mean that the annexed lands were still to pay *poors' rates* (as well as *cess* and *statute-labour money*) to the Barony parish, and that the Magistrates were to protect the owners and occupiers, by paying these rates for them out of the public funds, it is not easy to conceive what it does mean.

"Accordingly, the defenders are driven to great straits to give it a meaning; and actually maintained, at the debate, *first*, that the whole of this provision about the *poors' rates* really had no meaning, and must have been inserted by mistake, or *per incuriam*; and, *next*, that it could only have been inserted to satisfy the groundless apprehensions of the owners and occupiers, as to possible, but evidently incompetent claims on the part of the Barony parish; or, *finally*, that it might possibly relate to the *arrears* of former assessments. It is not thought necessary to make any remarks on these extraordinary suppositions.

"The variance in the phraseology, and indeed in the substance of the arrangements, as to the *cess* and other county burdens, the *statute-labour* and the *poors' rates*, on which the defenders dwelt largely, is very easily explained. The principle, it has been seen, is the same as to all; but the arrangements for carrying it into effect are naturally different, and the expression accordingly varies. The *cess* being a fixed and invariable sum, the provision is merely that it shall be annually paid over by the city, and there was in that case no need for any other arrangement. The *statute-labour* assessment, again, was liable to fluctuation, though not to any great extent; and it was quite practicable, therefore, and seems to have been thought more convenient, to fix an average amount in the statute, which should be paid in all time coming, as its conversion. But the *poor assessments* were liable to great and incalculable variations; and (as the result has shown) a fixed average could have been taken with any tolerable safety, as the rule of contribution in all time coming. They were, therefore, left to be settled by the annual assessments, and as these assessments must necessarily be by the individual owners and occupiers of the annexed property, the burden

parish of Barony, and the owners and occupiers of the said lands, or of the houses and buildings thereon, are not relieved from their previous

No. 231.

May 17, 1887.  
Burns v.  
Ewing.

the Magistrates is correctly expressed as an obligation to relieve those individuals, against whom personally a charge must have been first constituted, before the amount to be paid for them by the Magistrates could in any one year be ascertained. The whole provisions, therefore, as to each and all of these county and parish burdens are not only perfectly congruous and identical in substance, but the particular arrangements and expressions as to each, are judiciously adapted for carrying the principle into effect.

After this plain exposition of the words of the Act, it can scarcely be necessary to say any thing as to the defenders' main argument, that the *general terms* of the express disjunction of the district in question, from the Barony parish, must necessarily import a disjunction *quoad omnia*. The conclusive answer is, that the statute has not left the nature or effect of that disjunction to inference; but has expressly provided and enacted in what respects, and to what effect, the disjoined property shall still be tributary to the parish from which it is divided; and has, in a special manner, enacted, *inter alia*, that it shall still be liable to *poors' rates* in that parish. In fact, there is no *civil* burden, for which it does not continue liable as before, both to the parish and the county; and while the annexation, with all its consequent liabilities, is complete and total, it may be truly said that the disjunction can extend to ecclesiastical relations only;—for there is nothing else left, of which it can possibly operate.

One simple and obvious question brings out the palpable fallacy of the defenders' whole argument. If it was really intended by the Act to exempt the owners of the annexed territory from future poor assessments in the Barony parish, why was it not so provided? And above all, why was a clause inserted looking so very like a special provision the other way? It could not be that the framers of the Act trusted to the effect of the general words of the annexation and disjunction, for they leave nothing whatever to the operation of those words. Every thing is separately and anxiously provided for. They do not rely on the express annexation and consolidation with the old royalty, even for the extension of the Magistrates' jurisdiction over the new territory; but this, with every thing else, is specially enacted. But, unluckily for this trusting hypothesis, there is a special clause about those *poors' rates*, and the defenders' theory is, that it was introduced to quiet the idle fears of the annexed owners, as to the possible insufficiency of the general words to secure their exemption. Whoever else trusted to the virtue of these words, therefore, it is certain that these owners did not trust to them; and the legislature knew this, and in order to remove their distrust, is supposed to have put in this clause, bidding the Magistrates to relieve them from their imaginary perils. The Lord Ordinary must say that this appears to him to be nothing more of a mere absurdity. If the object was not only to secure these owners from the Barony assessments, but to quiet their foolish apprehensions of danger from them, was not the plain way to do this, just to enact that they should be exempted? For is it not conceivable that, with this object in view, the legislature, having full power to settle the whole matter by a word, should take this indirect, and really unintelligible course to effect it? It is needless to add, that the whole phraseology of the clause excludes this strange hypothesis. The Magistrates are there bound to give relief, not against possible claims, but against '*rates payable in the Barony parish*;' and this relief is to be given, not by refuting the annexation, but by paying them—not by a successful argument on the effect of the clause of disjunction, but '*from the funds of the community of the city*.'

When the case is so clear upon the construction of the Act itself, there is no need to refer to the powerful corroboration which this construction receives from the fact, that it has been so long and so generally followed in practice. It is quite certain that, when the Act was passed, the territory of the Barony parish required that satisfaction, both

1831. liability, for the assessments made, or to be made, for the support of the poor of the said parish, along with the other lands, and the owners and occupiers thereof, within the said parish; and that the Magistrates and Town-Council of the said city are bound to relieve the owners and occupiers of the said annexed lands, and houses and buildings thereof, of the whole of the said assessments, made or to be made for the support of the poor of the said Barony parish, by paying over, from the funds of the community of the said city, the whole amount of the said assessments as they have or shall become due, to the proper officer of the said parish, or person entitled to collect and receive such assessments, and therefore repels the defences set forth and maintained by both sets of defendants, decerns, in terms of the conclusions of the libel, against the defendants James Ewing and William Dunn, severally, for the sums of money concluded for against each of the said defenders, with interest upon the said several sums as libelled: And in the event of payment not being made of the said several sums by the said defenders, within twenty-one days

as to the statute labour and the poor's rates, which the Lord Ordinary thinks they have obtained by the clauses in question; and it is admitted that, after they submitted their amendments, they allowed the Act to pass without opposition. He is aware, however, that the admissibility of such evidence, however powerfully it may influence the mind, is very questionable, and therefore he in no degree rests his judgment upon it. With regard to the subsequent practice, however, he inclines to think, that, when it has been uniform—of many years' standing—and against the interest of those by whose consent it has been established—it may fairly be looked to for elucidating the true meaning of any doubtful or obscure enactments. Against a plain and precise statute (at least since the Union) no practice can be of any avail; and the Lord Ordinary thinks the statute clear enough here. But the defenders can scarcely deny, that in their view of its meaning, its enactments are full of obscurity, and that it is competent, therefore, to refer to early and long-continued practice for their elucidation. Now, the practice in this case amounts to no less than this, that ever since the passing of the Act in 1800, down to 1831, the Magistrates, upon whose petition it proceeded, have all along recognised their liability under the clause in dispute, and have, every year, paid over large sums, ranging from £300 to £1795, as their share of the Barony poor assessments. In 1814, when the first great increase of these assessments took place, the matter was referred to a select committee, who gave in a full and well-considered report, expressing their clear conviction that the increased demand could not be resisted, and that was deliberately adopted by the Council, and acted upon ever after. In 1821, some objections having been taken, not to the general legality of the charge, but to the way of ascertaining its amount, another committee of the Town-Council was appointed to adjust this matter with the Barony Heritors, which they accordingly effected, and gave in a long and elaborate report to the Council, with a scheme for checking the assessor's charges in a particular way, which was also adopted and acted upon down till 1831. In that year a new light broke in upon the Magistrates, and it was discovered, that they who framed and carried through the Act of 1800, were altogether mistaken as to its meaning; and that their practice, and that of their successors for thirty years, was against its true construction, as well as their own interest and duty to the city.

"The Lord Ordinary thinks, that a more extravagant allegation never was brought forward in a court of law; and sees nothing but the greatest absurdity at stake, which can explain the conduct of the Magistrates in continuing an unpromising a litigation."

advocate shall be final, decerns also against the other defenders, No. 231.  
 rates and Town-Council of the said city of Glasgow, and May 17, 1837  
 sots in office, for such of the said sums as may then be unpaid: Barnes v.  
 whole of the defenders, conjointly and severally, liable to the Ewing.  
 expenses."

and the Magistrates reclaimed:

and having been put out for advising, the Court (May 26, 1836)  
 es.

*for the Pursuers—*

annexation of the Barony parish lands effected by the statute was  
 disjunction, but one of a limited and qualified character, and  
 regards liability to assessment for the poor of their original  
 the lands in the same situation in which they stood prior to  
 of the Act, but with a right of relief to the owners and  
 thereof from the city funds. The third clause of the statute is  
 an enactment upon which the present case hinges. The decla-  
 ration is express that the Magistrates of Glasgow shall, from the  
 the community, relieve the owners and occupiers of the annexed  
 the poors' rates payable by them to the Barony parish, which  
 necessarily implies that the owners and occupiers of these  
 lands continue directly liable, as before, in payment of a rateable  
 of the poors' rates, of which they were to be relieved from the  
 the city. The provision in question, according to this its obvious  
 nature, is in accordance with the principle upon which the analogous  
 provisions in regard to other public and civil burdens affecting the  
 lands proceed, and generally with the scope and tenor of the  
 of the Act, the several provisions in which were framed with a  
 fair and equitable adjustment of the different interests affected  
 measure. The fact of the usage having been, since the date of  
 the Act, in accordance with the view now taken is admitted, and such  
 usage may competently be founded on in order to elucidate the true  
 meaning of the clauses of an Act alleged to be ambiguous. This is com-  
 mon in the case of a public statute in the provisions of which  
 there is obscurity,<sup>1</sup> and much more may usage be taken as the inter-  
 pretation of a private Act, such as the present, of which the construction  
 is a point of public law, but which merely professes and was  
 intended to regulate private or local rights, and can be regarded only in  
 the light of an interposition of the authority of the legislature to an-  
 nullify of such rights and interests previously adjusted and agreed  
 upon by the parties themselves.

1831. *Pleaded for the Defendants—*

7/1837. In a direct question of taxation such as the present, the pursuers, representing the Barony parish, have no right to insist except against the parties directly liable to themselves in the assessment; and with reference to the conclusion against the Magistrates, there is room for doubt whether there be a relevant case at the pursuers' instance against the Magistrates and the community. If there be termini habiles for decree against the defenders, Ewing and Dunn, there appears to be no longer any thing either under the statute or the present summons which can reach the other defenders. As to the question of the liability of the former, there was from the date of the statute, according to its true construction, and especially looking to the 11th clause, a complete disjunction quoad omnia between the annexed lands and the remainder of the Barony parish. But if these lands no longer form part of the parish, and if the proprietors thereof are no longer heritors or parishioners of the parish, whence do the pursuers derive their jurisdiction and power to assess? If the lands are "for ever separated," the whole machinery is gone by which a parochial rate could be either imposed or enforced against them. Moreover, these lands are declared to be assessable in an equal proportion of the poors' rates payable within the royalty to which they are annexed with the other inhabitants thereof. But the law will never presume for and will not countenance a double assessment.<sup>1</sup> It is merely by implication that the clause of relief founded on by the pursuers can avail them, and such being the case, it is insufficient to get the better of an express and positive enactment that the annexed grounds "shall be, and the same are hereby for ever separated from the Barony parish," more especially when the result would be to introduce a state of matters altogether anomalous and contrary to the general principles of law. Had it been intended that the right of assessment contended for was to be reserved to the Barony parish, an express clause of reservation would have been resorted to, such as was inserted to save the claim of the county for rates and other burdens, and the rights of the tithe-owners.

In regard to the liability of the Magistrates, except in so far as they happened themselves to be heritors of the lands afterwards separated from the Barony parish and annexed to the royalty, there was, prior to the statute, no colour for holding the parish to have any claim over these parties. Then, even assuming that the statute did impose upon them a certain liability, that was a liability created, not in favour of the Barony parish, but in favour of the individual "holders and occupiers of houses or lands within the extended royalty." Besides, even as regards these latter parties, it was in no sense an absolute or primary liability, but a

<sup>1</sup> Hill, June 25, 1835 (F.C.)

liary or secondary obligation of relief, in case a direct liability No. 231.  
 reared up against these parties themselves. In any case of May 17, 183  
 a statute the authority of usage is doubtful, but in the circum- Burns v.  
 he present case, it is not to be taken into account, and cannot Ewing.  
 defenders from falling back upon the statute itself.  
 e was this day finally advised.

JUSTICE-CLERK.—Your Lordships will remember, that when this re-  
 was presented, we thought the case deserving of consideration, and  
 ordered cases; and I wished also to have the same advantage

Ordinary had, by having before me the whole of the Act of Par-  
 I am not very fond of looking merely at clauses culled out here  
 The Lord Ordinary observed in his note, that he thought it impos-  
 body could read the first fourteen sections of the act without arriving  
 conclusion with himself; and now that I have read them, I have come  
 conclusion as the Lord Ordinary. It appears to me that it is  
 a fair construction of this Act of Parliament, while the obligation of  
 eived in language so perfectly plain and intelligible, to give effect  
 proviso, without holding it equally certain that, while the Magis-  
 isgow are entitled to levy poors' rates on the holders of the lands  
 in question in the same way as on those within the old' royalty,  
 e same time liable to the Barony parish as the proprietors of the  
 on those lands were formerly liable to that parish. It is perfectly  
 en you look at the preamble of the act, and the very anxious provi-  
 ed in it in regard to the conversion of statute-labour, and propor-  
 aid to the Barony parish, while the right to the tithes is to remain  
 id when you look also to the way in which provision is made for the  
 ess, and paying the proportions of it effeiring to those lands, it is  
 it had been considered that, upon the ground of expediency alone, it  
 at that the lands specified in the act should be annexed to, and brought  
 yalty of Glasgow. That was, in reality, the only object of this act;  
 at the different sections, it will be seen that, while they make all  
 provisions, the chief object is, that these lands should be compre-  
 n, and make part of the royalty of the city.

se that, when this object was accomplished, the interests of the  
 h were farther meant to be affected—that those lands, with the valuable  
 ed upon them, forming squares and streets, and at the time liable to  
 oors' rates along with the other parts of that parish, were for ever to  
 from that liability, and the power of assessment cut off without any  
 seems altogether inconceivable, the more especially when it is seen  
 anxiously provides for the sum of £5 being secured to the Barony  
 ount of the statute-labour conversion. Accordingly, the defenders  
 as they argue in their case, to the conclusion, that this obligation  
 no meaning at all, but has just somehow or other crept into the  
 w, my Lords, keeping in view the words of this enactment, that the  
 and Town-Council “shall also, from the funds of the community of  
 , relieve the holders and occupiers of houses or lands in the said ex-  
 ty of the poors' rates payable by them to the Barony parish, as having



1831. been a part thereof before passing this act," does it not expressly declare, that they shall be bound, out of the funds of the community of Glasgow, to relieve the whole of the proprietors of houses or lands of the poor's rates payable to that parish, as having been part of it before the passing of this act? To suppose that this express provision has no meaning at all, is a proposition to which I can pay no regard. It was a most just and equitable provision, in reference both to the interests of the parish, from the limits of which the lands had been separated, and to those of the city of Glasgow itself, that was acquiring the benefit of the extension of its royalty, with the power at the same time of levying from the annexed lands not only cess and statute-labour conversion-money, but likewise poor's rates, in the same way as was competent over the ancient royalty of the city. But, in addition to the fair construction of all those clauses, while the meaning of the legislature is sufficiently manifest, you have this important circumstance, that those very persons who got the act of Parliament to make Glasgow one great and magnificent city, as it now is, by including all those streets and squares within its territory, acting on their clear understanding of the act of Parliament, proceeded immediately to levy the city's poor's rates over those newly annexed lands, and then proceed, in the fair fulfilment of this obligation, to relieve the parties from all claims at the instance of the Barony heritors, by paying over to the treasurer of the Barony parish the sums that had been assessed by those heritors. This having been continued for a period of thirty years, is a clear proof of the understanding of all parties concerned, and affords a sound ground for interpreting the act, if there were any doubt as to its true meaning.

I may, however, observe, that there appears some little difficulty, in point of form, from the way the interlocutor is worded. The Lord Ordinary "decerns in terms of the conclusions of the libel against the defenders, James Ewing and William Dunn, severally, for the sums of money concluded for against each of the said defenders, with interest upon the said several sums as libelled; and in the event of payment not being made of the said several sums, by the said defenders, within twenty-one days after this interlocutor shall be final, decerns also against the other defenders, the Magistrates and Town-Council of the said city of Glasgow, and their successors in office, for such of the said sums as may be then unpaid," &c. Now, I must own I was a little startled by the way in which that part of the interlocutor is worded. It seems rather odd to decern against the Magistrates for that part of the sums that shall not be paid; and it seemed doubtful to me whether that was the way in which the judgment ought to be expressed; but as to the substantial part of the case I have no doubt, and that the Magistrates and Council and community are liable, however the finding may be expressed.

LORD MEADOWBANK.—I have studied the case as your Lordship has done, and I have no doubt of its substantial justice. I think it quite legitimate where there is doubt of the true import of the terms used in an Act of Parliament, or any public instrument, to arrive at their just interpretation through the practice, under and with reference to such instrument. Accordingly, I consider that the practice in this case which is established beyond all doubt makes the true meaning of the private and local statute quite unquestionable.

LORD GLENLEE.—Perhaps something may be said with regard to that provision of relief, that on the whole it goes too far; but, on the whole matter, it appeared to me that this is a declaration of the Magistrates' obligation at once to relieve the

heritors of the added part, of all claims at the instance of the Barony parish. I No. think it puts an end to the possibility of founding on the clause of annexation to the town churches. There is an annexation but qualified by this necessity of May 17. relieving the inhabitants of the part added to the royalty. I would go so far as to Burns, Ewing. say that there is an absolute declaration on the part of the legislature that they shall remain liable. But on the question, whether they remain liable, you are not to go to the clause annexing the lands to the town churches as if it stood unqualified. And then it appears to me that the town being obliged to relieve those heritors of all claims at the instance of the Barony parish—if there is no unreasonable charge made—it must be sustained and the town must pay it. It is impossible for me, in the question before us, to say that it is a just claim of relief, merely because it has been paid all along. I just throw the thing open, and I think on the fair construction of the statute there is a clear case, that the town are bound to relieve them, and likewise an express admission by the town for a vast number of years that such a claim existed; and in fact they did relieve them. With regard to that difficulty your Lordship alluded to, I don't think there is so much in it. If the statute had all along been libelled on, there would have been a difficulty in arranging in any other way than in decerning against the heritors, leaving them to take their relief, but the summons subsumes the constant practice of the Magistrates paying without any demand on the heritors at all. Whether that was a good way or not does not signify, but it makes the judgment conformable with the libel. The summons libels on the practice that the Magistrates were accustomed to pay at once when called on; and I observe no special objection is made against the present charge, as being an improper quantum that has been laid on. Therefore, I think that they are now bound to pay as they have been in the habit of paying for a length of time.

LORD MEDWYN.—If this case had occurred immediately after the Act of Parliament had passed, when there was no practice under it, I should have had no doubt whatever as to the interpretation of it. Notwithstanding the opinions expressed by your Lordships, and notwithstanding the manner in which the Lord Ordinary treats the argument of the defenders, I should have had no difficulty in coming to the conclusion that those who were formerly heritors of the Barony parish, should have been entirely relieved from the payment of the poors' rates for that parish. These lands were not merely annexed to Glasgow. The object was not merely to extend the royalty, but it was to disjoin those pieces of ground from the Barony parish. I have read the Act of Parliament as the Lord Ordinary has desired me to do, and I cannot say that it occurs to me as of the slightest importance, to consider in what position of an Act of Parliament that clause of disjunction is to be found. In fact, if the position of a distinct substantive clause in an Act of Parliament be of any consequence, I understand it is a rule of interpretation well-known in the law of England, that if a clause deviates from a preceding one, it is the subsequent clause that decides. But I don't go on that at all. I have examined the Act of Parliament, as I have been required to do, and when I see that it disjoins those lands from the Barony parish and annexes them to Glasgow, I cannot see that I can hold them to be liable for any rate to that Barony parish, unless they are specially declared so to be. Now the annexation is made under conditions; and attend to what these conditions are. I in vain look for any condition by which those who were Barony parish heritors are to be still liable for poors' rates there. I think it has not been sufficiently attended to, in the discussion before the Lord,

11. Ordinary, or in the papers, that there is but one burden, properly speaking, under which these lands lie, and that is the cess; and as these lands are distinctly disjoined from the Barony parish, had it not been the tenth clause, I should have considered them not liable for the cess to the county but to the town. But the condition of the disjunction was expressly under this provision, "that the several lands hereby annexed to the royalty of the city of Glasgow, besides the cess to be levied by the collectors of the town for and in respect of the houses and buildings erected thereon, shall remain liable and be subjected to the payment of a rateable proportion of the cess or land tax, and other public burdens imposed, or to be imposed on the shire of Lanark for and in respect of the ground, which cess shall be paid by the Magistrates and Town Council of the said city from the funds of the community, and shall be levied in the usual manner, any thing in this act notwithstanding." Now that was a very proper condition for the county to make, that no part of their cess should be taken away. But then it is not held to be implied that they are, though disjoined, still liable for county cess; but it is distinctly said that they shall be still liable, and as this would make them liable for cess both in the city and county, it is most properly provided that the Magistrates are to pay it out of the funds of the community; and why? because the cess is one of those burdens going to the common funds of the city, out of which the cess for the county naturally should be paid. There are also the burdens of statute-labour and poors' rates. The statute-labour is provided for in this way, "that the said Magistrates and Town-Council shall hereafter pay, from the money raised for the conversion of the statute-labour within the said city, to the heritors legally appointed to repair and maintain the public roads in the western district of the Barony parish of Glasgow, £5 sterling yearly as a conversion for the statute-labour of the said annexed lands." Now this is properly a personal tax, and does it say the money due for these lands under the conversion is still to be paid? No; it says distinctly there shall be paid £5 as a conversion for the whole lands so disjoined, and this sum is to be paid most properly out of the funds raised for the conversion of the statute-labour, not from the general funds of the city. These lands now paid the statute-labour within the city, and from that fund this payment was most properly made. The stipulation is, not that the whole money should be paid to the county, which might have amounted to £50, but only this sum of £5, which should be given as an equivalent for withdrawing part of these lands from the Barony parish of which they afterwards were to form no part. What is the reason why the legislature did not make the same stipulation with regard to the poors' rates, viz. that the Magistrates should pay the same over to the parish, and relieve the heritors of the annexed and disjoined lands, as they were now to pay poors' rates within the town? I cannot understand how, since the parties specially provided for cess and statute-labour, they did not specially provide also that this burden of poors' rates was to continue on the heritors of the disjoined lands, the Magistrates relieving them of the payment, if this was really intended. It is not difficult to see how this should have been done. Suppose there had been no clause of relief, and those lands totally disjoined, it is certain the liability to the parish would have ceased. Now what difference can the clause of relief make? It is quite new to me that a clause of relief can operate to constitute a principal obligation. That is a rule of interpretation not yet admitted into our law. The reading of the clause, however, is of importance—"And shall also, from the funds of the community of the said city, relieve the holders and occupiers of houses or lands in the said extended royalty

poors' rates payable by them to the said Barony parish as having been a reof before passing this act." That does not make "payable" equivalent paid." If they can make it out that it was still payable, unquestionably n, from their funds, was bound to relieve them, and Mr Ewing cannot be responsible for it. But I say decidedly, that if this question had arisen ately after the passing of this act, I should have had no hesitation in giving nion that there was no obligation here to pay poors' rates, because it was to make this provision, if it had been so intended, when provision was or other burdens, and when they were actually legislating with the poors' their view. In truth I cannot understand how, when the lands were d, the property was to remain liable for the poors' rates of the country parish, some special clause was introduced to that effect. It is quite true that if nders should be found liable, this clause will make the Magistrates relieve At the same time I think it unsound law that this clause of relief should hose parties liable. Such, I think, would have been my opinion looking to the object and words of the act; but, looking to the interpretation put by the parties, I have great difficulty in getting over the fact that this act ssed in 1800 or 1801, and if the Magistrates continued to pay for only a rs I would not have held it of so much consequence, as the chamberlain ave been mistaken. But what I lay the great stress upon is that this special is distinctly brought before the Magistrates in 1811, and most certainly they eld that they were bound to pay those sums. But it came to be a sum they thought it well to consider, although not certainly so large as it is id what is done? Why, holding that the heritors of these lands continued o pay poors' rates in the Barony parish, they gave an order to pay it out funds of the poor, for which they had no authority whatever from the as the statute distinctly says the relief is to come from the funds of the nity, and I think the payers of poors' rates in Glasgow are quite entitled to to it. It must make a great difference whether £1000 is raised the poors' rates or out of the funds of that great city. But although this how very negligently and inattentively parties have entered into these lings, yet after what has been done, I think I must give in to the belief that it erwise intended by the parties at the time; and, since your Lordships think tly from me, I am bound to hold that there is here an ambiguity in the of the statute, and therefore, as the practice has been uniform for these years, that the parties are the best interpreters of their meaning and of the itself.

D MEADOWBANK.—In consequence of what has been stated by Lord n I deem it proper to add, that if I had thought, as his Lordship does, that ds of the statute are clear, I should not have felt myself at liberty to look practice at all. I have taken the practice into view exclusively on the that in the terms employed in the statute there is great ambiguity. For if it clear that the statute imported one thing and the practice another, I had t to have gone beyond the instrument itself.

**THE COURT** accordingly adhered, finding expenses due.

**Geo. DUNLOP, W.S.—CAMPBELL and MACDOWALL, S.S.C.—Agents.**

No. 231

May 17, 183

Burns v.

Ewing.

No. 232.

May 18, 1837.  
 Forsyth v. His  
 Creditors.

— FORSYTH, Pursuer.—*Logan*.  
 HIS CREDITORS, Defenders.—*Paterson*.

*Cessio*.—In an opposed cessio, under 6 and 7 Will. IV. c. 56, the Court, at the same time that they made a remit to the sheriff for the liberation of the pursuer, granted his petition for interim liberation caution to the amount of £50, that he would attend all diets of Court, the sum of £50 exceeding the incarcerator's debt, and the incarcerator making no objection.

No. 233.

J. S. HALLAM, Pursuer.—*Robertson—Anderson*.  
 GYE and COMPANY, Defenders.—*D. F. Hope—Maitland*.

*Process—New Trial—Expenses*.—In an application for a new trial on grounds of the verdict being contrary to law and to evidence, and of excessive damages—Circumstances in which the Court refused the application, and allowed the pursuer his expenses, but subject to modification, though he had conducted his pleading properly throughout.

May 18, 1837.  
 2d Division.  
 Jury Cause.

SEQUEL of the case reported ante, XIV. 199, which see.

The jury having found for the pursuer Hallam on both issues, assessed damages at £2000, the defenders, Gye and Company, obtained a rule to show cause why the verdict should not be set aside, on the ground 1st, that it was against law, 2d, that it was against evidence, and 3d, that the damages were excessive.

*Robertson, for the Pursuer, showed cause.*

The first ground stated for a new trial is novel, no exception has been taken to the law laid down in the Judge's charge, which is admitted to be good law; the jury take their law from the Court, which is fixed by the charge, and the verdict therefore cannot be impugned as contrary to law. The evidence is sufficient to support the verdict, the justice of which is borne out by the authorities referred to by the pursuer at the trial.<sup>1</sup> Assuming the verdict to be a good verdict on both issues, and not being a case for merely nominal damages, it is not the part of the Court to interfere with what it is the peculiar province of the jury to fix the amount of damages.<sup>2</sup>

*Dean of Faculty, for the Defenders, in support of the rule.*

Admitting the Judge's charge to have been unobjectionable, the

<sup>1</sup> See cases cited ante, XIV. 202.

<sup>2</sup> Christian v. Lord Kennedy, 2 Murray, 51.

verdict was wrong, looking at it with respect to the application of the law N.  
 the facts of this particular case. With reference to the privilege May  
 attaching to judicial slander, the verdict on the first issue was in the circum- Hall  
 stances of the case unwarranted ; and if so, assuming the verdict to have  
 been right on the second issue, the jury were not entitled to slump the  
 damages, and find a sum upon both issues. Moreover the sum so found  
 to them was excessive and extravagant.  
 The case was this day put out for advising.

**LORD JUSTICE-CLERK.**—After having deliberately considered this case, at the  
 trial of which I presided, and the three grounds upon which the verdict is sought  
 to be set aside, viz. that it is against law—that it is against evidence, and that the  
 damages are excessive—and having referred to the proceedings at the trial, I am  
 of opinion that the verdict ought to stand. Had I conceived myself to have erred  
 on the law which I stated to the jury, I should have allowed it; but in the very  
 pleading in favour of the new trial, no fault is found with the Judge's direc-  
 tion in law. (His Lordship then referred to the law as laid down in the charge.)  
 As regards the verdict being contrary to evidence, the whole evidence was laid  
 before the jury, and this was matter for their consideration. As to the question  
 of excess of damages, perhaps it might have been consistent with the justice of the  
 case had the damages been less ; but can I say that the jury having found as they  
 did is a reason for granting a new trial? Before the Court are entitled to grant a  
 new trial, there must be a flagrant excess of damages ; and the rule is so laid down  
 by the Lord Chief Commissioner in his valuable work.<sup>1</sup> I am of opinion then that  
 the verdict ought not to be set aside. We should give the pursuer expenses, but  
 subject to modification.

**LORD GLENLEE.**—I cannot help thinking that the verdict of the jury on the  
 first issue was erroneous, and contrary to the rule by which statements in judicial  
 proceedings, if pertinent to the cause, are held to be privileged. I should be  
 inclined to allow a new trial.

**LORD MEADOWBANK.**—I concur with the chair.

**LORD MEDWYN.**—I have come to be of opinion that the verdict ought not to  
 be disturbed.

**THE COURT** accordingly discharged the rule, and found the defenders liable  
 in expenses, but subject to modification.

**J. and T. DARLING, W.S.—CAMPBELL and MACK, W.S.—Agents.**

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<sup>1</sup> Adam on Jury Trial, p. 197, et seq.

WILLIAM RICHARDSON, Advocate and Defender.—*D. F. Hope—Maitland.*

ROSCOE and RIGG, Respondents and Pursuers.—*M'Neill—J. Anderson.*

*Sale—Principal and Agent.*—A party in Liverpool received an order from a merchant in Glasgow to purchase for him a certain quantity of oil of a particular description; the party made a purchase of oil accordingly, and advised his correspondent that he had secured for him the quantity required, but thereafter in executing the order, limited this quantity to a half, as appearing in the invoice transmitted to Glasgow; the merchant having declined the purchase altogether. Circumstances which held insufficient to bind him to take the reduced quantity.

1837. On the 4th September, 1832, the advocate, Richardson, a merchant in Glasgow, addressed a letter to the respondents, Roscoe and Rigg, commission agents in Liverpool, ordering them to purchase for him 20 tons pale seal oil, at £30 per ton, or as near that limit as the market would permit, and stating that as the purchase was made for the chance of a rise, they might store it in the mean time till his acceptance was paid. About the 10th September, Roscoe and Rigg purchased all the pale seal oil on board a vessel called the Gem, and they had delivered to them 20 tons and 43 gallons. On the 15th September, they wrote to Richardson as follows:—"We have the pleasure to inform you that we have secured your twenty tons seal oil at £30, 10s. per ton. This will be landed and stored in a few days, when we shall hand you invoice. Sales have been made to-day in quantity at £31, at which importers now hold very firm." On the 20th September, they wrote in these terms:—"Annexed you have invoice of the pale seal oil for your order. The remainder of the parcel turning out coloured, we rejected it. Please to accept the inclosed draft, and return it to us in due course." The invoice which accompanied this letter showed a quantity of only 9 tons and 2 quarters, which it stated Richardson to have "bought of Roscoe and Rigg."

Of the same date, Roscoe and Rigg invoiced a quantity of upwards of 10 tons pale seal oil to Messrs Hutcheson and Milne of Glasgow, with whom they had previously corresponded, the invoice stating Hutcheson and Milne to have bought the oil of one Buchanan, per Roscoe and Rigg.

On the 24th, Richardson wrote to these parties acknowledging receipt of the invoice, and requiring delivery of the full quantity of pale oil ordered, or offering to take the straw-coloured oil mentioned in their letter at the market price. Some correspondence ensued, in the course of which Richardson offered to go into a reference, which Roscoe and Rigg refused; the result being that Richardson declined the purchase altogether, the quantity which he had been advised was secured for him not having been delivered.



after Roscoe and Rigg raised action before the Magistrates of No. 234 against Richardson, concluding for a balance due on the account between the parties, including the price of the 9½ tons of oil in Richardson. He pleaded in defence that he was entitled to full implement of the contract which had been completed between the parties, and was not bound to take partial delivery of the goods

May 18, 1837  
Richardson v.  
Roscoe.

In condescendence, Roscoe and Rigg alleged, inter alia, that they had received a prior order for pale seal oil from Hutcheson and Milne, and that it was wanted for immediate use; that when they advised Richardson of having secured 20 tons for him, the cargo had not been loaded, and the quantity of pale oil was less than they anticipated; these circumstances they had satisfied the order of Hutcheson and Milne, and had reserved the remainder for Richardson, which was the case in the invoice; that it was in conformity with the practice of Liverpool to purchase pale seal oil, according to the foreign invoice, to be examined or discharged from the vessel, and if part of it turns out to be dark or straw-coloured, the seller is not required to deliver, and the buyer has no right to demand delivery of more pale oil than may be delivered; but the buyer is bound to accept of the pale oil on board, although the quantity should turn out deficient; that it was also a common practice for a merchant or broker having several orders to execute from a cargo, for him to execute those first, where the purchaser required immediate delivery.

The Magistrates allowed a proof of their averments, which was accordingly given by two of the principal witnesses being a clerk and salesman of Roscoe and Rigg. Thereafter they decreed in favour of Richardson.

Richardson then brought an advocacy, in which he pleaded, inter alia,

that the respondents never having disclosed the parties from whom they had purchased the oil on account of the advocator, became thereby principals in the transaction, and are consequently not entitled to maintain this action on a separate and more favoured character of brokers.

The respondents having been employed, and having undertaken as agents to purchase the specific quantity of twenty tons of pale seal oil on account of the advocator, they were not entitled, under their employment, to deliver any smaller quantity of the commodity in question, to the effect of releasing him by the transaction.

The respondents having reported to the advocator in their letter of September, 1832, that they had effected a purchase of twenty tons of pale seal oil on his account, he was entitled to rely on this as an usual and concluded transaction, while they are barred from now setting up in a question with him as their employer, that the purchase was for a smaller amount.

respondents should make up the deficiency; nor, on the other hand, should he reject the quantity actually obtained and invoiced for him.

2. The respondents were justified in executing the order for oil from Milne from the cargo in question before that of the respondents in respect that it was a prior order, and for immediate delivery, and the extent of the cargo had not been ascertained.

The Lord Ordinary advocated the cause, recalled the intervention of the Magistrates, and assailed Richardson, issuing, at the same time, the following note: \*—

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\* " NOTE.—The Lord Ordinary must think it very unfortunate that the respondents refused to go into the reference offered, and an amicable settlement. He should have thought that, if they were as confident as they state of the rectness of their proceedings, according to Liverpool practice, the dispute should have been easily settled with very little expense or trouble. They now stand uprightly according to their own views; and it does not appear in this case that they either got or aimed at any profit to themselves in withholding the fulfilment of their pledge to the advocator; and it may also be that they were influenced by the change of the market, and may not have done handsomely in refusing to accept the bill. But the Lord Ordinary must say that a mercantile transaction, according to the view of it given by the respondents, he has seldom seen. Neither did they deal candidly with the advocator in the correspondence, the case at last coming to depend on a fact which was not all disclosed to him till the parties were in Court.

" The Lord Ordinary conceives that the case is a case of law, and of plain and admitted facts. The advocator employed the respondents, brokers, to purchase twenty tons of pale seal oil on the terms given. He told him that they *had secured that quantity*. As their letter indicated that the oil was not then landed, the alleged practice in Liverpool, though but feebly supported, of doubtful efficacy, where so unqualified a notice was sent to a mercantile

Roscoe and Rigg reclaimed.

No. 234.

LORD JUSTICE-CLERK.—I think the interlocutor of the Lord Ordinary impreg-

May 18, 1837.  
Richardson v.  
Roscoe.

ies, or sold it to two parties, very probably expecting that there would be sufficient for both in the ship, and that they preferred delivering to the others, and leaving the deficiency on the advocator? They have not proved even that case. 1st, The order of Hutcheson and Milne on the 23d August appears (for any good shown to the contrary) to have been answered by the ten tons invoiced to him on the 30th August; and 2d, There is no evidence whatever that the respondents had made *any intimation* to Hutcheson and Milne that they *had purchased* or *secured* for *them* ten tons, or any other quantity of the oil imported by the Gem. The evidence stands, therefore, the delivery to them was a *gratuitous* preference to them, to the prejudice of the advocator's *completed purchase*, as expressly announced to him: It was selling *what was his oil* to another favoured customer. It would be a singular usage, very different from what the Lord Ordinary has always understood of the Liverpool trade, which would sanction such a proceeding, and there is no evidence whatever to sanction it.

But taking the matter even in the best view for the respondents, that they *had* been under an express or implied obligation to deliver to Hutcheson, &c. as for immediate use, and that they held themselves bound to satisfy them from the first deliveries from the ship, were they not bound to tell this to the advocator when informing him that they *had secured* the twenty tons for him? The case is not as the respondents put it, that they had simply had two *orders*, one for speculation, one for immediate use. They would even in that case have been bound to tell him fairly, though no legal obligation might have arisen. But the essence of the matter here lies in the fact, that they had announced the purchase *as actually made* to him, without the slightest allusion to any contingency arising from another order, and that they got the quantity, and might have delivered it to him. If an obligation to a third party prevented them, could that affect the advocator, or oblige him to accept of *half implement*, not of his *order* merely, but of the *purchase* standing by the respondent to have been actually made on his account?

The question, whether the advocator was bound to accept of the nine tons in the circumstances, appears to the Lord Ordinary to be purely a question of law. The alleged usage about fulfilling *orders* for immediate use *first* is very lamely proved. But he must confess that it appears to him to be of little importance in the case like this. He has no idea that any such practice can entitle a party, whether as merchant or broker, so to trifle with his correspondent, as first to tell him that he has purchased according to his order, then to say that the vender had not the quantity of the quality required, and, at last, when forced to speak judicially, to avow that he got the full quantity in the purchase, but gave more than half of it to another customer. This the Lord Ordinary looks upon as a very serious question in mercantile law. He thinks that, in point of law, the advocator was not bound to accept of the half implement offered; and that it is nothing to the purpose in the legal question, whether, in taking the resolution to reject it, the advocator was influenced by the change of market or not.

Much discussion has taken place on the question, whether the respondents, though acting as *brokers* at first, rendered themselves *principals* as merchants at last.

The Lord Ordinary is inclined to think that they did so, both by the form of the invoice to the advocator, and especially by not disclosing the name of the vessel, when expressly required. The evasion of that demand has too much the appearance of an unwillingness to let the fact transpire that they did receive twenty tons from the vessel. But the legal effect of it seems to be that they took to themselves the character of venders; and some of the witnesses seem to be of that opinion. But in the Lord Ordinary's view of the case, this does not appear to be of much importance attached to it.

The Lord Ordinary is sorry to alter the judgment of the Court below in such a case. But he cannot help it; and he is of opinion that, in the way the cause has been treated, it is not without considerable importance."

234. nable. Looking to the letters which passed between the parties, the practice alleged by the respondents seems to have very little to do with the case, and were the case to turn upon it, I am not satisfied that such usage has been satisfactorily proved.

LORD GLENLEE.—I am of the same opinion. On the 10th September, Roscoe and Rigg had purchased and were proprietors of the whole pale seal oil on board the Gem. Now before the 10th they had received Richardson's letter directing them to purchase twenty tons of oil. On the 15th they write to say that they had twenty tons secured. When they do send the nine tons, it is with an invoice stating forth that the oil was "bought of Roscoe and Rigg;" and not as if they were brokers or factors. I think Richardson was not bound to accept of the oil, if the other parties had made an alteration on the paction.

LORD MEADOWBANK.—I am entirely of the same opinion. I doubt if the practice adduced would make out the practice under which the respondents attempt to shelter themselves. Besides, the custom spoken to by the witnesses does not apply to the case, or bear out the allegations of these parties. This is just an ordinary case of a party having committed a breach of contract; and they must see the consequences.

LORD MEDWYN concurred.

THE COURT accordingly adhered, finding additional expenses due.

FRASER and DUNCAN, S.S.C.—J. COLLIER, W.S.—Agents.

No. 235.

ALEXANDER MACALLAN, Advocate.—*M<sup>r</sup>Neill*.

WILLIAM COCKBURN, Respondent.—*Deas*.

*Process—Accounting—Spuilzie—Master and Servant.*—Circumstances which, where a summary application was presented to the sheriff, by the proprietor of a newspaper, against a clerk recently in his employment, concluding in immediate restitution of the amount of certain accounts, as uplifted by the clerk without authority;—Held that it was an incompetent proceeding, in respect that the matters in dispute between the parties formed a proper subject for an ordinary action of count and reckoning.

May 10, 1837. ALEXANDER MACALLAN, proprietor of the Edinburgh Evening Post newspaper, presented a petition to the sheriff of Edinburgh, stating that William Cockburn was employed by him, in August, 1832, as clerk in the office of the newspaper, with power to uplift and discharge accounts; that, soon after, other individuals were employed to assist Cockburn, and in March, 1833, Patrick Milne was employed as sole collector of the accounts, and Cockburn was retained for other duties; that in April, 1834, he, Macallan, heard that Cockburn had collected some accounts and appropriated them to his own use, and therefore he called on Cockburn to specify the sums, which Cockburn did by a writing showing that they amounted to £24, 7s. 11d.; that Macallan agreed to continue Cockburn in his employment, in order to wipe off this balance by earning for

1st Division.  
Ld. Corehouse.  
D.

ry; that Cockburn continued in his employment, drawing a small No. 235.  
 for his weekly maintenance, until March, 1835, when he took his  
 e, and, in May following, Macallan learnt that Cockburn had collect- May 19, 1837.  
 and appropriated other sums, and he called on Cockburn to specify Macallan v.  
 r amount, in writing, and to deliver up that amount and the former Cockburn.  
 nce; that Cockburn gave a note of sums so uplifted amounting to  
 , 6s. 1d.; that Cockburn “drew and appropriated the money in  
 stion without the knowledge or authority of Macallan, on the pre-  
 e that Macallan was indebted to him for his services, and that he was  
 tled to pay himself;” that Macallan was not indebted to Cockburn,  
 at all events, as Cockburn “had no right, on any pretence, to make  
 olent seizure of Macallan’s funds,” Macallan had a right to obtain a  
 mary order for restitution; he therefore prayed the sheriff to ordain  
 kburn “to deliver up to him the foresaid sums of £24, 7s. 11d. and  
 , 6s. 1d., reserving Macallan’s other claims on him, and to both par-  
 their defences.” Cockburn, besides pleading to the merits, objected  
 e competency of the application, as it truly resolved into an ordinary  
 ess of count and reckoning between Macallan and himself. By the  
 s of their agreement, as he was ready to prove them, Macallan was  
 bted to him in a larger sum than was claimed in this summary peti-  
 ; he, Cockburn, had uplifted the funds regularly, and, separately, as  
 e sums uplifted in 1834, they could not now form more than a com-  
 debt, even if not compensated; and there was no principle on which  
 istinguish the other sums from these. An action of count and  
 oning was therefore the proper action to raise.

appeared ex facie of the writings produced that Cockburn might at  
 bona fide have supposed that he had the power of uplifting the accounts  
 uestion. And there were confessedly counter claims, to a certain  
 rt, at the instance of Cockburn against Macallan. It also appeared  
 Macallan had not afforded to Cockburn such access to the books of  
 oncern as he was entitled to.

he sheriff “sustained the preliminary objection stated to the form of  
 process, dismissed the petition, and found the petitioner liable in  
 nses.”

Macallan brought an advocacy, in which the Lord Ordinary “repell-  
 e reasons of advocacy, and remitted simpliciter to the sheriff, and  
 ped, and found the complainer liable in expenses.” \*

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**NOTE.**—If the advocator had distinctly averred that the respondent, after  
 his service, continued to collect accounts without authority, it would have  
 been an illegal and fraudulent act on the part of the respondent. But there is no  
 averment on the record. It is only alleged that, by the second agreement  
 of the parties, the respondent had no power to collect accounts. But this  
 is denied; and ex facie of the writings produced, the respondent had the  
 power of collection, or at least might have bona fide supposed that he had that  
 power. In these circumstances, it does not appear to the Lord Ordinary that the

No. 235. Macallan reclaimed.

May 19, 1837.  
King v.  
Mackenzie.

THE COURT unanimously adhered and awarded additional expenses.

Buchanan v.  
Lumsden.

Ainslie, Macallan, and Graham, W.S.—P. Campbell, S.S.C.—Agents.

No. 236.

JAMES LAING, Pursuer.—*Sol.-Gen. Rutherford—Russell.*  
HONOURABLE MRS HAY MACKENZIE, Defender.—*D. F. Hope—Walker.*

May 19, 1837. A case of circumstances, in which the Court pronounced a  
interlocutor.  
2d Division.  
Ed. Jeffrey.

F.

Gair and Morton, W.S.—Walker, Richardson, and Melville, W.S.—Agents.

No. 237.

JOHN BUCHANAN, Pursuer.—*J. Anderson.*  
ROBERT LUMSDEN, Defender.—*M'Neill.*

*Process—Reduction—Decree.*—Opinion by a majority of the whole Court in a reduction at the instance of the pursuer of an action before Justices of Peace, of a final but unextracted judgment, to a certain extent, in his favour of all the previous proceedings in the action, with a conclusion for the full sum which he claimed, was incompetent, and that the plea was not excluded by production having been satisfied (which was done by the pursuer himself). Judgment on a closed record pronounced by the Lord Ordinary without the objection having been stated.

May 20, 1837. THE pursuer, Buchanan, a coal-hewer at West-thorn, raised an action against the defender, Lumsden, coal-master there, before the Justices of Peace for Lanarkshire, concluding for payment of an alleged balance of wages due to him to the amount of £30. Defences were given, and a proof led, upon which the Justices at Petty Sessions pronounced the following decree:—

advocator was entitled to resort to a summary proceeding, such as would be competent in the case of an admitted spuilzie, or a fraud of the nature of a spuilzie, to have the money collected paid over to himself, according to the maxim *Spoliatus ante omnia restitutus*. An ordinary process of count and reckon agreeably to the judgment of the sheriff, is the regular and proper form of proceeding. It is not denied that there are counter-claims, at least to a certain extent, at the instance of the respondent against the advocator. There is evidence that the respondent always offered to count and reckon, and it is proved that the advocator withheld the books of the concern, to which, in terms of their agreement, the respondent was entitled to have access. It will be observed, that count and reckoning could not have taken place in a summary process.

Glasgow, 3d February, 1834.—The Justices having resumed con- No. 237.  
 eration of this process, and whole steps thereof, with proofs of parties May 20, 1837.  
 Of consent declare the proofs concluded, and on the merits (for the Buchanan v.  
 sons stated in the note subjoined), decern against the defender for the Lumsden.  
 n of £3, 0s. 6d. sterling, in name of wages unpaid during the last three  
 nths; further, find the defender liable in expenses, modify the same,  
 der the circumstances, to £5 sterling, and decern.”

Both parties having appealed to the Quarter Sessions, this judgment  
 s, on 1st April, affirmed simpliciter, Lumsden being found liable in  
 , 11s. 6d. of additional costs; and the Justices “decern accord-  
 ly.”

Thereafter Buchanan brought a reduction of these interlocutors, while  
 l unextracted, and of the whole proceedings before the Justices. The  
 mmons of reduction called upon the defender “to bring, exhibit, and  
 duce before our said Lords a petition presented at the pursuer’s  
 tance to the Justices of the Peace for Lanarkshire against the defender  
 bert Lumsden, and likewise the interlocutors, sentences, or judgments  
 the following dates and tenor, &c., for the purpose that the whole  
 eedings in the said action, of whatever dates, tenor, or contents the  
 e may be, should be seen and considered by our said Lords, and the  
 l interlocutors, sentences, or judgments should be reduced, annulled,  
 l declared to be null and void, and of no effect in judgment, or out-  
 l the same in time coming, and that the pursuer ought and should be  
 oned and restored thereagainst in integrum, and that the defender  
 uld and ought to be decerned and ordained, by decree foresaid, to  
 ke payment to the pursuer of the sum of £30 sterling, being the sum  
 eluded for as aforesaid.”

No objection was stated against satisfying the production, the pursuer  
 self borrowing up the proceedings from the inferior court and  
 elucing them in process; and the Lord Ordinary, “in respect the  
 lies hold the production as satisfied,” appointed the defender to lodge  
 nces.

A record was thereafter made up on the merits and closed; in the  
 use of which, and of the subsequent discussion before the Lord Ord-  
 y, no objection was made by Lumsden to the competency of the  
 action. His Lordship reduced and decerned in terms of the libel,  
 ing the defender liable in expenses.

Preclaiming note being presented against this judgment, the Court,  
 advising (March 11, 1836), took up the point of the competency of  
 process of reduction, the interlocutors in question never having been  
 uted.

Mr MEDWYN.—The error arises from not recollecting what it is we are



237. asked to reduce. The technical *decree* of a court is the extracted decree; it is only the grounds and warrants of the decree which the pursuer calls for. Until it is extracted, there is no proper decree to be reduced. (His Lordship referred to Stair, IV. 46, 4.) This practice of proceeding by reduction is recently adopted, in order to avoid the provision in the Judicature Act, 1825, regard to advocations, as to finding caution for expenses.<sup>1</sup> You may as well regard interlocutory judgments as decrees before extract. This would be turning them from their proper use. The parties have no right to call for the records and proceedings which are here sought to be reduced. These are records of court, got at by borrowing the proceedings from the Justice of the Peace clerk, the pursuer himself satisfying the production. Prior to extract, this is the proper form of review. When a charge is given or threatened, the extracted decree, suspension is the form. When these modes of review are available, reduction is competent. (His Lordship referred to the case of *C. Watson*, Feb. 24, 1804 (F.C.); and also to the case of *Boyd v. Swinton*, 19, 1825,<sup>2</sup> and *Holmes v. Tassie*, Jan. 19, 1828,<sup>3</sup> which last differed in the circumstances from the present case.)

LORD JUSTICE-CLERK.—What makes against the competency of this is the fact, that the only way of satisfying the production must have been by borrowing the proceedings from the inferior court, which seems to be an incorrect method of satisfying the production.

LORD MEADOWBANK.—We are bound to protect our forms; and if an incompetent proceeding acquiesced in, it is our part to take notice of it.

LORD GLENELG was understood to concur.

The Court, "before further answer, appointed the parties to give minutes of debate on the competency of the proceedings in this case."

*Argued for the Pursuer—*

There can be no doubt that the judgment of the Justices under question exhausted the cause, the pursuer's claim being held to be well founded in principle, though sustainable only to a certain extent. No reduction is a competent form of process for reviewing the judgment decrees of inferior judicatories finally disposing of the cause; the fact of an unjust or illegal decree having been pronounced being what entitles the pursuer to complain. The inferior judge, in pronouncing the decree, has done his part, and the extract is the act of the clerk, being given forth as the warrant for execution, and tantamount to a certified copy of the decree. In the present case, more especially, extract was not necessary before raising a reduction of the decree, it being impossible for the pursuer to have complained by suspension, as the decree was not one upon which the defender had any interest to extract, or upon which he could have used execution.<sup>4</sup> It cannot be said that the process of reduction

<sup>1</sup> 6 Geo. IV. c. 120, § 41.

<sup>2</sup> Ante, VI. 394.

<sup>3</sup> Ante, III. 444 (new ed. 311).

<sup>4</sup> Erskine, IV. 3, 8.

an evasion of the statutory enactment requiring caution to be found No. 287.  
 here inferior court proceedings are brought under review by advoca-  
 on ; for the competency of that mode of redress was established long May 20, 1837  
 prior to any such enactment, and could not be affected unless by a posi- Buchanan v.  
 ve provision ; and the objection would, besides, apply with equal, if not Lumaden.  
 greater force to an extracted as to an unextracted decree. The objec-  
 tion now started has been overruled in the cases of Boyd v. Swinton, and  
 Holmes v. Tassie ;<sup>1</sup> and the present case is still stronger against its being  
 sustained, considering the period of the cause at which it has been stated,  
 and that the defender failed to bring it forward in limine.

*Argued for the Defender—*

The established mode of bringing the judgment of an inferior court  
 under review before extract is by advocacy ; as it is by suspension after  
 extract, when a charge has been given or threatened. In those situa-  
 tions where the extraordinary remedy of reduction is allowed, in order  
 to set aside the decree of an inferior court, there must be a decree—that  
 is to say, an extract or extracted decree. The judgments and proceed-  
 ings which were here called for and sought to be reduced did not belong  
 to either party, but formed part of the record of another court. The  
 reduction, therefore, could not be satisfied by the defender, and it had  
 not been satisfied by the pursuer by borrowing up the proceedings from  
 an inferior court, and irregularly producing them in this court, which  
 circumstance was itself sufficient to show the incompetency of the action.  
 This Court could not proceed in the reduction on the merits, unless the  
 reduction was regularly satisfied ; and if the production called for was  
 such as could not be regularly satisfied, the Court could not competently  
 determine the case.

At the next advising (June 24, 1836), the Court ordered the minutes  
 of debate to be laid before the other Judges, for their Lordships' opinion  
 on the competency of this process of reduction. The following cases  
 were at the same time referred to from the bench as bearing upon the  
 question, viz. Learmont v. Lord Arniston, Dec. 23, 1698 ;<sup>2</sup> Auchin-  
 chachie v. Hope, Dec. 17, 1713 ;<sup>3</sup> Campbell v. Baird, Dec. 3, 1825.<sup>4</sup>

Thereafter the consulted Judges returned Opinions as follows :—

**LORDS PRESIDENT, BALGRAY, GILLIES, MACKENZIE, COREHOUSE, MON-  
 TROFF, JEFFREY, and COCKBURN.**

In this process the following interlocutor was pronounced :—‘ The Lords  
 having heard counsel for the parties, and advised the case ; ordain the minutes of

<sup>1</sup> Supra.

<sup>2</sup> M. 13517.

<sup>3</sup> M. 13514.

<sup>4</sup> Ante, IV. 264 (new ed. 269).

237. debate to be laid before the Judges of the First Division of the Court as  
 1837. nent Lords Ordinary, for their Lordships' opinion as to the competency  
 v. process of reduction.  
 Jan.

" In consequence of this interlocutor we have considered the minutes given in by the parties, and have particularly adverted to the terms of mona of redaction brought by the pursuer, whereby the defender is called ' to bring, exhibit, and produce before our said Lords a petition presented by the pursuer's instance to the Justices of the Peace for Lanarkshire against the defender Robert Lumeden, and likewise the interlocutors, sentences, or judgments of the following dates and tenor,' &c., for the purpose that ' the whole proceedings in the said action, of whatever dates, tenor, or contents the said sentences, or judgments should be reduced, annulled, and declared to be void, and of no effect in judgment, or outwith the same in time coming, the pursuer ought and should be reponed and restored thereagainst in full, and that the defender should and ought to be decerned and ordained, before our said Lords, to make payment to the pursuer of the sum of £30 sterling, and the sum concluded for as aforesaid.

" Under these circumstances, we are of opinion that this process of reduction, the effect of which must be to remove the process from the inferior court, preventing the opposite party from further insisting or obtaining extract, is a fact necessarily causing a risk without caution, is an incompetent mode of proceeding, and we are of opinion that if the pursuer meant to complain of the interlocutors of the inferior court, and to bring them under review, he should have done so by a proper advocacy, and not by a reduction accompanied by tory and petitory conclusions, which in substance is nothing but an action turned into the form of a reduction, evidently for the purpose of evading statutory regulation of finding caution.

" In giving this opinion, we do not wish to lay down an invariable rule applicable to all cases without exception, but merely that we think that the process of bringing the case under review in this case is incompetent, and ought not to be sanctioned in the ordinary course of cases which occur before the courts."

LORD FULLERTON.—" The reduction here is brought, and the question of competency raised, under circumstances which appear to me sufficient to justify the objection.

" The decree in the inferior court is a final judgment, and it is in the power of the pursuer, both on the merits and the expenses. It is a decree therefore for the purposes of execution, admits of being beneficially extracted and paid to the pursuer.

" But the pursuer declines to extract it, because he is dissatisfied with the amount of the sum decerned for, and he has accordingly brought this action, concluding, first, for the reduction of the ' interlocutors, sentences, and judgments pronounced in the inferior court; and secondly, for the payment of the sum to which he lays claim.

" The defender stated no objection to this course, at the proper stage of the proceedings. The production was held to be satisfied of the competency of the record was made up on the merits, and the Lord Ordinary pronounced the

the pursuer. It was not till the cause came before the Second Division Court, on a reclaiming note, that the objection of incompetency was

No. 237.

May 20, 1837.

Buchanan v.

Lumsden.

first place, then, without giving any sanction to the general competence of unextracted decrees or interlocutory judgments, I think that rather the only ground, on which, in the general case, such a course is questioned, does not apply to the present.

When an interlocutory judgment is pronounced, which a party has an interest in the disposal of the farther merits of the cause; or when a final judgment is pronounced, which he has an interest to extract, the bringing up the present process in an action of reduction, might operate as a stay of all farther proceedings and thus give the pursuer all the benefit of an advocacy, without the necessity of finding caution. There might be good grounds there, for holding this to be an evasion of the rule regarding caution, which is the condition known and competent process of review.

There is no room for such an objection, because, in the first place, the judgment is final; and secondly, the pursuer of the reduction is the only party who obtains the extract of the decree, as affording the means of execution, and effect.

There is no rule of law, requiring the finding of caution, as an indispensable condition for obtaining the review of a judgment of an inferior court. It is not as I understand, that, if the decree had been extracted, the pursuer could competently raise a process of reduction; and in the ordinary case of one who obeys the judgment, there is no doubt that he may bring his action of reduction and repetition, without finding caution.

It is an intelligible ground, then, for requiring caution in the case of advocacy, not merely that it is a process for reviewing a judgment already pronounced against the advocator, but that it is a process, which stays the execution of a judgment so pronounced. And as this principle cannot possibly apply to the present case, I see no reason for sustaining the objection, which is here purely technical and thus obliging the pursuer to take an extract of a decree, for the purpose of cutting it down.

Finally, I think that the objection comes too late. It ought to have been made before the production was satisfied, or rather as a defence against being allowed to satisfy the production. That was not done. Of course the production is held to be satisfied, and the record made up on the merits. And it would be equally contrary to form and to substantial justice, that at this late stage of the case, and after judgment pronounced in the pursuer's favour by the ordinary process, the whole of the proceedings should be rendered of no avail, which the defender had the means of stating if he chose, and was to be before those proceedings were allowed to go on.

I may observe that the decisions referred to appear to have sustained the competency of such a procedure, under circumstances much more unfavourable than those of the present case."

Having been this day put out for advising, to be finally determined by the opinion of the majority of the consulted Judges, it being at, in the interim, the pursuer had died; whereupon

237.

THE COURT superseded consideration of the cause.

20, 1837.

FISHER and DUNCAN, S.S.C.—THOS. LEBURN, S.S.C.—Agents.

In v.

238.

JEAN HARVIE, Pursuer.—*D. F. Hope—Sandford.*  
 JAMES INGLIS, Defender.—*Sol.-Gen. Rutherford—Sh*

*Marriage—Proof—Judicial Examination—Process.*—1. In a marriage, certain facts and circumstances being set forth as implying courtship with a view to marriage, and as equivalent to a promise, and subsequent copula being averred; a proof pro ut de jure allowed to before answer as to the relevancy of the pursuer's averments. 2. In the Lord Ordinary, in pronouncing an interlocutor on the relevancy, he allowed the defender to be judicially examined; this interlocutor being in general terms—Held that it was still open to allow the judicial exami-

20, 1837.

Division.

Jeffrey.

F.

JEAN HARVIE, daughter of a farmer in Linlithgow, raised against James Inglis, a farmer in the same county, concluding it found and declared that they were married persons, or altered damages for seduction. As the grounds of action, she set forth in the condescendence the following facts and circumstances:—†

That the parties were of equal condition, were about the same age, and attended the same school; that their families resided about four miles of each other, and were on intimate terms; that several years preceding the date of the action, the defender had addressed to the pursuer in an honourable way, and during that time frequently spoke of marriage to her, and requested her consent to marry; that his wife, whenever he should be in a situation to marry; that in the years 1831, 1832, and 1833, he was in the habit of visiting the pursuer's father's house, and was received as her lover and accepted by her parents and others, and that the defender's father used to call her a "gude daughter;" that the defender made her presents, and in particular a silver thimble, having the initials of both their names upon it, and that he communicated to various persons his intention of marrying her, and heard him acknowledge that he had promised marriage to her, and intended to fulfil his promise, and in fact that he had stated that she would be Mrs Inglis, and that she

\* It is understood that no final judgment will be pronounced in this case, the pursuer's representatives declining to assist themselves.

† The statement in the condescendence did not materially vary from the averment in the summons, except that it was shaped more with a view to prove

ther person, should ever sit at the head of his table ; that upon the faith No. 23  
 of the courtship and of the promises of marriage aforesaid, the pursuer, May 20, 18  
 in September, 1833, allowed the defender access to her bed, and they Harvie v.  
 had carnal connexion together ; that thereafter, the pursuer having Inglis.  
 become pregnant, the defender on several occasions admitted that he had  
 promised marriage, and particularly on one occasion, when he was over-  
 heard, in April, 1834, or in March preceding, or May following, within  
 premises belonging to her father.

With reference to these averments the pursuer pleaded—

Long courtship or promise of marriage, followed by copula, constitute marriage, and the pursuer having been courted by the defender, and having admitted him to her bed under such promise of marriage, is the wife of the defender, and is entitled to the rights and maintenance of his wife.

It was pleaded in defence against the action—

There are no relevant facts and circumstances averred by the pursuer to constitute marriage, and her allegations are vague both in time, place, and circumstances.

The defender at the same time denied the pursuer's principal averments, and alleged various facts in opposition to them.

Thereafter the Lord Ordinary (the pursuer having previously moved that the defender should be judicially examined), pronounced the following interlocutor with the subjoined note : \*—“ Repels the objection stated by the defender to the relevancy of the pursuer's several averments on the record, and finds that there is in the said record a relevant and sufficient allegation of the constitution of marriage, by a substantive promise or agreement and engagement to marry, and by copula following on the faith

\* “ The case of Grierson, 26th November, 1755 (Mor. 12,393), has always been understood to have settled that proof of mutual purpose, agreement, or engagement to marry, *de futuro*, is at least equivalent to a proof of a promise to marry, and need implies the existence of such a promise, and a good deal more ; and from it necessarily follows that facts and circumstances clearly importing such a purpose and agreement may be proved *pro ut de jure*, though a mere promise in words could only be established *scripto vel juramento*. Both points are determined in the leading case, and have been taken for granted in a variety of subsequent cases, but in none more fully and deliberately than in that remarkable one of Honeyman, affirmed in the House of Lords. (See 5, Wilson and Shaw, Appeal Cases, 1.)

“ The objection to the latitude taken as to time and place is pretty well answered by reference to the length of time during which the open courtship for marriage, by the occasional admissions of a matrimonial engagement, continued to be exhibited in a narrow circle of society. If the case were to be decided by a jury at a *solemn*, the defender might no doubt be seriously prejudiced by so great a *latitude*. But the diets of probation before the commissaries are not peremptory, and a reasonable time is always allowed to the defender after the pursuer's proof is concluded.

“ It seems quite reasonable that, in such a case, the defender should be subjected to a judicial examination, the record being now closed.”

238. of such promise or engagement; and before farther answer, finds the pursuer entitled to have the judicial examination of the defender."

1837. The defender reclaimed.

The cause came on for advising, November 25, 1835, when the Court ordered cases.

*Pleaded for the Pursuer.*

A promise of marriage may be inferred from facts and circumstances which may be proved verbally. Any thing in act or word, which is equivalent in signification, or may, by fair interpretation, be construed into a promise of marriage, will be held equivalent to an express promise as to its effect in constituting marriage. And a protracted courtship, with a view to marriage, is of itself sufficient to establish that a promise has been made, and when followed by concubitus constitutes marriage.<sup>1</sup>

<sup>1</sup> Smith v. Grierson, Jan. 27, 1755, (M. 12391); Low v. Allardice, Feb. 26, 1794, not rep.; \* Ferguson v. M'Lymont, Nov. 26, 1818, Lord Justice-Clerk.

\* (*Low v. Allardice*, Feb. 26, 1794.)—In this case, which was a declaration of marriage, the statement in the summons, upon which the media conclusions were founded, was, "that the defender, having for three months past conceived an attachment to the pursuer, became a visitor at her father's house, saw her, and addressed her, and courted her for marriage; on many occasions did declare his unalterable intention, and did promise to marry her, and vowed perpetual fidelity to her, both by words and in writing; that on one occasion the said William Allardice, defender, read over the marriage-service in the Book of Common Prayer, and made the pursuer do the same, thus mutually pledging and rendering themselves to be married persons; that by these means the defender gained the pursuer's affections, and under the strongest assurances and declarations, and the most solemn vows and promises of marriage, and by actually declaring himself her husband, prevailed upon her to submit to his embraces, and on more occasions than one, they treated and behaved to each other as man and wife, particularly they slept together as man and wife two several nights in the house of the pursuer's father in Brechin." The commissaries pronounced the following interlocutor, "Facts clearly proven, that a copula took place between the parties in the course of an honourable courtship, and in consequence of a solemn promise of marriage by the defender to the pursuer; find these facts relevant to infer marriage between the parties; and therefore find and declare, in terms of the conclusions of the pursuer's libel, in so far as relates to the conclusion for marriage and adherence, and decree accordingly. The defender advocated the cause, and it was reported by Lord Abercromby upon informations. The majority of the Judges were for adhering to the interlocutor. The following note of their Lordships' opinions was taken by the late Lord Macdowbank, who was counsel for the pursuer, and is written upon his papers:—

"*Abercromby*.—Admits slept on 9th and 10th March, and previous to these nights promised marriage, but before these promises, enjoyed her person. Argument for defender, founding on 30th March, irrelevant; and also on defender's account of first copula; and farther not true, not supported, and contradicted by Brown, and by the circumstances; also that it was a new idea newly taken up.

"And in point of law, irrelevant. Would have asked defender from No. 1.

"*Eskgrove*.—Moved with situation of the parties here, equal in rank. Man in a better line of life ought to be circumspect in their proceedings with such persons; admitted any other woman would have thought honourable; without proof could



*for the Defender—*

No. 238

r to found a relevant claim for a conclusion that parties are husband and wife, there must be a clear, distinct, and unequivocal averment  
 May 20, 1841  
 Harvie v.  
 Inglis.

action for seduction, but libelling on facts considered by the Court relevant to constitute a marriage); *Campbell v. Honeyman*, July 9, 1830 (VIII. *Stewart v. Lindsay*, 1817, noticed in *Honeyman's* case; *Cameron v. Cameron*, 1814, not reported.

alleged third night; but here thinks it incredible and calumnious, and void. Then what does the case come to? Just the ordinary case of promissory courtship, followed with the consequence the law holds sufficient.

—As the law now stands, and from the facts stated by the Lord Ordinary affirming.

*Honeyman*.—Same.

*Lord*.—Has great doubts; 1, celebration; 2, cohabitation.

must be clearly proved, and witnesses competent. 3d, Promise with or without oath requisite in all cases; attempted in the case of *Smith* to infer from honourable views indicated to witnesses; principle of copula (*Britton v. Britton* copula purifies the condition; not on the ground of seduction. Now, 3d, and the declaration, conception of honourable intention not sufficient. *Prison*, master of the horse to the Duke of Montrose. Now, as to the letter, letter does not say they were prior to the copula, but still would be to hear than to speak.

*Clerk*.—Sorry we have questions of this nature, and sorry that we have no law, and thinks virtue better guarded. Clear promise, cum subsequent copula.

say in these cases to settle facts. Lady's allegation, promise and courtship copula subsequens. He again avers a prior copula, but late made, would have been made 30th March. Even if driven to decide the point, would be for the lady under all circumstances, but doubt very much the relevancy. A woman acts once unguardedly, and resolves not to repeat, only in case of a promise, that would be a marriage.

*Jury*.—Clear upon the letter, allegation in the summons as to the prayer for a conclusion that a promise cum copula can be avoided by a previous copula. *Smith* was a nice case; here the defender had plenty leisure. But clear on the plea of law, and the fact on which it is founded, disproved.

*Jury*.—Of the same opinion.

altering the law, for women wd. &c.

*Jury* reads evidence of promise before the two nights.

*Lord*.—Numberless cases where promise cum copula is good, notwithstanding commerce. Case of *Duffie*.

*Jury*.—Pleased with the opinion of the Court declaring marriage, but dissentient well stated in page 16th of the defender's information. Differs

thought it for the interest of female virtue to make marriage loosely; it must be clearly made out; cannot admit the competency of raising a promise on a declaration. Said gentleman must not say any thing ambiguous; but I say believe nothing ambiguous; promises ambiguous in the declaration, letter, but very well pleased with judgment" (two or three concluding words).

action there was an alternative conclusion for marriage or for damages. The conclusion for marriage was departed from, and the case was

deration whether the condescendence, to which alone we can look as offered to be proved, is relevant and ought to be allowed to be proved evidence, which only I understand to be offered. I should incline to the opinion of all the Judges on this case, before adhering to the interlocutor, a little farther than Smith and Grierson.

LORD MEADOWBANK.—I am glad of the proposal now made as I have consented to alter the interlocutor at present.

LORD GLENLEE.—I agree with the suggestion from the chair ; but I think the question is at all doubtful that a marriage may be established by facts and circumstances, as in the case of Smith, though a promise can be established by oath or writing. In Smith's case, the question was, whether what was offered to prove was relevant ; in this case we have no such specification and the judgment of the Lord Ordinary goes much beyond Smith and all cases I know of.

LORD MEDWYN.—I entirely concur, thinking this a case of the utmost

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<sup>1</sup> Barclay, July 5, 1611, 1 Stair, 416; Cockburn v. Logan, July 1717 (M. 12386); Castlelaw v. Agnew, 1717, noticed in Mr Hodgson Cay in Appendix to Dalrymple v. Dalrymple, 2 Haggart's Reports; Harvey v. Ford, Dec. 13, 1732 (M. 12388 and MS. collection of Lord Hermand); v. Hamilton, Dec. 14, 1748 (M. 13909); Forbes v. Countess of Strathmore, 27, 1750, Ferguson's Consistorial Law, p. 115; Kennedy v. Campbell, 1751, 5 Brown's Sup. 789; Pennicook v. Grinton, Dec. 15, 1752, 111; White v. Hepburn, Nov. 18, 1785 (M. 12686); Inglis v. Robertson, 3, 1786, not reported; Miller v. Tremamondo, Jan. 29, 1771 (M. 12391); v. More, Feb. 1786, not reported; Kennedy v. McDowall, Ferguson v. Meikle v. McGee, 1820, Commissary Records; Evidence of Hon. Henry Baron Hume, and Mr Hodgson Cay in Appendix to Dalrymple v. Dalrymple, *supra*.

at the proposed proof of marriage goes beyond what I consider to be No. 238.  
Scotland.

May 20, 189  
Harvie v.  
Ingles.

ordships then ordered additional cases, and directed the opi-  
whole Court to be taken upon them.

er the consulted Judges, with the exception of Lord Cockburn,  
opinion "that a proof ought to be allowed in this case, before  
o the relevancy of the pursuer's averments in the record."

CKBURN'S opinion was as follows:—I am of opinion, 1st, That the  
tements, particularly in her revised condescendence, are not relevant;  
ently that the defender ought to be assoilzied; 2dly, That though they  
t, the engagement on which the action rests, can only be proved scripto  
o of the defender; and consequently that that part of the Lord Ord-  
ocutor, which subjects him to judicial examination, or tends to recog-  
er mode of proof, ought to be altered.

is not easy to imagine a less satisfactory summons. As originally  
et forth copula, preceded by the facts that the defender "paid his  
the pursuer, professing the most sincere esteem, love, and regard for  
desire to marry her, which he often repeated, promising with the most  
tions, that he would marry her, and that she yielded in consequence of  
promises." This was the common case of a direct verbal engagement  
marriage. But the simplicity of the original summons was destroyed  
nendment, the exact import of which it is very difficult to ascertain.  
r rather implies, that there had been a promise, in the usual sense of  
out it also rests, or seems to rest, the case on the facts, that the defender  
ions" of marriage; that it was "generally known in the country, and  
of ordinary report, that the defender was courting the pursuer, and was  
d to her;" and that "by his constant attention and undisguised court-  
his declarations of affection, and open avowal of his promises, and his  
fulfil them, and by repeated requests that she would be his wife, he  
pursuer's affections;" a second amendment states, that she yielded  
aith of the promises and courtship aforesaid." And then a third one  
the marriage was constituted by "avowed and public courtship, as  
romises of marriage, followed by sexual intercourse." There is thus a  
inction kept up between what she calls the courtship and the promise,  
difficult to detect her in any preference of the one to the other, as the  
f her demand; and when the exact import of all this comes to be ex-  
er revised condescendence and plea, the same difficulty continues. It  
to discover whether she means to rely on the direct ordinary promise,  
plied one, which is said to be involved in what is termed the courtship,  
Her plea is expressed as if it had been purposely meant to restrict her  
alar ground of action.

as her case is rested, not on any immediate and specific agreement, but  
of constructive promise said to be implied in the defender's general  
ave the utmost difficulty in recognising any such promise as the basis  
e. I am aware that there are a few cases in which it has apparently  
with as sufficient; but the point cannot be considered as having been

issue on oaths by what he is said to have done, but even with the  
of time which her statements include, there is no sufficient and preci  
any formed and mutual engagement to marry.

Second, I scarcely know any point on which the authorities in the  
land are more clear, than that all promises, but especially those four  
basis of marriage, are only proveable by the writing or the oath of th  
have made them. Nor is this rule confined to mere verbal promises,  
as are said to flow from circumstances to be established like ordin  
expressly laid down as extending to all of what are commonly unc  
promises, or pledges de futuro, as distinguished from present and con  
ments.

There have, no doubt, been expressions used by Judges, to the i  
whose opinions the very highest respect is due, of an opposite tenden  
were only obiter dicta, and not necessary for the determination of the  
which they occurred. There are several cases on the other hand,  
necessity of restricting the proof to the writing or the oath of the  
expressly decided; and this even when the promise was not verbal, b  
inferred from circumstances. *Stewart against Lindsay* is a strong and re  
For the promise on which the defender was there claimed as a husb  
deduced from his conduct; yet it was expressly found that the facts  
duct could only be ascertained scripto vel juramento of him, and accor  
only by his examination on oath that they were reached. The whole  
decisions is adverse to the competency of any other proof. Even the c  
son, which has sometimes been supposed to have fixed the admissib  
evidence, when the promise arose from facts, turns out, when examin  
not to establish this, but rather to imply the reverse.

The Scotch law of marriage is loose enough already. But the obvi  
of the pursuer's doctrine is to make it still looser. The necessity of

(which it generally may) to assume this shape, all ordinary evidence  
it is plain that the sphere of relevant claims, and the chances of occa-  
s, are enlarged, and one of the barriers of female virtue weakened.

No. 238.

May 20, 1881  
Viscountess of  
Strathallan v.  
Duke of North  
umberland.

conformity with the opinion of the majority of the Judges—

COURT “recalled the interlocutor of the Lord Ordinary sub-  
mitted to review, and remitted to his Lordship to allow a proof to  
the parties, before answer, as to the relevancy of the pursuer’s  
statements in the record.” \*

A. M. ANDERSON, S.S.C.—J. LIVINGSTON, W.S.—Agents.

ESS of STRATHALLAN, and OTHERS, Pursuers.—*D. F. Hope—* No. 239.  
*Robertson.*

NORTHUMBERLAND, and OTHERS (Lord Glenlyon’s Trustees),  
Defenders.—*H. J. Robertson.*

ATHOLL and CURATOR AD LITEM, Compearers.—*M’Neill—*  
*Patton.*

*Pursue—Curator Bonis—Fatuus—Executor.*—An heir of entail  
and three daughters; his eldest son was fatuous; he had executed a  
division in favour of his youngest son; the daughters, alleging that the  
ultra vires of their father, and that it had the effect of altering the  
of their fatuous brother, diminishing his executry to their prejudice, as  
presumptive-executors, raised an action to reduce the bond, or at least to have  
that if the bond was paid out of the rents of their fatuous brother’s  
right to be assigned to him, and kept up as a debt against the next heir;  
concluded also for the appointment of a curator to the fatuous brother  
and his heirs, and for an order on him to concur in the action; a curator was  
who adopted the declaratory, but refused to adopt the reductive con-  
clusion; the youngest son objected that the pursuers had no title to insist, their  
presumptive-executors being merely contingent on surviving their  
father, and they being wholly superseded by the appearance of that per-  
son as curator: Held, that, though the interest of the pursuers was contin-  
ued a good title to pursue those conclusions which were not adopted by  
the person and his curator.

John Duke of Atholl left two sons, John Marquis of Tullie- May 23, 1881  
who became Duke of Atholl, and James Lord Glenlyon; and

1st Division  
Ld. Moncreaf  
S.

the case returned before the Lord Ordinary, the pursuer moved to have  
the matter judicially examined, the latter objecting to the competency of the  
in respect of his Lordship’s interlocutor, which allowed such examina-  
tion, having been altered by the Court, as above, and no notice taken of  
it. The Lord Ordinary reported the matter to the Court (May 30), who  
opinion that by their interlocutor, his Lordship was left at liberty to follow  
as he pleased as to the judicial examination, and directed him to repel  
the objection to the competency of the application.

free rent at £8000 per annum, and bound the granter and heir to pay £24,000, or such sum as three years' free rents should be; "and the amount of the said three years' free rents of the said estates as aforesaid, shall be payable to the said trustees as at three instalments, at and against the first, second, and third Martinmas or Whitsunday that shall happen in the first, second years immediately succeeding my decease, and that by three in that is, the first instalment of one-third part thereof, or one year's free rents, at the first term of Whitsunday or Martinmas after the expiration of one full year after my decease; the second instalment, of one year's free rents, at the first term of Whitsunday or Martinmas after the expiration of two full years after my decease; the remaining third instalment, of one-third part thereof, or one year's free rents, at the first term of Whitsunday or Martinmas after the expiration of three full years after my decease, with a fifth part more of the said respective instalments of liquidate penalty of failure, and the legal and ordinary interest or annual rent of the respective sums aforesaid, from and after the before-mentioned day of payment respectively, until actual payment be made." It was added, directing £1500 per annum to be paid out of the said three years' rents, to the party having the care of the Marquis's support and maintenance of his lordship, and that, in lieu of the same so paid, the trustees of Lord Glenlyon should receive, out of the said fourth year, the sum of £4500, and corresponding interest, for the said fourth year, of Lord Glenlyon, being the amount deducted during the first three years, by way of annuity to the Marquis.

The summons set forth the Duke of Northumberland and others, No. 23  
of Lord Glenlyon and John, now Duke of Atholl, and his tutors May 21, 1  
ny has, and James, Lord Glenlyon, as the parties who should Viscountess  
at their instance. It stated the tenor of the bond, which was Strathellan  
“ reduced, &c., by decret of our said Lords, to be pronoun- Duke of Northumberland.  
the instance of the pursuers, and of the said John, now Duke  
oll, and of his tutor, or other legal guardian, if he any has,  
ight and should be decerned and ordained to concur with the  
s, as pursuers in the action to follow hereon, on account of the  
of the said Duke in the subject-matter thereof, in manner after  
d; and if the said John Duke of Atholl has no tutor, or other legal  
n, a curator ad litem ought and should be assigned to him by our  
rds, to prosecute and follow forth the action to follow hereupon  
l form, the said bond of provision, &c. to be reduced, &c. by decret  
l, &c.”

ing the reasons of reduction it was stated, that, by the death of  
Duke in September, 1830, his right to the rents of the entailed  
ad ceased; that it was ultra vires of him, and injurious to his suc-  
to direct in what manner the rents of any one year, during his  
or's period of possession, should be appropriated; and, in parti-  
hat a deed appropriating rents in payment of the capital sum of  
vision in the bond was not consistent with the permissive powers  
entail, under which it was only the annual interest of such bond of  
on which was exigible out of the rents of a single year. But far-  
the present Duke was fatuous, and incapable of making a settle-  
his whole succession, heritable and moveable, must be left to the  
disposition of the law, and every deed by another party which  
ed the natural course of his Grace's succession was illegal. The  
n question was executed for the purpose, and with the effect, of  
rring to Lord Glenlyon a large sum which must otherwise have  
ed in the present Duke's executry, and fallen to the pursuers as  
rs in mobilibus. The deed was therefore injurious to the pursuers,  
was an unwarrantable encroachment on that right which belonged  
Duke's unfortunate situation, of having his estate left in so far  
urbed, that it would descend, at his death, in the event of his not  
alescing, according to the rules of intestate succession, the entire  
le estate which accrued during his life, descending to his execu-  
nd his entire heritage to his heir. The pursuers farther pleaded  
the late Duke had been the legal guardian of the present Duke,  
ed which he executed, encroaching on the rights of the present  
was on that account the more liable to reduction. It was stated  
parate reason of reduction that the sum of £24,000 exceeded three  
free rents.

the action concluded that the bond should be reduced, or, “ at all  
, whether the said bond of provision shall be reduced or not,” it



1837. *John v. Duke of Atholl.*  
 should be found and declared that John, now Duke of Atholl, had the sole right to the rents of the estates, free of all claim except for the interest of the sum of £24,000, or such other sum as should be found to be the legal amount of the provision; that the rents accruing after the present Duke's accession, should not be applied in payment of the capital sum in the bond of provision; "or otherwise and in case the said rents shall be applied in payment of the said sum of £24,000 of capital, or any part thereof, it ought and should be found and declared, by decree foresaid, that the said defenders are bound to grant, and the said John Duke of Atholl, and the guardians named, or to be named, for him, shall be entitled to take assignations to the said provision, to the extent to which the same shall be paid, in favour of the said Duke, his heirs, executors, or assignees, and that to the effect that the said capital sum of provision, so far as paid, may be kept up as a burden affecting the entailed estates."

A curator ad litem was appointed to the Duke, and defences were lodged by him, stating, that the only point in which it appeared that the Duke's interests might be considered at all compromised by the bond of provision, regarded his Grace's right to demand an assignation from Lord Glenlyon's trustees, so as to keep up the debt against the succeeding heir of entail: that Lord Glenlyon's trustees had agreed, on receiving the money, to grant an acknowledgment, keeping open, *hinc inde*, the Duke's right to demand, and their right to refuse, such assignation: and that, in these circumstances, it did not appear necessary for the Duke to make any farther appearance, if the arrangement was acknowledged by a judicial minute on the part of Lord Glenlyon's trustees.

Lord Glenlyon's trustees lodged a minute in these terms, and no farther appearance was at that time made on the part of the Duke. Lord Glenlyon's trustees, in their defences, objected to the title of the pursuers to insist, and also to the form of the action. The Lord Ordinary ordered cases on these questions, which he reported to the Court.\* Before they

\* "NOTE.—This is a very peculiar case, and it is proper for the judgment of the Court. The Lord Ordinary will only observe, that he does not think it as settled, by any opinion which the curator ad litem may have formed on the merits of the reduction, or even on the view which the Court may take of the correctness of his resolution, in regard to the interest of the Duke of Atholl. His Grace being in the unfortunate situation of a lunatic, is under the care of the Court; and it will be for them to judge of these matters. But independent of any such question, as to the course to be taken by the curator ad litem, the question remains whether the existing nearest of kin have not a good title to insist in the action. The merits cannot be considered where there is no argument on one side. The Lord Ordinary will only say, that, in the state of the case, he is strongly inclined to think, that the pursuers have a title derived from the evident interest, though but a contingent interest. He holds the rule to be, that nothing shall be done in regard to the rights in property of a lunatic, by which the natural course of succession, on his death, is or may be altered, and that those contingently interested

advised, John Atholl Bannatyne Murray Macgregor was appointed **No. 239.**  
 or bonis to the Duke, and he was called on by the parties to consider **May 23, 1837**  
 action, and either state his concurrence in it, or his resolution not to **Viscountess of**  
 ar. He lodged a minute, stating that he declined to support the **Strathallan v.**  
 ctive conclusions of the action, but that it appeared proper to insist **Duke of North**  
 ose conclusions which had for their object to restrict the amount of **umberland.**  
 ond, if it exceeded three years' rents, and to declare Lord Glenlyon's  
 es to be bound to grant an assignation to the bond of provision, in  
 r as it might be paid up out of the rents of the estate.

ord Glenlyon's trustees contended that the objection to the title of  
 pursuers was strengthened by this partial appearance for the Duke.  
 n if his Grace had adopted none of the conclusions at all, the pursuers  
 d have had no title, because their interest, as presumptive execu-  
 s of his Grace, was merely contingent and uncertain, and would  
 ely vanish if they predeceased the Duke and Lord Glenlyon. And  
 egard to any interest which the Duke might himself have, to appear  
 insist, that was within the province of the Duke's curator bonis to  
 rmine upon, and he had accordingly adopted part of the action ; but  
 decision, declaring the rest to be a matter in which the Duke should  
 nsist, was conclusive on that subject.

he pursuers answered that they had an interest, and therefore a title,  
 nsist in all the conclusions of the action as originally raised. And  
 gh their interest was contingent, that did not affect their title to pur-  
 as the Court was daily called upon to protect contingent interests.  
 o far, however, as the Duke and his curator had adopted the action,  
 interest and title of the pursuers was superseded. But in so far as  
 Duke and his curator had not done so, the pursuers' interest and title  
 ained the same as at first. And farther, the decision of the curator  
 not conclusive on the point whether it was for the Duke's interest  
 he should insist in the reductive conclusions of the libel or not. The  
 e was under the protection of the Court, and if the pursuers could  
 fy the Court that it was proper for his Grace's interests that the  
 ctive conclusions should also be insisted in by him, they were entitled  
 nsist that the curator should be ordained to do so.

**ORD COREHOUSE.**—I do not think this question is attended with any difficulty.  
 s is a very clear title to pursue. The pursuers' interest is contingent to be  
 but a contingent interest may be defended against injury just as well as a  
 t interest. There are instances of this occurring in Court every day, as, for  
 nce, in the use of arrestments in security of contingent debts, or upon the  
 ndence of an action. The summons sets forth that the late Duke of Atholl

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the succession have a right to interfere to prevent any such acts, unless they  
 be shown to be necessary for the lunatic's personal interest."

illegal act of the late Duke, and refuses to reduce it, I see no preventing the party whose interests are lesed by that illegal act from a reduction of it. Whether it is truly illegal and reducible is not but I offer no opinion upon the subject. It may perhaps be shown that it is truly for the personal benefit and advantage of the Duke, though his executors, and that it could not be reduced without injury to him. There may be other defences on the merits, into which I do not enter. But on the point of title, which is alone before the Court, I am clearly of opinion that the pursuers ought to be sustained.

LORD GILLIES concurred.

LORD MACKENZIE.—I am entirely of the same opinion. If the pursuers had not insisted in any of the conclusions of the action, the pursuers would have title to insist in them all ; and as the curator has only insisted in part the title of the pursuers to insist in the rest remains unimpaired.

LORD PRESIDENT.—I am satisfied that the title must be sustained. A contingent interest is every day sustained in Court as a title to pursue. A remotest substitute heir of entail may raise a declarator of irritancy. An individual interest is merely contingent. And although the pursuers cease their brother the Duke, and so turn out not to be his executors, the mean-time, his executors presumptive, and entitled to challenge a reduction of the executry.

THE COURT sustained the title of Lady Strathallan and Lady Murray Macgregor, and remitted to Lord Cuninghame, as Lord President, to proceed with the cause.

A. MONYPENNY, W.S.—H. GRAHAM, W.S.—MACKENZIE and SHARPE, W.S.

WILLIAM BROOM, Pursuer.—*Whigham.*

No. 240

ADAM ANDERSON and JAMES HAIR, Defenders.—*Maitland.*

May 23, 183

Broom v.

Anderson.

*Process—Reduction—Decree.*—Reduction an incompetent mode of reviewing interlocutors of an inferior court disposing of the cause and allowing expenses, expenses not having been modified and decerned for, and the decree not having extracted.

THE defenders Anderson and Hair presented a petition to the Dean of May 23, 1831, of the burgh of Sanquhar, complaining of some operations of the pursuer Broom, whereby a certain water-course was diverted into their property, and praying for an inspection of the same by a court of burgesses. Appearance having been entered for Broom, the Dean of Guild summoned a court or jury of burgesses who, after hearing evidence ex parte, and viewing the premises, returned a verdict finding Broom not entitled so to divert the water-course. To this verdict the Dean interposed his authority and thereafter pronounced an interlocutor ordaining Broom, within a certain time, to direct the water in dispute into its former course, finding him liable in the expenses of process, and allowing an account thereof to be lodged. This order being disregarded, the Dean pronounced another interlocutor granting warrant to and authorizing Anderson and Hair to do the necessary steps for turning the water-course, finding Broom liable to these parties in the expense to be necessarily incurred by them in doing, and allowing a particular account thereof to be lodged. Before the expenses referred to in these interlocutors had been modified and decerned for, and while the judgment was still unextracted, Broom brought the present action against Anderson and Hair concluding to have the interlocutors and whole proceedings above-mentioned reduced upon legal grounds of law.

2<sup>D</sup> DIVISION

Ld. Cockburn

F.

The production having been satisfied without objection, it was pleaded, in defence, that the action was incompetent, in respect the interlocutors in question were not final; the expenses awarded against Broom having been modified and decerned for, and the decree not having extracted.

The Lord Ordinary “sustained the defence of incompetency,” and dismissed the action, finding the pursuer liable in expenses.\*

**NOTE.**—The Lord Ordinary proceeds entirely on the principle of the case *Keith* against Keith, as reported in the Faculty Collection. The objection as to the defences, is, that the case is not *final* in the inferior court. But on this, the decree, if extractable, has not been extracted, a fact which, in the present case, the Court noticed and decided on, though not brought forward by the pursuer.—The Lord Ordinary thinks it right to state that the doctrine in *Coutts* has been found to operate very extensively, and that being strongly objected to at the bar, a case on the point is now in the First Division.”

No. 241.

JAMES M'FARLANE, Pursuer.—*D. F. Hope*—*A. M'.*  
JOHN FISHER, Defender.—*Sol.-Gen. Rutherford*—&

*Trust—Stat. 1696, c. 25—Proof.*—1. In a declarator of trust to 1696, c. 25, is applicable, it is competent to prove trust by writing in the hand of the party importing an acknowledgment or admission of trust, without a formal back-bond of trust.—2. Evidence which held sufficient to prove title to property, the titles to which were taken wholly in name of one person, is held to the extent of a half in trust.—3. Opinion intimated, that in a declarator of trust it is not necessary to prove the constitution of a trust at the time of the proof of an emerging trust will support a conclusion for declarator of trust.

May 23, 1837. In the year 1800, certain subjects in the neighbourhood of Glasgow were disposed absolutely by one King to the defender Fisher. The name of the subjects was made up. Thereafter Fisher granted to the pursuer M'Farlane, and a lease of the same subjects was entered into between them on the footing of their being joint-proprietors. In 1835 Fisher raised action against Fisher, setting forth that the subjects were in 1800 by himself and Fisher jointly, and the purchase money then paid, advanced by them equally; that the same were granted to Fisher, and the rights and titles taken in his name for behoof of both parties, as joint and equal proprietors; and the court have it found and declared that the disposition, &c., was a trust for the use and behoof of himself and M'Farlane, as joint and assignees, or at least was held in trust to the extent of one-half.

2d Division.  
Ld. Moncreiff.  
T.

w to the partnership in 1803, and that the subsequent administration of up to the date of the action had been as of a joint-property, and offered to and produced, in proof of the property having been joint, a variety of writings under the hand of Fisher. Of this description were bills in part payment of the price of the subjects dated in 1801, and signed by the parties jointly, but which on the back bore the marking "as by John Fisher;" the contract of copartnery between M'Farlane and Fisher in 1803, being a probative writ under the hands of both, describing them as "proprietors of the field and ground," &c., in question in which character they bound themselves and their heirs to grant a lease of it; a "statement" of sums paid by the parties "with regard to the field" down to December, 1807, which was made up by Fisher, and countersigned by M'Farlane's docquet upon it; certain vouchers and receipts under the hand of Fisher connected with the administration of the property, and a declaration of it to have been joint; a joint engagement in 1809 for repairs on the property; and, lastly, certain letters in 1824 and of other dates, signed by Fisher, expressly recognising the right of M'Farlane as a joint-proprietor.

Fisher, in defence, denying generally the pursuer's averments, alleged, that the subjects were purchased, and the bills for the price retired by himself; that he had exercised a right of property in them throughout, and had been recognised as the proprietor in the charges for public works and otherwise; that it had been proposed in 1802 that M'Farlane should purchase a half of it, but he had never done so, which explained the clause in the contract of copartnery; and he pleaded,—as the summons set forth, that the subjects in question were acquired by Fisher, and that the lease to the same taken in his name "in trust and for behoof of himself and the pursuer as joint and equal proprietors," and concluded for declaration of trust, and as this statement of trust was contradicted by the titles, and denied by Fisher, it was not competent, in terms of the statute, c. 25, to prove the same, except by a declaration or back-bond of the pursuer, "lawfully subscribed" by the person alleged to be the trustee, or by reference to his oath.

The Lord Ordinary pronounced the following interlocutor, adding the concluding note: \*—"Finds that it is sufficiently established scripto of the

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\* Unless it is to be held to be the effect of the decision in the case of Duguid v. Wight, March 2, 1797, that nothing but an express and formal back-bond declaration of trust can be admitted to prove a case of trust or joint property, the Lord Ordinary must be of opinion, that the pursuer's averment of trust, to the effect of the property being held for the joint benefit, and at the joint risk of the parties, is fully proved in this case. But he understands the doctrine of that case, as expressed in the judgments, to go no farther than this, that under the statute, c. 25, to qualify the effect of a written title, can only be proved *scripto vel jura-* mento of the party, and that no parole evidence is admissible; and so it appears to

of the field and ground,' &c., and in that character *they* bind *themselves* heirs to grant a lease of it. 2. The bills granted for the price, which bills of the parties, are the writs of the defender. The markings on them, at least in the material part of them, have plainly been made at a very late period, and if so, they militate against the defender. 3. That of the sums paid by the parties, 'with regard to the field,' down to 20 1807, which is not denied to have been made up by the defender with docquet upon it, may be taken as the mutual writ of the parties; and if it is correct in the particulars or not, it necessarily assumes that the joint. 4. Such of the docquets upon the vouchers enumerated in No. I. to the Record, as are expressed in the terms quoted in Cond. Art. 8th *one half of the within from James M'Farlane. JOHN FISHER*—or in other terms, are good evidence by the defender's writ that he dealt with I a joint proprietor. The others may afford real evidence, but cannot be taken as the defender's writ to the same effect. 5. The *joint receipts* for rents, &c. Art. 10 of Condescendence, are clearly good evidence, and direct to the effect. The *holograph* statement of rents, &c. to 1815, shows that all the parties were charged as on a joint property. 6. The *joint engagement*, May 2 1808, is a direct mutual writ to the same effect. 7. The defender's letter of 16th May, 1808, bears again—'You (M'Farlane) have agreed to sell *part of the field, if I would sell mine.*' How can this be explained other than as a distinct recognition of the right of the pursuer as actually a joint proprietor. 8. The defender's letter to Gibbie (Art. 21 of Cond.) who had nothing to do with the contract of copartnership, expressly assumes the same thing. 9. This is also very material. 10. The *joint receipt* for rents, &c. is still stronger. 11. It may be a question, whether the books of C. Co. are to be taken as the defender's writ, seeing that he was not on the books, but, by the contract, was appointed to keep the books. But at any rate the fact proved by them is admitted in the Answer to Cond. Art. 1 in those books the parties were uniformly treated as joint proprietors. 12. The defender's letter (Cond. Art. 25), though somewhat equivocal, is clearly admissible, and, in connexion with the other documents, is conclusive.

"There is a good deal more referred to in the Condescendence, which evidence, may be very important. The Lord Ordinary has only attended to the writs of the defender; and they appear to him



der and pursuer : Therefore, finds, decerns and declares in terms **No. 241**  
 st or declaratory conclusion of the libel ; but before further **May 23, 18**  
 ppoints the cause to be enrolled : Finds the defender liable in **M'Farlane**  
 and remits the account, when lodged, to the auditor to be taxed." **Fisher.**

reclaimed, contending in support of his note, that this was a  
 of trust, to which the Act 1696, c. 25, was applicable, and yet  
 to the statement in the summons, there was no trust originally  
 d in Fisher's person, nor was there any evidence thereof; that  
 had been assigned, as in other cases of declarator of trust, for  
 on of a trust, and the evidence adduced was insufficient to prove  
 ce; <sup>1</sup> that this evidence, furnishing merely matter of inference,  
 f that character and description which the Act required; that the  
 ought to be such as to fall under the category of "a declaration  
 ond of trust," and at all events should distinctly import a trust; <sup>2</sup>  
 thing more than the writ of party had been intended by the sta-  
 expression "writ or oath of party" would have been used, as  
 ase in those statutes where this mode of proof was pointed out  
 tent.

it was answered, that the action was relevantly laid as a decla-  
 rust, and the subsistence of a trust, from the very commence-  
 the transaction, was proved by the evidence; that, admitting  
 lence of facts and circumstances to be insufficient, the writ of  
 der importing an acknowledgment or admission of trust, was  
 t to a declaration of trust, and all which the statute required,  
 ; evident from the case of Duggan, and the other cases referred  
 the form of the document was of no importance, if granted with  
 to the transaction in question, and the pieces of evidence  
 n in the present case formed an express acknowledgment, and  
 d evidence of a trust.

USTICE-CLERK.—I can see no ground for objecting to the principle of  
 Ordinary's interlocutor. Keeping in view the preamble of the statute  
 the entrusting of persons without any declaration or back-bond of trust  
 from the person entrusted, is the occasion of fraud, &c., we must give  
 traction to the enacting clauses. I am of opinion that the words, "de-

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ere. *There is no need in this case for parole evidence.* The writs of  
 or instruct a *joint property as actually existing*, and nothing else; and  
 effect of such evidence cannot be done away by a mere gratuitous  
 of which there is not the least trace in any of the writings or acts of the

m v. Wight, March 2, 1797 (M. 12761); Mackay v. Ambrose, June 4,  
 , VII. 699); Lyon v. Reid, May 25, 1830 (ante, VIII. 789); Taylor  
 t, Nov. 14, 1833 (ante, XII. 39).

*supra.*

this construction then to the Act, I have to look to the proof of what has been adduced in this case. Laying out of view the evidence of fact and circumstances, I think there are writings under the hand of the defender which show what was actum et tractatum between the parties, and the subject in question was made over to the pursuer.

LORD MEDWYN.—Although I differ from the chair in the result which has been arrived at, yet I entirely agree as to the law and the construction of the Act of 1696, and shall add nothing more on that point. We must attend to the facts and its conclusions. This is a declarator of trust, the original title taken to the defender, and also the charter of confirmation. I have no case where the titles were made out so differently from the allegations of the parties, and no motive attempted to be assigned for such a proceeding. In *Duggan v. Wight*, the motive was, that the pursuer, being a Roman Catholic, was incapable of holding the property in his own person, and it was the object to have the titles made up in the name of the defender. So in *Mackay v. Ambrose*, *Lyon v. Reid*, and *Taylor v. Cranford*, and in *Macdonald v. Beaton*.<sup>1</sup> Again, in all the cases I have seen, is it property or a debt the usual question; but here, the question is between the fact of a trust and the defence of Fisher. I think none of the documents founded on inconsistent. They admit of an interpretation confirming the statement of the pursuer (His Lordship here referred to the documents alluded to in the Lord Ordinary's note). I cannot, therefore, concur with the Lord Ordinary in treating this as a common declarator of trust, no motive being assigned, and all the documents explainable on the statement of the defender; and I think this action should have been dismissed, reserving to the pursuer to bring another action.

LORD GLENLEE.—I cannot see any solid ground for differing from the Lord Ordinary. If it were necessary in every declarator of trust to prove the

ascertained, that the Act 1696 had only in view the case of deeds intended to be in trust, and that proof of facts and circumstances might be adduced to establish a trust, arising as in the case of Spreul, noticed by Kilkerran.<sup>1</sup> May 23, 1824, Ker v. Hotchkiss. The doctrine has been held to be going too far, and is now rejected. In the late case of Taylor v. Crauford, you have it found that, if there is proof by writing in the defender's own hand, you may have a trust emerging declared. Here the defender only says, that there was no trust ab origine; but was there none afterwards? In 1803, when a contract of copartnership was entered into, and a list of the subjects granted by the pursuer and defender, was there not a trust? See the defender's own letter in 1824, in which he declares his readiness to settle when matters are settled; and this must be connected with the contract of copartnership in 1803, which contains an acknowledgment under the defender's hand and of the pursuer being a joint-proprietor. Upon the whole, it is impossible not to be satisfied that, whether there was originally a trust or not, there is established an incidental trust to the extent of one-half of the property. If the wording of the libel had only said *it is*, instead of *it was*, a trust, all would have been right. I think, however, there is sufficient evidence for holding that it both was a trust. I am not sure that the Lord Ordinary is right as to some of the other pieces of evidence, particularly as to the bills; but I concur in the judgment, and think it would be too much to hold that, because there may not have been a trust ab initio, we ought to dismiss the action, reserving to the pursuer a new one to have the subsequent contract or trust declared.

**D. MEADOWBANK.**—We are agreed as to the law of the case, and in holding that there must be some writing under the hand of the defender indicative of a trust. The only question, therefore, is, whether there be sufficient written evidence indicating this party's understanding that the subject was held, to the extent of one-half, in trust? I think there is sufficient evidence of such an understanding, and that, even from the first, the subject was acquired with the intention of being held in trust.

THE COURT accordingly adhered, finding additional expenses.

JAMES STUART, S.S.C.—ALEX. NAIRNE, S.S.C.—Agents.

MISS ESSEX KER, Pursuer.—*Robertson.*

MES HOTCHKISS, W.S. and OTHERS, Defenders.—*D. F. Hope—Thomson—Urquhart.* No. 24

*cess—Issue—Reduction—Writ.*—1. In a reduction of a bond, on the ground, inter alia, of the bond having been impetrated from one of the grantees who was in a state of blindness, and without it having been read over to him, the court held as to the alleged impetration which held not such as to infer reduction.

<sup>1</sup> July 16, 1741, Kilkerran v. Trust.

docquet being in 1820, when the sum at the debit of General Ker was upwards of £10,000. In 1821, the firm of Hotchkis and Co. dissolved, it being arranged that the General's debt, which was then owing, should remain with Hotchkis.

Thereafter General Ker and his son Walter Ker granted their bill, payable at 12 months, for the amount due at the time of the dissolution upwards of £14,000. This acceptance was renewed five times during the succeeding years, Hotchkis continuing to retain General Ker's law-agency till his death in 1824, when it devolved on the firm of Hotchkis and Meiklejohn, of which firm the defender Hotchkis, who was his father, was a partner.

In April, 1832, the sum due to Hotchkis by General Ker was £14,720. Some time prior to that date, his son, Thomas Ker, an attorney in Newcastle, had entered upon a negotiation with Hotchkis, being held out in letters from the General as authorised for him, with the view of endeavouring, on the part of his father, a settlement of the debt. He proposed, as the only way of settling it, that Hotchkis should take a bond signed by his father, his brother, or himself, stipulating to pay such a sum as might be agreed to by General Ker, or any of his family, should succeed to the dukedom of Roxburgh, they being the next heirs after the present Duke of Roxburgh, then a minor. This proposal having been agreed to, a bill was granted in April, 1832, by General Ker and his sons, Walter and Thomas Ker, whereby, on the narrative that the accounts between General Ker and Hotchkis having been balanced and docqueted, the debt above-mentioned was due, and that the said Hotchkis was entitled to receive the same, a bond was granted by General Ker and his sons, Walter and Thomas Ker, in favour of Hotchkis, for the sum of £14,720, with interest thereon at the rate of 5 per cent. per annum, from the date of the docqueting of the accounts, till payment.

, to which place General Ker, being then advanced in years, No. 242.  
 he express purpose of signing it from his residence at East May 23, 1837  
 Northumberland. The deed was also subscribed by the other Ker v.  
 and was duly delivered at Edinburgh. Hotchkis.

g after the date of granting the bond, General Ker raised  
 inst James Hotchkis, as representing his father, and Tytler,  
 to have the whole accounts between himself and the late firm  
 s and Tytler opened up and examined, and the balance ascer-  
 count and reckoning.

Ker died in December, 1833, and his daughter, Miss Essex  
 sted in his stead as pursuer of the process of count and reckon-  
 after Hotchkis assigned the bond for an onerous consideration  
 1 Hotchkis of South Wales.

sex Ker then brought an action, as General Ker's daughter  
 for confirmed, against the same defenders, to have the bond  
 0, the docquets or settlements of accounts, and the bill above-  
 reduced on various grounds,—1mo, As irregular and infor-  
 That the bond was not the deed of the granters—that it was  
 over or explained to General Ker—that at the alleged date  
 was advanced in years, and laboured under a defect in his eye-  
 h prevented him from being able to read writing—that he was  
 ignorant of its nature, and that the import of the deed was never  
 o him in any manner of way; 3tio, That the bond was vitiated  
 ing clause, and that as it stands it was not the original bond  
 to have been signed by the ex facie granters; 4to, That the  
 cancelled, the signatures of the witnesses having been torn  
 , That it was not delivered; 6to, That it proceeded on a  
 tive, inasmuch as it declared that the accounts between the  
 l the vouchers thereof, had been fully examined, while in point  
 y had not, and also that states of intromissions with the funds  
 Ker had never been exhibited.

tated as a preliminary defence against the action that John  
 the true holder of the bond in question, had not been called;  
 efence having been sustained, a supplementary action was  
 inst him accordingly, which was conjoined with the former.  
 ence to the 1st, 3d, and 4th reasons of reduction, the pursuer's  
 ence contained certain general averments in regard to the ex-  
 and form of the bond. With reference to the 2d reason the  
 were as follows:—That General Ker was in a state of blind-  
 e date of signing the bond—that it was not read over to him  
 signed it—that he was incapable of reading writing—that he  
 ware of its object and effect—that it was unfairly impetrated  
 but how, when, or by whom, was not averred. With reference  
 reason of reduction, it was stated that General Ker's agents  
 lered accounts of their intromissions nor exhibited accounts of

done in regard to the granting of the bond as done with the  
of General Ker, and also from insisting in the other conclusions  
settlements of accounts which took place between the defender  
and General Ker.

The pursuer on the other hand contended, that she was entitled  
to the process of count and reckoning above-mentioned conjoined  
present process, and the statements in the one made part of  
and that as in a question of relevancy and with reference to the  
of reduction, as well as to the others, she was entitled to have  
remitted to the jury roll, with a view to framing a general conclusion  
on his averments.

The Lord Ordinary pronounced the following interlocutor (12, 1836), adding the subjoined note: \*—" Having con-

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\* "It is evidently the duty of the Lord Ordinary to consider the  
reduction on its own proper merits. There might be matters con-  
stated in the count and reckoning which would not be barred by a  
But the question, whether the bond, the bill, and the docquets called  
be reduced, must depend on the practical relevancy of the grounds  
insisted on; and the material point is, whether the bond is challenged  
legal grounds.

"The summons in the *first*, *third*, and *fourth* reasons, and the conclusion  
in the 12th article, contain certain vague general averments in imper-  
bond, in respect of its form and external state. But these were not  
before the Lord Ordinary, nor has any warrant been applied for, for  
the original deed from the record, without which no judgment could  
given on any such points.

"The Lord Ordinary, therefore, must understand the case to stand

d in these conjoined processes of reduction, and having heard No. 242.  
curators thereon, and made avizandum, and particularly con-

May 23, 1831  
Ker v.  
Hotchkiss.

the respondent's statement, to which the pursuer makes no answers *denials* (to which the Lord Ordinary specially called her attention before the case was closed): *But she admits the authenticity of the letters, the contents of which in a great measure compose those statements.*

In the state of the case, the pursuer's counsel demands a general issue, Whether the deed is not the deed of General Ker, or some issue on his averments. As the case is really special, the Lord Ordinary thinks that this demand raises a question of very serious importance.

The documents produced, and admitted to be genuine, establish beyond all doubt that the negotiations for a settlement by such a transaction was conducted by a part of General Ker by his son, Mr Thomas Collingwood Ker, then solicitor in Newcastle; while a letter of General Ker himself (said to be a copy of the handwriting of Mrs Ker), on the 29th January, 1832, renders it scarcely possible to have a serious doubt that he had fully authorized his son to act for him, and was fully informed of the arrangement which had been proposed; and the pursuer further demonstrate, that every thing connected with the signing of the deed of General Ker was left in the hands of Mr Thomas Collingwood Ker, both as agent and his agent being at the time in Edinburgh.

The deed bears to have been signed by General Ker *at Newcastle*, not at *East Edinburgh*. The 8th article of the condescendence would lead one to infer. At Newcastle, in the house or office of Mr Thomas C. Ker, it is signed by General Ker, in the presence of Masterton, *a clerk of Thomas Ker*, and another *agent of General Ker*; and both Thomas Ker and his next brother, Walter Foster, are parties-obligants in it. The subsequent *delivery* of it at Edinburgh is made under the hand of Thomas Collingwood Ker.

It is not a question about a *testamentary* deed. It relates to a bond containing a most onerous contract. It was no doubt of a very peculiar kind. An obligation for a large sum of money, contingent on an event of rather a very doubtful occurrence: But, in consideration of it, the defender condescends to discharge absolutely and unconditionally a debt exceeding £14,000, and is bound to be just in the body of the bond; and on the faith of it, such a deed was executed, and most deliberately delivered and accepted, and is still to be observed then, 1st, That the pursuer, who is bound to make an averment for reduction, *does not aver* in her condescendence that Mr Thomas Ker was *not authorized* to act as his father's agent. She has indeed put a *positive denial* against the pointed and precise statement of the defenders supported by documents, of which it would be trifling, and has been impossible, to deny the effect. But surely this will not do. She has put the *negative*, that this is not the deed of General Ker; and, if it be the question to show, that a person who *acted as if he were* authorized, was not the pursuer bound to make a *positive* averment on that point. Observe, 2d, That it is admitted that General Ker himself *did sign* the deed, 3d, That it is *not averred* that the subscribing witnesses *did not see him* sign, 4th, That it is not averred that the *defenders knew* that General Ker signed, or that the deed had not been read to him.

The case, therefore, is reduced to a very simple issue of *law*. The terms of the contract having been settled between *the authorized agents* of two parties, the counter deeds to be granted fully revised by them, a bond to be given by the pursuer, and sent to *his authorized agent*, living at a distance of 120 miles from the place where it was to be duly executed. Under his *exclusive* management it is *duly executed*, and, in the presence of the party himself, *professedly* subscribing it. It is delivered, and the counter deed, also duly executed, is delivered and accepted. Is it releasing such a bond, by the granter or his representative, to say that, without the possession of his faculties, he had become blind, and that the deed



Miss Essex Ker reclaimed against both these interlocutors

was *not read over* to him? Unfair dealing is out of the case. For unfair dealing, it could only be by *his own son and agent*, deceiving at the same time. It is not said, that Mr Thomas Collingwood Ker, of Mr Hotchkiss, or was influenced *by him* to deceive General Ker.

“ Now, the law of such a case seems to the Lord Ordinary to *Blindness* is no statutory objection. The judgment of the House of Fife case, July 17, 1823, Shaw, l. p. 495, decided that, by itself at objection at all. It was a question, then, whether, without proof of being read, it could be sustained, though the *only* ground on which it was reduced, was its being found upon the verdict, that the witnesses had not seen the granter subscribe, or heard him acknowledge his subscription. But in the case of a *settlement*. The party challenging was not the granter, or his general representative, *having the same interest*, but a particular heir excluded by the deed. The case of a bond, conducted solely under the superintendence of the granter's own agent, must stand on very different principles. Being *confessedly of sound mind*, if being blind, he relies on his agent's accuracy, is he to be allowed to break his obligation, deceiving the other party, that agent did not read the deed to him, or he did not require it to be read? It seems to the Lord Ordinary that blindness can have no such privilege. It appears to be in assuming that blindness of itself makes a nullity. It is not so. All that has ever been held is, that in the case of a private deed, a blind man may execute or not as he pleases, blindness and evidence of the deed not being read, may raise a presumption of his not knowing its contents. But in the Lord Ordinary's apprehension, avail against a third party contract, to whom a deed, confessedly signed by the obligant, *under the hand of his own agent*, has been delivered for the stipulated value received in consideration. In the case of a settlement, the House of Lords held that *reading over* was dispensable, and that there might be other means by which the granter was made fully aware of the contents of the deed; and, in a case like this, the Lord Ordinary conceives that the presumption of knowledge is as

RD JUSTICE-CLERK.—I can see no reason for altering these interlocutors. No. 242.  
 joining the two processes is out of the question. As to the main point of  
 as Ker having authority from General Ker to act as he did in the negotiation  
 Mr Hotchkis in regard to the bond, I can have no doubt whatever, looking  
 neral Ker's letters and the whole conduct of the parties. I hold it to be im-  
 le, under the pursuer's statement as to the impetration of the bond, that any  
 could be framed to go to the jury. On the other points I agree with the  
 Ordinary.

RD GLENLEE.—I am entirely of the same opinion, and taking the whole to-  
 ; I am not sure that I have ever seen the equal of this reduction.

EDS MEADOWBANK and MEDWYN having concurred,

THE COURT unanimously adhered, finding additional expenses.

J. J. FRASER, W.S.—HOTCHKIS and MEIKLEJOHN, W.S.—Agents.

RUSSEL and AITKEN, Advocators.—*Patton.*

No. 243.

ALEXANDER M'FARLANE, Respondent.—*Whigham.*

*Principal and Agent.*—Held, in conformity with the case of King v. Shirra,  
 ry 23, 1827, that an action against a bank-agent, in his character as such, on  
 nt of a bank transaction, in which the agent was alleged to have acted wrong-  
 was incompetently laid.

THE advocates, Russel and Aitken, writers in Falkirk, presented a  
 on to the Sheriff of Stirlingshire, against the respondent, M'Far-  
 agent for the Bank of Scotland there, setting forth that the late  
 rt Scott, for whose trustees they were agents, had prior to his death  
 anted various bills with the different banks in Falkirk, some  
 ick were current at the time of his death; that his trustees instruct-  
 e petitioners to pay these bills as they became due, on condition  
 ceiving indorsations without recourse on the indorser; that they  
 dingly paid several of the bills, receiving indorsations to the fol-  
 g effect:—"Pay Messrs Russel and Aitken, writers, Falkirk,  
 ehoo of the trustees of Mr Robert Scott, without recourse;"  
 an acceptance by one Smith, due 26th February, 1835, had been  
 anted by Scott with M'Farlane, as agent for the Bank of Scot-  
 and on 2d March thereafter, the petitioners sent one of their ap-  
 ices (Kincaid) to the office of the bank with money for this bill, and  
 press request that it should be indorsed as above; that Kincaid paid  
 money accordingly to M'Farlane, who, however, instead of in-  
 dg the bill as required, put on it the following receipt:—"Received  
 nt from Messrs Russel and Aitken, Falkirk, (Signed) A. M'FAR-  
 Agent;" and that on Kincaid returning the bill to them, the peti-  
 A wrote to M'Farlane, stating the money to have been sent to him as  
 gent, and complaining of his not having indorsed the bill as re-  
 The petition then prayed to have M'Farlane ordained forthwith

May 23, 1837

2D DIVISION.  
 Ld. Moncreiff

an illegal and improper act done by the respondent individuals, and the conclusions were properly directed against him, and there was no necessity for calling as parties to the proceeding, others who had no share in the illegal act, and neither were, or could be presumed to be, participants in the transaction.

2. M'Farlane was not entitled to relieve himself of the obligation to indorse the bill, or to return the money, or to shift the responsibility for his breach of that obligation on the Bank of Scotland, upon the pretence that he acted not in his private character, but as the agent of the bank, because the money never was truly paid to the bank, but was taken possession of by M'Farlane contrary to the terms of his engagement as bank-agent; and besides, the bank had no interest to object to the indorsation of the bill without recourse.

3. The true facts upon which the case of *King v. Shirra* was decided, and upon the strength of which decision the Sheriff rests his judgment in this case, having been different in their nature and character from those occurring in the present case, that decision ought not to be followed in judgment in this case.<sup>1</sup>

M'Farlane in answer repeated his plea already stated, that the action of the petition, the action was incompetently laid.

The Lord Ordinary, in respect of the decision in the case of *King v. Shirra*, repelled the reasons of advocacy, and remitted simpliciter, and in the interlocutor the subjoined note.\*

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<sup>1</sup> Ante, V. 231 (new ed. 215).

Russel and Aitken reclaimed.

No. 243.

LORD JUSTICE-CLERK.—I cannot find any thing like a principle for distinguishing this from the case of King and Shirra, and would not disturb that decision. It is of infinite importance, when a point of this kind is once decided, that it should not depart from it. May 24, 1837  
Brewster v.  
Marquis of  
Abercorn.

LORD MEDWYN.—There is no rule in jurisprudence better founded than this; therefore I am for adhering to the interlocutor, though I should not have concurred in the principle of the decision referred to.

LORD GLENLEE.—The petition might possibly have been so laid as to infer a conclusion against the party, not merely as bank-agent, but otherwise. As it is laid, however, against him in his character of bank-agent, the advocates' letter to Farlane expressly setting forth that the money had been sent to him as such, I consider it altogether safer to adhere.

LORD MEADOWBANK concurred.

THE COURT accordingly adhered, finding additional expenses.

JAMES BURN, W.S.—DAVIDSON and SYME, W.S.—Agents.

REV. PATRICK BREWSTER, Pursuer.—*Sol.-Gen. Rutherford—  
J. M. Bell.*

No. 244.

MARQUIS of ABERCORN and OTHERS (Heritors of the Abbey Parish of Paisley), Defenders.—*Whigham—Forman.*

*Church—Stipend—Augmentation.*—Circumstances in which the Court refused to award any augmentation to the second minister of a collegiate charge.

THE Abbey parish of Paisley is in length about nine miles, and in breadth about three miles. There are above 100 heritors in the parish, May 24, 1837  
1st Division  
Teind Court

Respondent, he individually should be the proper party. He is unable however to distinguish the case from that of King v. Shirra, and he is of opinion that uniformity of decision in such a question is of chief importance. It is true that the payment of the money in King's case, was a long time before the action was brought. The act complained of was in the mode of its application; and if it could be legally held in that case that the money was paid to the bank, it is not easy to deny that it was so in the present case. It is not in the record that Kincaid, the young man intrusted by the advocates, refused to pay the money, or to leave it on getting the receipt given, or that he did at the time demand it back, when he saw that the receipt was not in the terms required; and though this may have arisen from a moral oversight, in reliance that the indorsation would be in conformity to the law laid before the respondent, yet, rightly or wrongly, the money was paid or delivered to the bank in the person of their agent. In fact, the only evidence the advocates have of the payment, is that very receipt, and the respondent's admission qualified as it is. The Lord Ordinary is, therefore, unable to find any difference in principle between this case and that of King, though he has considered it carefully, thinking the plea rather of a captious nature; and if the Court thought it necessary to go into it in King's case, even where it had not been stated in the House of Lords, he does not see how he can reject it in a case in which it was stated as a very first.

neither manse nor glebe, one-half payable in meal, the other in barley, with the sum of £15, for communion elements. In 1834 the minister, in a process of augmentation, was allowed a stipend of 10 chalders, and £20 for communion elements.

In 1836, the second minister raised a process of augmentation, in which it appeared that the two glebes of the first minister yielded respectively, the annual sums of £47, 10s. 5d., and £19, 1s. It appeared that, pursuant to the act of Assembly, 25th May, 1836, considerable portions of the Abbey parish had been allotted to several churches, and declared parts of the new parishes, erected by the act, spiritualia, around these respective churches. One of these was situated at the town of Johnston, and included that town; the population of this new parish was 6500. The church within this parish had been erected as a chapel of ease in 1794, and an ordained minister had constantly officiated there since that time. The other two were newly built. One, called Lavern Church, had a stipend assigned to it, containing 2300 souls. This parish included parts of three old parishes, and that which belonged to the Abbey parish contained a population of about 1800. The other new church was within the Abbey parish, but in St George's parish, in the town of Paisley. In allocating a district round this church, a suburb called Charleston, which was part of the Abbey parish, was thrown into the newly erected parish. That suburb contained a population of about 1700. The distance between the extremities of the old parish was diminished by the erection of these spiritual parishes.

In support of his claim for augmentation, the pursuer insisted

ion to the stipend of 22 chalders ; and on the precedents afforded by No. 244.  
previous judgments of the Court of Teinds in dealing with former  
cases of augmentation in this same parish.

May 25, 1837.

Irving v. Irving.

the defenders, who were the principal heritors of the parish, answered that, since the last augmentation, the erection of three spiritual  
parishes had been made, which relieved the ministers of the Abbey  
church, of a population amounting to 12,300 ; and that, as the Court  
could not award a manse or glebe to a second minister, they could  
not take the manse and glebe of the first minister at all into view in  
making a suitable provision for the second minister, because if they  
did so, that would be tantamount to making an allowance to the second  
minister in lieu of manse and glebe, which the Court had no right to do,  
directly or indirectly.

The Court were of opinion that no augmentation ought to be awarded.  
Their Lordships did not deliver opinions at length, but were under-  
stood to be influenced, partly by the circumstance that an ample stipend  
was already provided to the second minister, and partly by the erection  
of many spiritual parishes, which diminished the duties of the cure.  
On this last subject, the view of the Court was understood to be, that, so  
long as the churches, built in any parish, were mere chapels of ease, having  
a spiritual parish erected around them (as they were prior to the act of  
Parliament, 25th May, 1833), their Lordships had not been in the habit  
of taking these chapels of ease into account, in awarding an augmenta-  
tion ; but, since the erection of spiritual parishes under that act, the  
duties of the minister of the old parish were in so far circumscribed and  
diminished ; and this formed a circumstance to which the Court ought to  
give regard.

Their Lordships, therefore, refused to award any augmentation.

MACLEAN and HAMILTON, W.S.—J. NAIRNE, W.S.—Agents.

JOHN IRVING and MANDATARY, Pursuers.—*Brodie.*

No. 245.

vs CHARLOTTE HYSLOP, or IRVING, Defenders.—*D. F. Hope—  
T. Grahame.*

*De to Pursue—Approbate and Reprobate—Service.*—The pursuer and defen-  
der, a process of reduction, ultimately derived right to a heritable subject from  
a common author ; the defender was in possession ; assuming the common author  
to be in the right of the subject, and duly infeft therein, the pursuer had  
no right to insist ; but such assumption would have been contrary to the fact :—  
The pursuer was competent for the defender, though deriving right from the common author,  
to maintain possession, by founding on the defects in the common author's right,  
the effect of cutting off the pursuer's title to insist ; and judgment pronounced  
in favour of the defender.

his second son, deceased. This disposition contained an infest, and a procuratory of resignation. John Irving, junior, his father, and entered into possession of the subjects, but title. He died in 1825 without issue. Robert Irving, his next substitute in the disposition of John Irving, senior, did service before the bailies of Annan as "propinquior et legi of his deceased brother, John. He afterwards produced to the service, and the disposition of his father, John Irving, senior, and obtained an infestment from them, in July, 1825, which proceeded upon the procuratory of resignation contained in that of 1807. He afterwards entered into a postnuptial contract, he disposed these subjects to his wife, Mrs Hyslop or Irving, and failing issue of their marriage, he disposed the fee of one to John Irving, residing in Stanwix. The fee of the other was disposed to other nephews.

Robert Irving died in 1834, after having been in possession years, and his widow entered into possession of the subjects in her own right. In 1835, John Irving in Stanwix expedited a service before the bailies of Annan, as nearest and lawful heir of provision John Irving, junior, under the disposition and settlement of his father, senior, in 1807. He then raised an action against Mrs Hyslop for reducing her liferent right, removing her from the subjects, calling on her to account for the rents drawn by her during the session.

He pleaded that, under the disposition of John Irving, senior, the infestments were made in favour of his son, John Irving, junior, and his wife, Mrs Hyslop, and that the subjects were conveyed to them in full payment of the debt due to him by them.



es to him ; and, therefore, his disposition was altogether ineffectual, No. 245.  
 it was open to the pursuer to take up the subjects in the disposition, May 26, 1887  
 is service as heir of provision under that deed. He also pleaded, Irving v.  
 as all these results flowed from the assumption that the title of John Irving.  
 ng, senior, was a good feudal title to the subjects, and as both parties  
 red their right from him, as their common author, the pursuer must  
 ail in any question with the defender, because it was not competent  
 er to state any objection to the title of her own author, John Irving,  
 or. He denied that the liferent disposition of this subject was  
 ous, and alleged that the defender was otherwise sufficiently pro-  
 d for by her husband.

lrs Hyslop pleaded in defence, that the pursuer neither had a better  
 , nor could make up a better title, than her own. It was true, that,  
 er right flowed from the disposition of John Irving, senior, she could  
 repudiate it ; but, while founding upon it, she was entitled to point  
 that, from its nature, it was such that the pursuer could not extract  
 it the means of making up a preferable title to her own. But as  
 Irving, senior, was never infest, it followed that the pursuer, even by  
 ig up the procuratory in his disposition, could not make an effectual  
 nation ; and as John Irving, senior, was a natural son, having no  
 al right of succession in him, and as no means had been specified by  
 h a valid procuratory of resignation of these subjects could be taken  
 y the pursuer, he was unable to make up an effectual feudal title.  
 therefore, could not insist in a reduction of the defender's title.  
 , separately, as the defender's deceased husband, Robert Irving, had  
 in possession for above three years, and the pursuer's pleas, if  
 ssful, would show he had possessed on apparency, then the pursuer,  
 assing him by, and serving to a remoter ancestor, would become  
 , under 1695, c. 24, for the onerous deeds of Robert Irving,  
 ding the liferent provision of these subjects for the support of his  
 w, the defender. So that he had no interest to cut down her life-  
 upon one ground, when he was bound to give full effect to it on  
 er.

ie Lord Ordinary (Cockburn) “ repelled the objection to the title  
 rsue ; repelled the defences against the reductive conclusions of the  
 ions, and reduced in terms of this conclusion, and decerned ; found  
 he pursuer, having served himself heir to a remoter ancestor, passing  
 obert Irving, the deceased husband of the defender, who was more  
 three years in possession on apparency, is liable for the onerous debts  
 eeds of the said Robert Irving ; found that this liability may affect  
 ther two conclusions for removing and for payment,—therefore,  
 answer as to these conclusions, remitted to inquire and  
 as to the circumstances from which the onerosity or non-onerosity  
 deed by Robert Irving, in favour of the defender, is to be inferred,

into the interlocutor of 27th June, 1830, assented and  
decerned, and found her entitled to expenses." \*

\* " NOTE —As the Lord Ordinary has taken a somewhat differ-  
ent case from that argued by either party, he would have directed addi-  
tional facts to be lodged, had not this been a miserable subject between poor peo-  
ple ill able to bear the expense of the protracted proceedings which have  
taken place. As they will, of course, reclaim to the Court at any rate, the  
resources of the parties should be reserved for the Inner-House. The  
Lord Ordinary's interlocutor will be corrected, if he is wrong. The  
title is at once understood from the following explanation of the title.

" The subjects in dispute are situated within the burgh of Anna-  
burgh.

" For many years prior to 1807, they had been possessed by  
John Irving, senior, as proprietor. That person's right appears to have been  
possession was infeft; and, indeed, there does not appear to have been any  
premises in favour of any body for nearly a century prior to that  
afterwards adverted to. Nothing, however, turns on this, as nei-  
ther party object to the title of John Irving, senior, through whom both parties  
question derive right.

" John Irving, senior, in 1807, executed a disposition and deed  
whereby he conveyed the subjects to his fourth son, John Irving,  
heirs of his body; whom failing, to Robert Irving, his third son,  
heirs of his body; whom failing, to his second son William (father of the pre-  
sent pursuer) heirs of his body.

" John Irving, senior, died soon after 1807. He was succeeded  
by his son, John Irving, junior, who possessed for a considerable period  
alone. He died uninfest, and without issue.

" He was succeeded by the defender's husband, Robert Irving, the  
maker of the settlement, and it is on the supposed ineptness of  
this action is founded.

" It will be observed that Robert was the heir of conquest of

The pursuer reclaimed.

No. 245

LORD MACKENZIE.—I think the action should be dismissed, as the pursuer has no title nor merits to found on. I do not exactly follow the view of the Lord Ordinary.  
May 25, 1883  
Irving v. Irving.

the bailies, in virtue of the procuratory in the settlement of 1807, and got new infestment, more burgi, on 22d July, 1825. Thereafter Robert executed the settlement on his wife in liferent, now under reduction.

“Now the whole case, on the part of the pursuer, is founded on the supposed aptness of this title. It is said that Robert’s service was inept, as ‘*legitimus et propinquior hæres*’;—that he should have been served heir of provision: and never having been so, it is argued that the present case is identical with the noted precedent of Lord Cassilis and Sir Andrew Cathcart, when it was found that a general service as heir of line does not take up and transmit subjects which fell to be taken up by the party as heir of provision (Mor. p. 14,447).

“But there is a very material distinction between the cases. In the Cassilis case there was no title by infestment; the subjects, indeed, were held feu; and one of the arguments used by Sir Andrew Cathcart was, that there was no proper diligence of Earl David having any animus adeundi as to the subjects, which were ultimately found to belong to Sir Andrew.

“In the present case, however, Robert Irving did not stop with the service. He took that service, along with his father’s settlement, to the bailies of the shire—the proper judges of cognition—and got them to enter him on the exhibition of a special recital of the service and settlement. It appears at present to the Lord Ordinary that this was a valid infestment. It proceeded on competent diligence, detailed and set forth on the face of the instrument, that the substitution opened to the party to whom infestment was given by the bailie. For if John Irving, junior, died without issue, as was proved by Robert’s general service to him as nearest and lawful heir, then necessarily the succession opened to Robert, next substitute in his father’s settlement.<sup>1</sup> This is all the Court laid down as indispensable in the noted case of Glen and Peacock in 1826, which has been frequently referred to in questions of title.

“No doubt the service of Robert Irving would have been more correct if it had described him as heir of provision of John Irving, senior, seeing that John Irving, senior, never was infest. But Robert’s service as heir in general of John Irving, senior, was the proper evidence to show that that person had died without any issue, and so to give Robert a right to demand infestment from the bailies in these burgage subjects under the substitution in his father’s settlement.

This being the case, it deserves notice in this question, that the bailies of a shire have more extensive powers in giving infestment than notaries in feudal districts. The bailies are Judges of Cognition; and, if they do not proceed in a regular way, or on very insufficient or incompetent evidence, they are entitled to receive resignations and to give new infestments in burgage subjects. The Lord Ordinary thinks it would be a great stretch to reject the sasine in favour of Robert Irving in the present instance, as given improperly or erroneously by the bailies.

“Neither is this giving any undue effect to Robert’s service, such as it was. If Robert expedie a proper service as heir of provision, it would have carried the title to the procuratory and precept in his father’s deed, without sasine. But when a general service to his brother was followed by sasine under the substitution in his own favour in the old man’s settlement, that title is supposed to be now unchallengeable by any party.

In order to illustrate this question, the parties may refer to the case of Houston,

<sup>1</sup> 4 Shaw, p. 742.

inherent disposition to his wife, the defender; and, after his death, pretending to come after him in the order of succession to the tenement to cut down his title. But he has not a better right, of any sort, than the right of Robert Irving, the defender's husband. Even if he were to reduce the defender's title, he would just be obliged to go and beg the bailies of the burgh, without instructing any lawful right to him more than the deceased Robert Irving possessed. The pursuer does not think the true right to the tenement was in Robert Irving while he lived; the ultimate right was in him, considering the length of undisturbed possession his predecessors had enjoyed; the formal right also, so far as there was any right at all, was in him. How then can the pursuer, who does not connect himself with any ancestor who was infeft, raise a reduction? He has no title, and not even the shadow of a title, to do so.

LORD GILLIES.—I do not adopt all the views of the Lord Ordinary. I think the liferent right of the defender cannot be set aside at the instance of this pursuer. It is true that her title is not unimpeachable, but it is no better. They are both in *pari casu*. If it be clear that the defender had no title to grant her the liferent right, it is equally clear that she has no title to set it aside.

LORD COREHOUSE.—I concur in the view taken by Lord McKim. I adopt the findings in the interlocutor of the Lord Ordinary, which should be recalled. The onus does not lie on the defender to prove that the title was onerous; it is to be presumed onerous until the pursuer proves otherwise.

LORD PRESIDENT concurred in thinking that the pursuer's title was weaker than the defender's.

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4th February, 1784 (Mor. p. 14,420), where there were two burgages, one of which was found inent and the other contained. It appears to the

THE COURT recalled the interlocutor of the Lord Ordinary, repelled the reasons of reduction, so far as regarded the provision in favour of the wife, and found expenses due to her.

No. 245.  
—  
May 25, 1837  
Browning v.  
Hamilton.

W. BELL, S.S.C.—W. MARTIN, S.S.C.—Agents.

IN BROWNING and MATTHEW BROWNING, Pursuers.—*D. F. Hope*— No. 246.  
*J. Anderson.*

JAMES HAMILTON and OTHERS (Browning's Trustees), Defenders—  
*Sol.-Gen. Rutherford—Russell.*

JAMES WATT, Defender.—*Neaves.*

*Marriage Contract—Provision to Children—Jus Crediti—Trust.*—1. A father, infest in certain lands, became a party to the marriage contract of his son, J. B. junior, and disposed these lands to him under various real burdens; the son also undertook several personal obligations; the contract contained this clause:—"If there be a son or sons, or son and daughter, or sons and daughters of this marriage, alive at the dissolution thereof, in that event the said J. B. junior, obliges and his aforesaid to give and dispose to that son, or these sons, the just and equal part of the said lands of Benthall, to take effect immediately after his own decease, so to do no deed in hurt or prejudice of this obligation, only he is to have liberty to divide the same amongst the children of this marriage, if more than one son, as they shall think fit, or his children deserve:" this obligation was not recited in the contract of J. B. junior; he contracted debts to a greater amount apparently than the value of the estate, and granted real securities over it, after which he conveyed it to the trustees, with powers of sale, for the purpose of satisfying his debts, "so far as the value of the property will go:" the trustees sold the lands, and afterwards J. B. junior, predeceased his wife, leaving two sons, who raised a reduction of the heritable securities, and of the sale of the estate, contending that their right to one part of the lands, under the contract of marriage, could not be defeated by any act of their father, his creditors, or his trustees, and insisting in ulterior conclusions of total liability against the trustees:—Held that the pursuers were entitled to enforce any bonds or other deeds executed gratuitously or fraudulently by their father in prejudice of the obligation in the marriage contract, but not to compete with the onerous creditors of their father, or to challenge his onerous deeds. 2. Question whether, in special circumstances, a private sale by trustees to one of their number, was not reducible.

JAMES BROWNING, son of John Browning, senior, of Benthall, was married May 25, 1837. 1837, to Margaret Hamilton, daughter of Robert Hamilton, tenant in 1st Division. Cockburn. Benthall. John Browning, senior, who was infest in the lands of Benthall, became a party to the contract of marriage, which bore that he, John Browning, and under the reservations and burdens after-mentioned, gives, sells, and disposes to and in favour of the said John Browning, younger, his heirs and assignees whatsoever, absolutely, heritably, and irredeemably, all and hail the lands of Benthall, &c." "In which lands of Benthall the said John Browning, elder, binds himself to infest and sease his son, and his aforesaid, heritably and irredeemably, and the said Margaret Hamilton in a liferent of £5 sterling yearly, &c." "But this contract is granted and accepted with and under the burden of paying to the said John Browning, elder, as after-said, and the said John Brown-

as good, as the said John Browning younger, as  
him and his foresaids" to pay to his wife Margaret Hamilton  
vived him, the sum of £5 annually, during her lifetime; he  
ged him and his foresaids" to give her a dwelling-house, &  
remained a widow. A provision followed as to the distri  
moveables in the event of no child surviving the dissolution of

The next clause was in these terms:—"Item, if there  
sons, or son and daughter, or sons and daughters of this  
alive at the dissolution thereof, in that event the said John  
younger, obliges him and his aforesaid to give and dispon  
or these sons, the just and equal half of the said lands of  
take effect immediately after his own decease, and to do no  
or prejudice of this obligation, only he is to have liberty  
same amongst the children of this marriage, if more than o  
shall think fit, or his children deserve."

The two next clauses obliged John Browning, younger, (s  
saids, if there were no son of the marriage, to pay certain su  
to the daughter or daughters "procreate of this marriage an  
decease," with liberty to him, if there were more than one  
divide the sum among them as he thought fit; "and the term  
of these respective sums, to be at the first term of Whitsun  
tinmas happening after his decease."

These provisions were declared to be in full of all the le  
the wife and children, and Margaret Hamilton bound herself  
sterling, in name of tocher good.

A precept of sasine was inserted, "to the effect the said.



mother and survivor of them; "item of the sum of 90 pounds Scots ly to Mrs Ann Fleming, during her life, and reserving to the said Browning, elder," during his life, the portion of lands already specified in the disposition as so reserved.

No. 246  
May 25, 1811  
Browning v  
Hamilton.

Under the precept in this contract, John Browning, younger, was in- in 1778. Prior to this, the 4000 merks had been paid. The sasine recited the burdens of the annuity of £90 Scots, the liferent of £5 to John Browning, senior, and his wife or the survivor, and the liferent of £5, the house, &c. to Margaret Hamilton, who was Mrs John Browning, or; and also the portions of land reserved by John Browning, senior, himself. It did not recite any of the provisions in favour of the children. Two sons were born of the marriage, John (tertius) and Matthew, who survived the dissolution of it. It was not dissolved till 1832, at which John Browning died and left his widow surviving.

From 1777 till 1827, Browning, above designed as John Browning, younger, continued to exercise all the rights of an ordinary fee-simple proprietor of Benthall. He contracted a considerable amount of debts, in 1818 he granted a heritable bond and disposition for £800; in 1819, another security for £1000; in 1820, a third security to James Watt of Flakefield, for £1000; in 1823, a fourth security for £800; and a fifth security, which, like the third, was to the said James Watt, for £1200; and subsequently, a sixth security for £3600. These were respectively made real securities by infestment, and their total amount was £6020. In 1827, Browning executed a conveyance, with powers of sale, of his whole estate, heritable and moveable, including the lands of Benthall and also the separate lands of Lairdfad, to James Hamilton and others, "in trust, for the purpose of settling the granter's affairs, and paying the debts due by him, so far as the price thereby disposed would go." James Watt, already mentioned, who was a connexion of Browning, was one of these trustees. Under this disposition the trustees were infest. After repeated advertisements, the lands were finally sold in 1828, conform to minute of sale, by James Watt, by private bargain, at a price of £3650 for Benthall, and £200 for Lairdfad. John Browning, tertius, signed this minute of sale, in which he was designed as acting "for himself and the family." He was, at the time, held a mandate from his father to act for him. His father afterwards, in 1829, expressly ratified the sale, upon obtaining certain stipulations from Watt, as to the liferent of part of the houses, &c. The price of Lairdfad was higher, to the extent of £200, than the highest price of a previous sale by public roup which had proved abortive. The price of Benthall was less, to the extent of £350, than the upset price at the roup, but no offer had been made at that upset price. The minute of sale contained a power of redemption of the lands of Lairdfad, by John Browning, tertius, at any time within five years. Before concluding the sale, a meeting of the creditors of Browning was called by advertisement in the Gazette, and in two local newspapers,



...and also for determining that the pursuers' father was bound to dispose of one half of the lands of Benthall to them; that the defenders and successors in the subjects, were personally liable to the obligation, and should be ordained to dispose one half of the lands to the pursuers accordingly; but, in the event of the subsisting obligation being irreducible, it should be declared that the pursuers were liable under the marriage contract for the price of half the lands of the defenders, as his trustees, or jointly and severally as individuals, to be ordained to pay over the full value of half of the lands of the defenders at the time of their father's death, or otherwise to pay its amount in damages for their father's breach of contract in putting away the whole of the lands of Benthall.

Several pleas of a special nature were raised, involving whether the pursuers had homologated the sale to Watt, and from challenging it; and whether Browning's ratification of 1829 had been fairly obtained. Independently of special pleas, the pursuers contended (1), that under the provision in their favour in the contract 1777, their father was onerously bound to dispose of one half of the lands of Benthall to them. This obligation formed a condition of the title under which he himself acquired and held the lands, rendering him a mere fiduciary as to one half of the fee; and that neither he nor his creditors could defeat the pursuers' right to that half. The pursuers were therefore entitled to set aside the deeds under which the lands had been conveyed to Watt, and to obtain a conveyance from the defenders of one half of the lands of Benthall. (2) At least, the obligation in the contract was such as to bind the pursuers' father, immediately on the dissolution of his marriage, to dispose of one half of the lands to his son.

led to call on their father's trustees (who were aware of his obligation No. 246.  
 or the marriage-contract, and had nevertheless disposed away the May 25, 183  
 s), to make good to them the value of one half of the lands which Browning v.  
 , as representing the pursuers' father, and acting for him, had thus Hamilton.  
 away from the pursuers.

The defenders concurred in pleading, 1. That the provision relative to half of the lands of Benthall, did not enter the infestment of owning, the pursuers' father, or in any way qualify his right of fee, could not affect onerous third parties contracting on the faith of the deeds, in which no such provision appeared. But Browning had covered lands with real burdens, to an amount greatly exceeding their value ; unless the pursuers could reduce these securities, they had no interest

And as the infestment of the trustees in 1827 was for behoof of creditors exceeding the value of the estate, the pursuers had no right in a deed to cut down such infestment, unless they possessed not merely a jus crediti, but a right of preference which they had failed to instruct. 2. Browning's obligation only was to dispose one half of the lands "to take effect immediately after his own decease." This could not raise up a jus crediti, but merely gave a spes successionis, to children nascituri. And, according to the true construction of this clause, there was no obligation to execute such a deed, immediately on the dissolution of the marriage, or if the mother had predeceased ; but, in the case which actually happened, the father predeceased, so that no species of obligation could, according to any construction, have been purified against the father in his lifetime. And it was the more evident that nothing could vest in the pursuers during their father's life, as he had reserved right to divide the half of the lands, in any proportions which he chose ; and he might have exercised that right at any period of his life. 3. As the pursuers had no jus crediti, they could not challenge the sale to Watt, which had been ratified by their father. But even if the pursuers had a jus crediti, and could therefore call their father's trustees to account, in a count and reckoning, that was not the nature of this action. In regard to the personal conclusion against the trustees, to pay half the value of Benthall, the pursuers' interest in Benthall was less than nothing before the trust was granted ; and, at any rate, the trustees were liable in nothing in a just count and reckoning for their intromissions, and no such action had yet been brought against them.

In regard to the sale to Watt, the defenders pleaded that it could not be reduced as it had been ratified by Browning, the truster, and by the creditors ; and that the pursuers had no title or interest to challenge the sale, as they were postponed to the onerous creditors of Browning, who had ratified the sale, and whose debts far exceeded the value of the lands. Special pleas were also urged as to alleged homologation of the sale by the pursuers, especially John Browning.

No. 246.

May 25, 1837.  
Browning v.  
Hamilton.

The Lord Ordinary "sustained the defence and decerned; and found the pursuers liable

The pursuers reclaimed.

LORD GALLIES.—I think the pursuers have a marriage, to the effect of not being liable to be disponees of their father. But their right must be proved.

LORD MACKENZIE.—I take a view similar to satisfied that the pursuers are either preferable, compete with the onerous creditors of their father, event of their mother's predeceasing their father (the pursuers could have compelled their father to in their favour; in any terms whatever. And fide among his sons at pleasure, which power he might alone would imply that he could not have been so in favour of his sons, so as to vest their respective chose. And farther, the same inference might, provision in favour of daughters.

LORD COREHOUSE.—I think the pursuers do compete with onerous creditors of their father. I the pursuers, that their father was under any obligation to vest any right in the pursuers. Certainly competition with the gratuitous disponees of the interlocutor under review should be modified; but than that. The pursuers are creditors among her creditors, of their father.

LORD PRESIDENT was understood to concur.

THE COURT pronounced this interlocutor

\* "NOTE.—The conclusion for reduction of conclusion for the half of the lands of Benthall, the pursuers have a jus crediti under their father's conclusion for reduction of the trust-deed proceeds they are not only creditors, but preferable creditors. The Lord Ordinary is of opinion that they are neither the question with the bona fide onerous creditors of circumstances, he dealt with as having any jus that, without being creditors, and merely under that, be entitled to challenge the bonds as gratuitous. The challenge actually brought, solely on the ground—and if it be true that this character does not merit—as maintained at least before the Lord Ordinary are groundless.

"The only other claim is for reduction of the ground that he, being a trustee, could not purchase. The Lord Ordinary considers the application of the facts of the case. The sale was consented to and by the pursuers."

entitled to challenge any bonds or other deeds executed gratuitously, or fraudulently, by the late John Browning, their father, in prejudice of the obligation in favour of the children of the marriage, expressed in the contract of marriage between him and Margaret Hamilton their mother; but that they are not in the right under the said contract, to compete with the onerous creditors of their father, or to challenge his onerous deeds; therefore remit to the Lord Ordinary, to inquire and proceed farther in the cause, as to him shall seem proper, and reserve all questions of expenses.”

No. 241  
May 25, 18  
Maxwell v.  
Wylie.

WOTHERSPOON and MACK, W.S.—M'LEAN and HAMILTON, W.S.—CAMPBELL and M'DOWALL, W.S.—Agents.

DAVID MAXWELL and OTHERS (Thomson Mure's Trustees), Raisers. No. 247  
RS ADAM WYLIE, and DAVID PARK (Executor-creditor of Adam Wylie), Claimants,—*Ivory*.

DAVID WYLIE, and HIS TRUSTEES, Claimants.—*D. F. Hope—Ivory*.  
HENRY M'CULLOCH, Claimant.—*Maitland*.

DAVID MAXWELL and OTHERS (Trustees of David M'Culloch), Claimants.—*Maitland*.

MOWAT or CAMERON and HUSBAND, Claimants.—*Sol.-Gen. Rutherford—Moir*.

MRS WYLIE or CROSBIE and HUSBAND, Claimants.—*M'Neill*.

MRS WATSON, and MRS JOHN M'CULLOCH, Claimants.—*Penney*.

*Life and Liferent—Legacy—Succession—Vesting*.—1. A testator conveyed his estate, heritable and moveable, to trustees, who were directed to pay over the annual proceeds of it to his three unmarried sisters, and the survivor of them; and “after the death of the said three sisters, and the survivor of them, and, in case, of the termination of their respective liferents, I hereby direct my said trustees to make payment to my six nephews and nieces after named, or to the survivor of such of them as may have deceased before that time, of the several sums of money hereinafter specified; viz. to A. W. the sum of £1500 sterling, &c.; and the said six legacies shall bear interest from the first term, after the termination of the liferent hereby provided to my three sisters, and the survivor of them;” A. W. was the testator, and two of the sisters, but predeceased the third sister, and left issue:—Held that the legacy of £1500 had vested in him on the death of the testator, and was effectually assignable by him, during his life, or attachable by the executor-creditor, after his death.—Observed by the Lord Ordinary, that, when a legacy is left to one person in liferent, and another in fee, the subsistence of the liferent does not prevent the fee from vesting at the death of the testator; the rule appears to be the same when a fund is conveyed by the testator to trustees, with directions to pay the interest to one person during his life, and the principal to another, at the liferenter's decease. At least, this is the rule when there is no destination of the fee to an individual simply, and no ulterior substitutions are required to keep the trust up for the benefit of those substitutes.”

A testator had three unmarried sisters who survived him, and three married sisters who predeceased him leaving issue; he directed his trustees (under a settlement of his whole estate containing powers of sale), to pay the annual proceeds to the three unmarried sisters, and the survivor of them; “after the death of my said sisters, and the survivor of them,” the trustees were directed to pay certain legacies, and, “after the payment of the said several legacies” they were directed “to pay

14. Corehouses. Marion, were unmarried, the other three, Mrs M'Culloch, M  
Mrs Wylie, were married, and each had issue. In 1810 A  
Mure executed a disposition and settlement conveying to trust  
estate heritable and moveable, then belonging to him, or  
belong to him at his death. The primary purposes of the  
to certain provisions to his wife, and to his children if he shou  
The settlement then proceeded:—"5to, In the event o  
no lawful children procreated of my body in my present  
marriage, the whole of the remainder of my estate and e  
conveyed shall be liferented by my three unmarried si  
Margaret, and Marion Thomson, or by such of them as  
existence at the time, in equal proportions; and I hereby  
rize, and empower my trustees to pay over to my said thr  
the survivors or survivor of them, during their respective l  
proceeds of the remainder of my said estate and effects." 6  
was left to each of the trustees. "7mo, And lastly, after  
my said three sisters before named, and the survivor of  
course, of the termination of their respective liferents, I l  
and authorize my said trustees to make payment to my six  
nieces hereinafter named, or to the child or children of such  
may have deceased before that time, of the several sums of  
inafter specified, viz.: to John M'Culloch, manufacturer  
and Janet M'Culloch, his sister, wife of Robert Watson  
banker in Glasgow, the sum of £1500 sterling each; 1  
Mowat, daughter of John Mowat, Esquire, of Shetland, n  
William Cameron, lieutenant of the 78th regiment of foot,

e my said trustees to pay over the whole residue and remainder No. 247.  
aid estate and effects hereby conveyed, if any be, to the said  
t, David, and Adam Wylie, by equal portions," &c.

May 25, 188

Maxwell v.

Wylie.

use here succeeded, the terms of which raised a question of con-  
of a special nature; the clause declared, that if one or more of the  
should succeed "as heirs" to a part of the lands of Ingliston,  
ere at that time vested in trustees for behoof of the testator's bro-  
muel Thomson, who was fatuous, then such legatee was to forfeit,  
eat, his legacy. The terms of this provision are not quoted, as it  
wards held by the Court not to apply to the case which happened  
uel Thomson predeceasing Adam Mure Thomson, so that the  
Ingliston were not taken up by any party "as heirs" of Samuel  
n, but fell under the disposition of Adam Thomson Mure's own  
ent.

May 1st, 1822, Adam Thomson Mure executed this addition or  
to his settlement:—"I do hereby, in virtue of the reserved  
nd faculty contained in the foregoing trust-disposition and settle-  
recall the same in so far as it directs and authorizes my trustees  
named to pay over the whole residue and remainder of my estate  
cts thereby conveyed, if any be, to the therein designed Margaret,  
and William Wylie, by equal portions, to the same effect as if  
ad been no such clause as to the destination of the residue inserted  
aid trust-disposition and settlement; and in lieu and place of the  
stination of the said residue and remainder hereby recalled, I  
he said residue and remainder of my estate and effects to be paid  
my said trustees to the heirs who by law would have been entit-  
ucceed to my heritable property, had no settlement thereof been  
d by me; declaring that nothing herein contained shall hurt or  
he liferent right created by the said trust-right disposition and  
ent in favour of my three sisters therein named, and the survivor  
."

n Thomson Mure died soon afterwards. He was survived by his  
nmarried sisters, Mary, Margaret, and Marion. The representa-  
his deceased married sisters were, respectively, David M'Culloch  
houskie, son of Mrs M'Culloch; Mrs Mowat or Cameron, wife  
ain Cameron, and only child of Mrs Mowat; and David Wylie,  
-Clerk of Justiciary, eldest son of Mrs Wylie.

823, Adam Wylie, the testator's nephew, married, and, by ante-  
-contract, he assigned to trustees for behoof of his wife and himself,  
ent allenarly, and the children of the marriage in fee, the above-  
ed legacy of £1500, under burden of the liferent of the testator's  
Adam Wylie died without issue in 1832, having been predeceased  
of the testator's sisters, but survived by the third. He was in-  
and after his death, David Park confirmed to him as executor-

legacy, as having vested in Adam Wylie. They pleaded the legacy of £1500 was burdened with a liferent to the testator, the fee was directly and unconditionally bequeathed, and it vested on the testator's death. The other parties, interested in the trust-estate, answered, that the trustees were only to hold the legacy "of the survivor of the three sisters of the testator" of £1500, to each nephew or niece specified, "or to any of such of them as may have deceased before that time;" and that it was to bear interest only from the first term after the death of the last surviving sister. Thus the legacy was made payable only to such niece as survived the whole sisters, or to the issue of such niece surviving. And as Adam Wylie died without issue, before anything had vested in him.

2. The second question related to the period when the residue of the estate had vested; and to the number of shares it was to be divided.

One of the unmarried sisters, Mary, had executed a settlement of David M'Culloch, in June 1822, conveying to him her whole interest under the settlement of Adam Thomson Mure, except a reserved right. This was, after her death, conveyed by David M'Culloch to trustees, along with his right and interest as the representative of M'Culloch a deceased sister of the testator. The other two sisters, Margaret and Marion, in Oct. 1823, had similarly conveyed their whole right and interest under the settlement to Henry M'Culloch of David M'Culloch. In these circumstances it was pleaded by Adam Wylie, and Mrs Cameron, who each represented a married



They were expressly restricted to a liferent by the original settlement, and the intention of the codicil was not to enlarge their right in any, or to superinduce, incongruously, a partial right of fee, upon their right of liferent; but merely to direct a different distribution of the among the heirs, ab intestato, who should be existing when the period of distribution arrived. Each of these three parties should therefore have an equal share of the residue.

Henry M'Culloch, and the trustees of David M'Culloch, answered, though a liferent was provided to the unmarried sisters, the fee was suspended any where during their life, but vested immediately after the testator's death, in the parties to whom it was conveyed. In the settlement these had been Margaret, David, and Adam Wylie; but for the codicil, the fee would have vested in them so soon as they died. But the codicil revoked that provision, and, in lieu of it, left the residue to be paid to the testator's heirs, in heritage, ab intestato. Had there been no settlement, these heirs were his three unmarried daughters and the representatives of the three married sisters, each taking an eighth-share. Henry M'Culloch was therefore entitled to two sixths in right of Mary, and Margaret Thomson Mure, under their settlement in his favour; and the trust-dispones of David M'Culloch were in right of two sixth-shares, one, in virtue of the conveyance from Thomson Mure, one of the unmarried sisters, and the other in right of the deceased Mrs M'Culloch, one of the married sisters, whose representative David M'Culloch was.

Lord Ordinary pronounced this interlocutor:—" Finds that the legacy to Adam Wylie, who survived the truster, did not lapse in consequence of his predeceasing one of the truster's three sisters, to whom a liferent of the residue of the trust-estate was provided: Finds that the heirs, who by law would have been entitled to succeed to the heritable property, had no settlement thereof been executed, are his sisters Mary, Margaret, and Marion, who survived him, and the representatives of Nicholas, Jean, and Janet, who predeceased him. Finds that the fee of the residue of the truster's estate, in terms of the settlement of 1st May, 1822, is divisible into six shares accordingly; that it is due to those persons at the death of the truster, as it would have been to them in the character of heirs-portioners if he had made no settlement, and that it is now payable to them, or to their heirs and assigns: Finds that the clause in the trust-deed (by which it is provided, that any of the legatees should succeed as heirs to the lands and estate of John, Knockbrex, and others, the property of the truster's brother, Thomson, the person so succeeding, should have no right to the residue of the trust-estate provided to them by the truster) did not take effect, in respect that Samuel Thomson was survived by the truster, who succeeded to the said lands as heir, and who has disposed of them by the settlement, which has given rise to this process: Therefore, prefers the



vid Wylie and his trustees reclaimed.

No. 247.

**THE PRESIDENT.**—I think the interlocutor is right. I see no difficulty in May 25, 1831  
Maxwell v. Wylie.  
ing it to have been the testator's intention to give his unmarried sisters a  
liferent, and at the same time, a partial fee, of his estate. It appears to have  
his primary object to secure their comfort, which he did by providing the  
t of his whole estate to them. And he finally directed the fee of the residue  
estate to be shared among his heirs, ab intestato, which had the effect of  
one-sixth share to each of his unmarried sisters, along with each of the  
rs or nieces representing his married sisters who were all deceased.

**THE GILLIES.**—I do not think that any construction of this settlement can be  
d, which shall be free of doubts; but I concur in the view of it which has  
aken by the Lord Ordinary. The testator first of all bestowed the liferent of

he intended to dispose of his property in a manner so unusual and capricious.  
stance, it is alleged, can be found, in which a person making a settlement  
d his trustee to give a liferent of his estate to certain individuals, and a share  
fee likewise to each, both existing at the period of his death. On this point,  
rd Ordinary has felt considerable doubt. It is by no means improbable,  
e truster intended that his sisters should have no interest in his estate beyond a  
t, or rather, it is certain that this was his intention in 1810, when he executed  
st-deed. By that deed, he conferred upon them the liferent alone, and gave  
to his niece, Margaret Wylie, and his nephews, David and Adam Wylie.  
clause had remained unrevoked, it is thought that the fee of the residue  
have vested in his niece and nephews from the date of the truster's death,  
bly to the decision in the case of Wallace just referred to, which ruled the  
Marjoribanks, 18th February, 1836, and several intermediate cases. These  
ns have not been shaken by Mowbray v. Scougall, and others, 9th July,  
for in that case there was a series of substitutions to various persons in life-  
nd others in fee, after the extinction of the first liferents, which raised the  
ce, that the truster meant the trust to subsist after the first liferents had  
l, and consequently, that the fee was to remain in the trustees for the benefit  
substitutes after that event had taken place. That presumption appears to  
rd Ordinary to have run through all the cases which seem at first sight to be  
d to the judgment in the case of Wallace.

at in the present case, by the original deed 1810, the liferent was provided  
truster's sisters, and the fee to the three persons named, with no substitution  
ot even to the heirs of those fiars.

here seems no reason, therefore, to doubt, that if this settlement 1810 had  
ed unaltered, the three Wylies would have been vested with the fee from the  
f the testator. But the codicil of 1st May, 1822, simply recalls the bequest  
fee to these three individuals, and provides it to the heirs-at-law, who would  
en entitled to succeed if he had made no settlement, that is, to his six heirs-  
ers at the period of his death, who come exactly into the place of those  
tim fiars in the original settlement, and in whom the fee must vest in the  
anner, and to the same effect, as it would have vested in those nominatim fiars.  
may be conjectured, indeed, that when the truster provided the fee to his  
ortioners by the codicil 1822, he meant to except the three heirs-portioners  
n he had previously bestowed the liferent. But there is no declaration  
ed or clearly implied to that effect. There is no inconsistency in a liferenter  
also a fiar of part of the subject liferented; and the Lord Ordinary is inclined  
h, that in the construction, not of a privileged instrument like a testament,  
a disposition of heritage, executed in regular form, and in liege poustie, it  
he, it is reasonable to interpret that exception on the strength of conjecture

**LORD MACKENZIE.**—I cannot say that I am of a different opinion to the Lord Ordinary. The words of the codicil which direct the sum to be paid over by my said trustees "to the heirs, ab intestato, create an obligation, as the period of payment is expressly postponed until after the death of the last unmarried sister. But still the substance of the settlement is to be paid among his heirs at law; his heirs ab intestato. Now his own survivors are not only among that class, equally with the representative of the deceased, but there can be no doubt that the testator was fully aware of this, and that he meant to bestow a share of the residue on each of his survivors equally with the representatives of his deceased sisters; at least if it is conjectured that he had any other meaning, he has used words which are plain and too express to allow the Court to act on that conjecture.

**LORD COREHOUSE** intimated that he retained the opinion which was expressed in the interlocutor under review.

**THE COURT** adhered.

**J. GORDON, W.S.—D. WELSH, W.S.—J. MCCLELLAN, S.S.C.—A.**

**No. 248.**     **EATON, HAMMOND, and Sons, Pursuers.—D. F. HOPKINS, —**  
**MACGREGOR'S EXECUTORS, Defenders.—Sol.—Gen. RUTHERFORD, —**  
**son—Graham—Bell—Penney.**

*Bill of Exchange—Executors.*—1. Parties with whom a bill (when renewed) was discounted, allowed it to lie over for some months unpaid, without any communication had with the acceptors; at the expiration of the term, the drawer, who truly had no claim of debt against the acceptors, they

gave powers to Mr Archibald Campbell of London for managing the affairs. In October, 1827, Campbell, who was at the same time an executor of the late Sir Alexander Campbell, represented to these parties, without foundation, that a debt of £3,300 was due by the trust-estate of Sir Alexander's executors, and he accordingly drew a bill upon them for this sum, which was accepted by them. The bill was in the following tenor:—

No. 248

May 25, 1828  
Eaton v. Macgregor's Executors.

“ London, 16th October, 1827.

,300.

Six months after date, pay to me or my order, the sum of three and three hundred pounds sterling, on account of the estate of the Major-General Alexander Murray Macgregor.

(Signed)

“ ARCHD. CAMPBELL,

“ One of the Executors of the late

“ Sir Alex. Campbell.”

the Right Honble. Lady C. Murray Macgregor, the Earl of Caithness, and Sir Evan John Murray Macgregor, Bart., the executors of the said Major-General Alexander Murray Macgregor.”

(Accepted, payable at No. 6, Regent Street, London.)

(Signed) CHARLOTTE MURRAY MACGREGOR.  
CAITHNESS.

E. J. MURRAY MACGREGOR.”

This bill was discounted by Campbell with the pursuers, Eaton, Hammond, and Sons, bankers in Newmarket. When it became due the pursuers agreed to take a renewal, payable at four months, which on coming due was again retired by a new bill for the same sum accepted before. This last bill became due on 20th February, 1829, but was not paid, being allowed to lie over on promises of payment by Campbell, and no communication on the subject was made to the acceptors. In May, 1830, Campbell wrote as follows to Eaton, Hammond, and Sons:—“ I do most fully excuse you for what you write to me, and in consequence thereof, I will write most pressing to Edinburgh, to demand of me forthwith part of the £12,000 now due to me by the executors of General Macgregor and Sir Evan Macgregor, the whole of which I ought to have received when I went down there in October 1829, and if you will send me the bill you hold, accepted by these executors, and discharged (I mean without your indorsement or discharge), I will hand it down to my agent there, who, I think, will be able to

of obtaining delivery of the bill from Sir Alexander Cam  
which was appointed by decret of that court to be m  
this was accordingly done.

Thereafter Eaton, Hammond, and Sons, having thus  
sion of the bill, raised action against General Macgreg  
acceptors, for payment of the contents.

In defence against this action it was pleaded—

1. The pursuers have, as in a question with the d  
legal possession and right to sue on the bill in question.  
document from Campbell by simple delivery, no com  
subject having ever taken place between the pursuer  
and the possession of the bill thus acquired through  
sole ground of the pursuers' title to sue, it seems to  
would lose the lawful possession of the bill, as well as  
thereon, also by and through the act of Campbell, and  
by redelivery of the bill to that individual, and the tra  
debt operated thereby.

2. The pursuers never had any legal claim agains  
beyond what would have been competent to Campbell  
have, by their own laches and general conduct, now lost  
the defenders upon the bill in question.

3. The defenders having accepted the bill merely as  
the late General Macgregor, and not being in possessio  
try funds, no claim for the debt can be maintained again  
To this it was answered—

1 The circumstances under which the pursuers parted

, or are alleged to have done, can relieve the defenders from No. 24  
liability as acceptors.<sup>1</sup>

acceptance by the defenders is in their individual characters ; May 25, 18  
either as individuals, or as General Macgregor's executors, they Eaton v.  
Macgregor's  
Executors.  
either case liable.<sup>2</sup>

Lord Ordinary decerned in terms of the libel, finding expenses  
added to his interlocutor the subjoined note : \*—

Bar v. Southey, 1826, 1 Moody and Malkin, 14.

v. Morins, 2 Broderip and Bingham, 406 ; Thomson v. M'Lauchlan,  
829, ante, VII. 787.

case might have been attended with difficulty, at least as to the *personal*  
the defenders, if the parties to the bill had really stood in no other rela-  
h other than appears on the face of that instrument ;—that is, if the  
ing merely one of Sir Alexander Campbell's executors, had truly in that  
equired and obtained the acceptance of General Murray Macgregor's  
satisfaction (or security) of a debt due by one of these estates to the  
t the drawer was not merely an executor of Sir Alexander Campbell—  
o the factor, commissioner, and confidential manager for Macgregor's  
nd it is manifest, from the letter of 22d October, 1827, and all the sub-  
respondence, that it was truly in this last character, and not in the other,  
l was drawn by him, and accepted by his constituents. That letter is  
ct or degree an application for payment or security on the part of Sir  
Campbell's executors. It is solely and emphatically a confidential letter  
actor and manager of Macgregor's trustees to his constituents, on the  
ie trust, and their acceptance is required, not, in the first instance at least,  
or liquidate the debt due to Sir Alexander Campbell, but, in the most  
l distinct terms, to enable him, their factor, *to raise money* to carry on  
s of the trust. If money was raised upon it, therefore, by discounting  
k, and the proceeds actually paid over into the hands of the factor and  
er of these trustees, it is thought that there could be no more doubt of  
*personal* responsibility to the bank, than if the discount had been required  
oney paid over to themselves personally, and without the intervention  
it or representative whatever. Payment made to their agent, in short,  
ence of a mandate to him to raise money on their acceptance, is to all  
purposes payment to them, and if the drawer had had no connexion  
exander Campbell, but had drawn the bill in his individual character  
ees, in consequence of the arrangement proposed in the letter referred  
t supposed that, after the money was so raised, the defenders would  
een advised to dispute their personal liability, although they might have  
heir subscriptions (which they have *not* done here), the designation of  
General Murray Macgregor. The mandate to raise money on their  
though in that official character, was the most complete pledge  
that they had trust-funds wherewith to repay it ; and the fact that the  
actually taken by them, through their factor and agent, made them as  
r liable, *personally*, for such repayment, as they would have been for  
price of any article for which they had bargained with third parties,  
an account of the trust.

Does it make any difference that the drawer was actually one of Sir  
Campbell's executors, and drew the bill under that designation ?  
the terms and plain object of the letter of 22d October, the Lord  
humbly of opinion that it does not. It is still manifest that the  
leading object in granting the bill was, not to pay the drawer a debt due  
as Sir Alexander's executor, but to enable him by discounting it, to



No. 248. *Macgregor's executors reclaimed.*

May 25, 1837.  
 Eaton v.  
 Macgregor's  
 Executors.

The Court were clear that the Lord Ordinary

raise money for the immediate use of the trustee in view the *secondary* object of vouching, or ultimately supposed to be due to the executors, but, at a *time* taken in payment of that debt. It was first of all raised upon it to be applied, it might be, in extinction also, of any others that might prove to be more accepted and sent to the drawer, that money in place, is quite enough for the pursuers, since, if discounting it with them, it seems quite impossible that he did any thing but what they expected, and that, because he did not apply it in paying off in other way, they should be excused from repaying the value on their mandate and credit. The Lord Ordinary that the main reason for drawing the bill as for Campbell's estate, was not to secure that debt the discount of the bill by connecting it with a re-appearing to give the additional security of the over and above that of the acceptors. There were executors by this way of proceeding, but in a *quality* those who had actually advanced the money, the acceptance in order that money might be raised conclusive against them.

" They maintain, indeed, in their case, that the bill was to be so raised, or that their bill was to be actually believed all along that it remained in the hands of Sir Alexander Campbell, and was retained by him supposed to be owing to those parties. The first question is, that, if the bill was actually discounted, and accepted, it is irrelevant in a question with the discounters, to account for such an avowment on the part of the drawer, and veracity are above all questions. But the executors misunderstood their instructions when they made themselves have forgotten the origin of the transaction, and the confidence in their commissioner, when they drew it. For it is palpably inconsistent with the explicit terms of the first bill for their acceptance, and not less so with the terms of its renewals. If the bill had been truly drawn for their debt to Sir Alexander's executors, there could be no reason for renewing it all along, so long as it was in their hands, they were undeniably acting in concert with the drawer, and it is inconceivable that it should not have been renewed when it came in for its payment. Instead of this, however, the first bill was near falling due, he applied to the drawer for renewal, in order to retire it, and is so anxious to get it off to Lord Cathness, before getting it into the hands of the acceptors, who was in his own neighbourhood, and in the hands before the 8th of April, in order to retire it before the 16th. The Lord Ordinary must say, that to suppose that any of the parties to this correspondence had the first bill was still in the hands of the drawer, and had been discounted with a third party. If the facts had been set forth in detail, it could not, in the more completely of that fact.

But then it is said that Campbell afterwards

the merits, though without concurring in all the views contained in No. 248.  
note; being of opinion that, had the question been between Campbell,

May 25, 1831  
Eaton v.  
Macgregor's  
Executors.

ders as still the *holder* of those bills, and at last actually raised action at them in name of his brother executors in that character. Now, there is to be no doubt that he did in many respects deceive and impose upon his constituents. But in so far as concerns the statement in his subsequent letters, he was at those dates the holder of the bill in question, the Lord Ordinary is of opinion that it imports any contradiction to what he conceives to have been the clear meaning of his former communications, or ought to have led the defenders to believe, even at those dates, that those bills had never been discounted. The and indeed the only consistent meaning of the latter statement was, not that he had not been originally discounted on their credit, but that he had since been obliged to advance his own funds to *retire* them; and this, accordingly, is what the defenders have themselves stated, and apparently proved, was precisely his position. He soon after gives in to them an account, in which he states, that he had advanced between £10,000 and £12,000 *in advance* for the trust-estate; and one of the items of that *advance*, alleged to have been made as their factor, and of which the bills on them to relieve him, is the amount of those bills.

If he had merely kept the bills in his hands as one of Sir Alexander Campbell's trustees, he might, indeed, have been a *creditor* of the trust in that capacity. He could never have stated this debt due to him in that character as an *item of actual advances as factor*, unless he had first paid to the executors the money raised by the discount, and afterwards retired the bills with his own. But it is quite certain that he never did any such thing,—the bills being to this day undischarged in the hands of the pursuers; and the defenders now maintain that they never supposed he had done so. It is very remarkable, indeed, not only that he never reported or exhibited any discharge from Sir Alexander's executors, or in any way pretended that their claim had been satisfied, but that from the very beginning, he never states them to be anxious for payment, or holds out their acquiescence as a ground for granting or renewing the bills. He first asks them as a condition of raising money for carrying on the business of the trust, and ultimately asks for payment in liquidation merely of the great balance which he alleges to be owing to himself individually, in consequence of his advances as factor. What probably meant the defenders to believe, and what (if they trusted to him) they must have believed, from his whole communications to have believed, was, that he had employed the proceeds of the discount in *the other* affairs of the trust, and afterwards retired the bills with his own money.

In a question between the acceptors and those who discounted on their credit, it is of no consequence that this was false; nor, in fact, would it have been of any consequence that he had made the defenders believe that this particular debt due to the executors had been paid off with the proceeds of the discount. The bankers who gave their money on the faith of the defenders' acceptance, must still be obliged to receive payment, however their agent may have misemployed that money, or whatever false account he may have given of its application.

His view of the true nature of the transaction disposes not only of the defenders' objection to a *personal* liability, but of almost all their other defences. The Lord Ordinary is of opinion, that there is no ground whatever for the plea of *ratio debiti*, and that nothing can be more extravagant than the attempt to apply to a case like the present, the rigorous, and by no means universal rule of law, that even an onerous acquirer of a bill may be liable to the exceptions coming against the drawer if he does not acquire it till after it is past due. The ground for maintaining such a doctrine here seems to be, that the pursuers had to take two renewals of the original bill, and are now suing on the last renewal, which bears date, of course, a considerable time after the first bill was due, and this, the defenders appear to think, is equivalent to their having taken the bill itself after it had remained so long dishonoured. It seems to be

pursuers and Sir Alexander Campbell's executors, whereby they to allow the suit against the defenders to proceed in the name actually covenanted that the defenders should receive no notice or preferable claim upon their part to the contents of the bills as was founded. This, at first sight, has no doubt an unfavourable is plausibly represented as tending to persuade the defenders to no unsatisfied discounters in existence, and consequently of preventing such measures for their relief as might still have been as duly apprised of the fact.

" Upon farther consideration, however, the Lord Ordinary is was nothing in this arrangement which should deprive the pursuers to insist against the proper debtors for this just and onerous debt that the defenders may have suffered prejudice by the course although there is no evidence that they have actually so suffered. of the duty of the onerous holders of a bill to be watchful for the acceptors; and there are many ways in which they may incidentally interest, either by acting or abstaining from acting, without forfeiting right to recover from such acceptors. Provided they do not fraudulently, or knowingly adopt or abet the frauds of others, it is the course which a regard to their own interest may suggest; however in the result that a different course would have been more advantageous to the debtors. Now, there is not the slightest appearance either of negligence on the part of the pursuers in this case, any more than on that of Sir Alexander Campbell's executors, the only other parties to the agreement, and when duly attended to, seems fully to justify the course they pursued in presenting back the bill to the drawer, at his request, they probably should sue on it in their names; and it seems undeniable that they dealt with it for their interest, and *quoad hoc*, as their agent. But for other indorsement on it but that *blank* one, under which it had been presented to the pursuers, it was unfortunately in his power to fill up above the name of the executors of Sir Alexander Campbell, or indeed to present it to any other person. This power he seems accordingly to have exercised without the pursuers, and to have delivered over the bill (or rather, as it appears from the original bills which had been given up on receiving their release

the pursuers, the parties in right of the bill, of their legal claim No. 248.  
the defenders, acceptors thereof. In regard to the question of

May 25, 1835  
Eaton v.  
Macgregor's  
Executors.

at all events, by mixing up their own competing claims to the sum in with the main question of the acceptors' obligation to pay, and therefore ly occurred, as a prudent and proper arrangement, to allow the suit n progress at the executors' instance to proceed, and to stipulate only question as to who should have the ultimate benefit of the expected ould be afterwards settled in a separate discussion. In all this, it appears ord Ordinary there was nothing culpable or savouring of fraud, neither e seem to have been any purpose of actual or positive concealment, but resolution not to compear as parties in the existing suit, nor to mix up ion of the executors' accountability to them for what they might recover bill, with that of the defenders' responsibility to its legal holders. By sement of the drawer, and the actual possession of the document, the had undoubtedly a legal title to demand payment and to discharge the ough they might ultimately be bound to account to the pursuers for the nd so far from seeking to dissemble or conceal the existence of such a is remarkable that it was openly brought forward in the Court of y by the pursuers at a very early stage of the executors' action against the , and in a suit to which Campbell, from whom their whole right was was regularly called as a party. If there were any good objections to the in the person of the executors, it is plain enough that this was unknown rsuers; and it is not alleged that they ever did any thing to embarrass ders in maintaining these objections. The Lord Ordinary must, however, hat the defenders take much too high a tone in now assuming, as a matter ty, the validity of these objections. They have advantage enough, no the present state of the case for taking this tone. For the pursuers, to e whole question is irrelevant, have no interest to complain of it; and the , whom alone it affects, are no parties to the present action. It is inaccurate, however, to ascribe the ultimate abandonment of the suit by ators, to their conviction of the justice of these objections, it being matter istration, from mere inspection of the dates, that this step was the result, necessary result, of the previous decision in the Chancery suit, by which e interest in the bill had been finally adjudicated to belong, not to those s, but to the pursuers. The date of that decision is 21st July, 1834, and ators' action is proposed to be abandoned for the first time, soon after the own of the Court of Session in November thereafter. The defenders' s to the executors' claim of debt may or may not be invincible. But, r, there has been as yet no judicial determination on the subject. The as not decided on its merits, but was withdrawn and abandoned because ers have been found to have no right to the bill on which alone it proceeded; not only quite open to them still to bring forward their claim in another t the defenders themselves seem to intimate, that steps have already been t that purpose.

this, however, is irrelevant to the merits of the present case. The e fact is that the defenders deliberately granted their acceptance for the of the drawer's *raising money on it*, and that the pursuers did give their n the credit of that acceptance. In these circumstances, it is thought have no valid defence against payment, except by clear proof, either of a agreement to release them from their obligation, or of some actual fraud onesty operating to their loss; and as the Lord Ordinary is of opinion e is no such proof, he cannot but repel the defences. Expenses seem to f course, more especially as the defenders have rested their case almost ly on an allegation which it is impossible to reconcile with the written of process."

*Manse.*—When a manse though “capable of being repaired” requires repairs to render it at all habitable, it is not incompetent to do what may be necessary to be done, whether by repairs or alterations, to render the manse sufficient and suitable to the circumstances and a competent residence for the Minister of the parish.”

May 25, 1837.

2d Division.  
Ld. Moncreiff.  
T.

THE parish of Symington, in the Presbytery of Biggar, Lanark, is of the yearly rental of £2,400. The whole of the manse is valued at £75, and the stipend of the minister is made up to £150 under the Small Livings Act. The population, according to the census of 1831 was 364, but was said now to have increased to 511. A new manse was built in 1790, at an expense of £222, 14s. 4d. The old materials of the former manse, estimated by the surveyors, have been worth £50, and it was accepted by the Presbytery on the terms of law.” In the year 1824 a washing-house was built, and repairs executed, costing in all about £50, but with the exception of these repairs appeared to have been made on the manse since 1834, the present incumbent, the charger, Mr M’Lean, was of the parish, on which occasion the heritors, with a view to put the manse in a proper condition for his residence, employed Mr James Buchanan, a burgh architect, to inspect it. Mr Angus accordingly inspected it and returned a report to the heritors specifying the repairs which he considered necessary to render it a fit residence for the minister. The heritors, however, resolved not to adopt his report, but to give an addition of a kitchen and a room above, and employed a tradesman (Mr Robertson) to give them a specification of the cost of such addition, being of an inferior description to those

tery to inspect the manse and report, he presented a copy of the report No. 2  
 prepared for the heritors, to which he adhered. This report stated the May 25,  
 manse to consist of,—on the ground-floor, of which the ceiling was 8 feet Carmich  
 7 inches in height—two rooms of 15 feet 9 by 13 feet 4, and 13 feet 2 by M'Lean.  
 10 feet 3, respectively, a kitchen and back kitchen, and two closets with  
 borrowed lights about 6 feet square ;—on the bedroom floor, to which the  
 access was by a wheeling timber stair—four rooms and a closet, the largest  
 room being 13 feet 3 by 12 feet, and the height of the ceiling 8 feet 3  
 inches ; and in the garret—a sleeping room and an open loft or lumber  
 room. There was not a wall press in the whole house. The report then  
 proceeded as follows :—“ The masonry of the walls is standing quite  
 straight, and appears to be substantial ; the whole of the pavement is  
 much out of repair, and it, along with the hearths in the ground-floor,  
 appears to be exceedingly damp ; the windows in front are 5 feet high by  
 2 feet 9 inches wide. The flooring and joisting of the bedroom floor, and  
 the timber work of the roof, are good ; the flooring of the garrets and  
 ground-floor, not so good ; the sleepers of the latter are decayed in several  
 places ; every other portion of the joiner work throughout the manse is  
 of the most slim description ; the partitions are of wood, and four inches  
 thick, including standards, lath, and plaster ; the room-doors are from 1½  
 inches to 1½ inches thick, 6 feet high, by 2 feet 10 inches wide ; the most  
 of the locks are out of order ; none of the scuntions of windows are lathed  
 or lined with deal ; the inside of the exterior walls is only partly lathed ;  
 the ingoings and breasts of windows in general have neither bound nor  
 plain deal linings ; no chimney-piece in any of the rooms, and only a few  
 have jamb mouldings ; the plaster throughout the whole of the manse is  
 in very bad order ; none of the floors are deafened ; the stair to bedrooms  
 is of wood, and of a very superficial description ; none of the window  
 sashes have been hung excepting three, and these single hung ; the most  
 of the windows are out of repair ; the slater work of the manse appears to  
 be insufficient, in so far as fillets are nailed on the joints of the sarking.  
 “ Having thus given an outline of the present state of the manse, and  
 the extent of the accommodation which it contains, I am decidedly of  
 opinion, that notwithstanding the alterations and repairs which may be  
 made within its present area ; yet the accommodation thereby acquired  
 would, in my opinion, be too limited for the proper accommodation of the  
 minister ; and although a new kitchen, &c. were to be built, and possibly  
 a bedroom over it, yet, from the height of the present ceilings, I do not  
 see how a comfortable diningroom, without regard to a drawingroom,  
 could be obtained within the present building, under all the circumstances  
 of the case. I am further of opinion, that the kitchen and back kitchen  
 should continue in their present situation, subject to the general repairs ;  
 and that two new rooms and a staircase should be added to the present  
 manse, each room to be 18 feet by 16 feet or thereby, having 10 feet 6  
 feet ceiling. These rooms and staircase will cost about £280.

any such absolute rule; but that, looking to all the cases, of Strathblane,<sup>2</sup> the true inference was, that, when a manse extensive repairs to render it at all habitable, which in the case here, it was not incompetent to discern for additions were necessary to make it a suitable and comfortable residence for the minister.

The Lord Ordinary reported the bill and answers to the effect of the subjoined note.\*

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<sup>1</sup> Greenlaw (Creich), July 31, 1788, 5 Sup. 513; Robertson v. Heritors of Dalmeny, July 28, 1789 (M. 8515); Shields v. Heritors of Dalmeny, June 18, 1818 (ante, XIII. 1018, Note); McKensie (Lochcarron) v. Heritors, 1835 (ante, XIII. 1018).

<sup>2</sup> Heritors of Strathblane v. Hamilton, July 10, 1827 (ante, V. 1018).  
\* "The Lord Ordinary takes the course of reporting the case as the most beneficial to the parties. The case seems to be sufficient in the facts of it, to enable the Court at once, either by confirming the decision of the Presbytery, or by any remit, with instructions, if they are not satisfied, to settle the whole matter.

"The Lord Ordinary cannot bring himself to the opinion, that a fixed general rule laid down, such as the complainers insist upon, would be incompetent for the Presbytery, in such a case as the present, to give directions as to the manse and offices. He thinks that the case is exactly the same as that of Strathblane, 10th July, 1827, in which certainly the Court was not bound to be tied up by any such unbinding rule; and in the case of Strathblane, while Lord Jeffrey, in his note, expressly recognised that the case of Strathblane as establishing a principle for such a case, though in contrast with the case of Lochcarron, the Court expressly waived the decision of any ground involved in the latter. The present is a case in which, on the clear facts, it must be assumed that the manse requires very considerable repairs to render it habitable at all; in which it has not been



the heritors now renewed their offer to execute the repairs and additions specified in Mr Robertson's report, with this declaration, that, if sanctioned by the minister, they restricted it to whatever "by law" he should be found entitled to. The minister rejected this offer, and the Court (June 1, 1836) pronounced the following interlocutor:—"Before us, remit to Mr Thomas Brown, architect in Edinburgh, to inspect and examine the manse in question, and to report, whether, besides repairing the manse of Symington, the additions offered by the heritors in their said minute are sufficient to make the said manse not unsuitable and benefice, and a competent residence for the minister; or, whether further additions decerned for by the decree of the Presbytery are required, and what part thereof, for the above purpose—moderation in dimension, and simplicity in ornament, being always rigidly observed."

Mr Brown returned the following report:—

1. I have inspected and examined the manse in question, and find that it requires very extensive repairs to render it at all habitable. Its present condition is well and correctly detailed in the 'Report to the heritors of Symington,' by Mr George Angus, to which I beg leave to refer your Lordships. I am therefore of opinion, that repairs upon the old manse, of a description similar to those pointed out by Mr Angus, are essential to render it comfortable.

2. In regard to the additions to the manse offered by the heritors, I am of opinion that they are not of such a description as to render it a sufficient and competent residence for the minister of Symington or any other parish. The additions which they propose are insufficient, not so much in extent as in arrangement, inasmuch as they propose to form the principal rooms within the old house by increasing the sizes of the apartments on the ground-floor. This I think very objectionable, as the ceilings are little more than 8½ feet high, with windows and doors of equally diminutive proportions. The additions are appropriated to the kitchen and nursery. On the other hand, the additions decerned for by the decree of the Presbytery, although not so suitable, yet, keeping in view the limited rental of the parish, and the circumstances, I am of opinion might be gone into in a more

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The Lord Ordinary must say, that the heritors bring the case before the Court in a very unsatisfactory form. To state, in answer to the specific demands made by the Presbytery and the minister, that they will do *what the law may require of them*, and neither to put in the records of the Presbytery, or even in their own minutes, *any precise proposal* of the repairs which they will execute, nor to produce *any report, specification, or estimate* of work to be performed, is, it was clearly their duty to obtain when they objected to those approved by the Presbytery, seems to be a very unreasonable way of asking the interposition of this Court, which, even though the Court should think that the decree of the Presbytery should not be wholly approved of, may leave them in great difficulty as to what order should be made, without sowing the seeds of further litigation.

pointed out by the minister's sketch, the expense of which is £80 to £90, making a total of about £270 for additions and repairs on the manse.

"3. As to the offices and garden-wall, I consider that the repairs pointed out and detailed in the specification by Robertson, are very judicious, and such as to render them good and suitable to the manse.

"4. There appears to be no notice taken by either party of the state of the ground to the north of the manse, which is both a public road, and no fence whatever; it ought certainly to be enclosed in some manner, either by a low wall, or paling and hedge."

The heritors, on this report being returned, offered to acquiesce in the bill provided it was also acquiesced in by the minister. This the minister refused, and the Court instructed the Lord Ordinary to take record on the bill by mutual minutes and answers. In these minutes the heritors still insisted on their plea that no additions were competent, while the minister contended for the repairs and additions recommended in Angus's report, and decreed for by the Presbytery.

The Lord Ordinary pronounced this interlocutor, adding the following note: \*—"Finds that, in the circumstances of this case, it

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\* "NOTE.—The Lord Ordinary has a strong apprehension, that in this case, here mainly struggling to cast the expense of the litigation on one side or the other, otherwise, he cannot but think that the case might have been easily decided in favour of Mr Brown's report was received. It is his duty, however, to decide on the merits of the pleas maintained.

ascertained that the manse in question 'requires very extensive repairs No. 249  
to render it at all habitable,' it is not incompetent to consider generally

May 25, 1851  
Carmichael  
M'Lean.

from original insufficiency, or by the lapse of time, come to be in such a state that *requires extensive repairs to render it even habitable*, it is then competent for the Presbytery, and for this Court in reviewing their sentence, to consider, not merely what is absolutely essential to render the old building habitable, but what might reasonably be done, by alterations and additions, to render the manse a suitable residence for the minister in the circumstances of the parish.

"The first of these points seems to be the amount of the law laid down in the cases of Dalmeny, Channelkirk, and Lochcarron. In the first, the manse had been built only ten years before, in the incumbency of the minister who made the claim, and the demand was purely for additions, on the ground of want of accommodation. The second was perhaps not essentially different, though some repairs were required; but it was greatly affected by the consideration, that the offers of repairs and additions made by the heritors were held, and expressly found, to have been reasonable; and even as it stood, two Judges, and one of them Lord Robertson, thought it not within the rule adopted in Dalmeny. The third case is nearly identical with Dalmeny. The old case of Creich was, in the Lord Ordinary's opinion, certainly too strong, at least in one point, to be now taken as precedent. No one, it is thought, would now maintain, that where a manse requires a new roof, it would be sufficient to *thatch it*, merely because it had been formerly thatched.

"But the second point above stated appears to be equally well settled. In the case of Strathblane, the Presbytery had expressly found that the manse 'is repairable.' But as it appeared clearly from the report of the architect, to whom the Court remitted, that it required very extensive repairs to render it habitable, the judgment of the Presbytery, which ordered both repairs and additions, was affirmed by the Court. There may possibly be a difference in degree between that case and the present. But the same fundamental facts are established, viz. that though the manse is repairable, *it requires extensive repairs to render it habitable*.

"But there are other cases in which the principle was recognised. In the case of Kirkliston in 1808, though the main question was, whether a new manse or additions should be given, the old house was found to be clearly repairable; and Lord Ordinary will here transcribe the interlocutor of the late Lord Meadowcroft, giving instructions to Mr Reid, the architect, to whom he remitted, which embodies principles which appear to be sufficient for the solution of the present case. 'Remit to Robert Reid, &c. to examine the manse of Kirkliston, and report, 1mo, How far it is defective in safety, comfort, and accommodation, for the use of a minister of that parish. 2do, Whether, by any, and if any, by what alterations, additions and additions, it may be rendered a sufficient manse, and at what expense. 3tio, At what expense a sufficient new manse, affording proper accommodation to the minister, could be finished; and in making this inspection and report, the architect will have in view, that no minister is entitled to have a new manse, or his present one altered, merely from the size, form, and arrangements of the apartments being ill suited to the fashion of the times; but that he has a right to have a substantial dwelling, not unsuitable to the revenue of the benefice, neatly and comfortably furnished without and within; and if an old manse has become ruinous in whole or in part, so that renovation, rather than reparation, is become necessary, such renovation may with propriety be adapted to the taste of the times, moderation in dimensions, and simplicity in ornaments, being always to be observed.' On the principles thus laid down by very high authority, and which appear indeed to be recognised by the interlocutor of the Court in the present case, Lord Ordinary is of opinion that he is fully warranted in sanctioning such reasonable additions and alterations in the circumstances which this case presents. It may be added, that it is only on a similar distinction, which was

plainly indicated in the case of *Lerwick*, that the decisions in that of *Lauark*, *Carnwath*, *Carluke*, *Dunning*, in regard to churches, & *Rosskeen*, February 9th, 1830, can be reconciled with those of *Methven*, and *Neilston*.

" But the Lord Ordinary also thinks, that in such a case as this matter cannot just be considered on the same footing as if an endowment were required; and farther, that the rental, and the general circumstances of the parish, do legitimately enter into consideration in determining the amount to be paid, as is suitable and reasonable. This principle is distinctly recognised in the case of *Lord Meadowbank*, and also in the interlocutor of the Court, in which the Lord Ordinary thinks that the manse will be comfortable and respectable in conformity to Mr Brown's report, and that, in the circumstances, the burden should be laid on with all reasonable moderation and therefore thinks that the respondent should have been satisfied with acquiescence in it.

" The Lord Ordinary has been in doubt whether to remit to Mr Brown's specifications *here*, or to remit to the Presbytery. But he has taken the shortest and least expensive course, when the interlocutor shall remit to the specifications for the repairs seem to be in Mr Angus's report, as to the offices and garden-wall in Mr Robertson's. Those for the additional alterations are chiefly what are wanted. The report is perhaps a little deficient in regard to the latter. But Mr Brown can make it all clear.

" As to expenses, the Lord Ordinary thinks, that after the court of heritors, in inducing the minister and Presbytery to delay proceeding until Mr Angus should report, there could be nothing very erroneous or unreasonable in the Presbytery taking Mr Angus's report for their guide. He is not satisfied that the heritors did make a distinct offer to execute even the repairs specified in Mr Robertson's. But, at any rate, that has been found to be insufficient. It therefore appears to the Lord Ordinary, that as no objection has been made which the minister and Presbytery were bound to make, and as no specific objections had been stated against the plan by Mr Angus, the respondent was in person originally selected by the heritors, the respondent was in

Mr Brown, shall be duly executed, the heritors will thereby have satisfied their legal obligation to render the manse sufficient, suitable and competent: Therefore, approves of the report, so far as it goes; but, in respect that it contains no specification of the work to be done upon the manse, for the execution thereof, or on which an accurate estimate can be made, remits to the presbytery, with instructions to recall the decree of suspension, and thereafter to remit to the said Thomas Brown to report to them accurate specifications of the whole work recommended to him in regard to the manse, offices and garden-wall, with estimates of expense required for executing the same; and thereafter to proceed there according to law; and decerns accordingly: Finds the respondent entitled to the expense incurred by him previous to the interlocutor of the Court of 1st June, 1836, and remits the account, when lodged, to the heritor, to be taxed; but in respect that the suspenders made offer to the respondent to acquiesce in the report of Mr Brown, provided the respondent were also willing to acquiesce in it, leaving the question of expenses to be determined by the Court or the Lord Ordinary, and that the suspenders have since maintained that he is not in law entitled to any expenses whatever, Finds no other expenses due to either party.”

Both parties reclaimed, but

No. 245  
May 26, 1836  
Ogilvy v.  
Erskine.

THE COURT adhered, except as to expenses, finding none due to either party.

M'KENZIE and SHARPE, W.S.—M'LEAN and HAMILTON, W.S.—Agents.

GEORGE OGILVY, Pursuer.—*Sol.-Gen. Rutherford—Ivory.*

No. 250.

MRS ANN ERSKINE or WATT, Defender.—*D. F. Hope.*

*Description—Succession—Faculty—Trust—Provision to Heirs.*—Under a nuptial contract in 1754, the husband “bound himself to convey and settle to the use of the lands of Kirkbuddo to and in favours of the heir-male to be procreated by him and his present spouse; whom failing, to the heir-male to be procreated by his body, in any subsequent marriage; whom failing to the heir-female to be procreated by this or any other marriage, the eldest always succeeding without division.” The contract contained no disposition of the lands, and no procuratory or assignment; the husband was previously infeft in the lands, in fee-simple; he died in 1784, leaving one son and two daughters; the son immediately executed a trust-deed of the lands, with powers of sale, chiefly for the purpose of paying his father’s debts, and under an obligation to re-convey “to him, his heirs or assigns” the lands, if unsold (or the balance of price if the lands were sold), after the purposes were fulfilled; the trustees, as empowered by the trust-deed, served the son as nearest and lawful heir to his father: they then infeft themselves in the lands, under the precept in the trust-disposition, and possessed the lands for 10 years, after which, their whole advances being paid to them, they re-disposed the lands to the son, with a procuratory of resignation ad remanentiam, for consolidation of his right of property, with the right of superiority remaining in the son, and annulling the trust, which was done accordingly; the son died, without a settlement, in 1834:—Held, that, as the right of the son, under the obligation in the nuptial contract, was equally unlimited with his right as nearest and lawful heir

...succeeding without division, from his dying, to the said  
Erskine's nearest heirs or assignees whatsoever." The contract  
dispositive clause in reference to this obligation, nor any  
resignation, or precept of sasine. Francis Erskine never  
position of Kirkbuddo in terms of the destination in the co  
son, Colonel Francis Erskine, and two daughters, Mrs Ogi  
and Mrs Watt of Meathie, were born of the marriage. Fr  
the father, died in 1776, having executed, shortly before  
trust-conveyance of his whole estate, heritable and moveab  
of Colonel Erskine, declaring that he was to enjoy the whol  
burden of his father's debts and obligations, but that, as he  
service, the trust-management would be expedient during  
and was to fall on his returning to Scotland and taking the  
on himself. In January, 1777, Colonel Erskine, on the na  
trust-deed, and that, he had returned to Scotland for a short  
father's death, and that from various causes, the validity and  
the trust-deed were doubtful, executed a trust-conveyance  
heritable and moveable estate which had belonged to his fat  
ticularly of the lands and barony of Kirkbuddo, together w  
and title which he himself had therein. The deed stated, th  
to the more full execution of the said trust, and payment of  
and performance of the obligations prestable by my said fa  
enable the trustees to borrow for his behoof, power was  
trustees to burden or sell the lands "in case they shall find it  
sary for their own security, or judge it most for my advantag  
is left absolutely to their own determination." In the even

continue irrevocable in security, and until full and complete payment of what all, or any of the said trustees shall advance in execution of this trust;" "and upon the termination of the said trust, and the trustees being paid and relieved as aforesaid, the said trustees shall then, and no sooner, be obliged to re-dispose to me, my heirs and assignees whomsoever, the said lands and barony of Kirkbuddo, whole other subjects before disposed, in so far as shall remain undisposed of by them in execution of this trust, and to make payment to me and my aforesaid of any balance that shall be in their hands," &c. The deed farther empowered the trustees to expedite a service of the Colonel as "heir in special to his father," and to infest him in Kirkbuddo, or to make up his titles "in any other competent form." The deed contained procuratory of resignation and precept of sasine in favour of the trustees. The deed contained an assignation of "all writs, rights, &c., old and new, of and concerning the lands and others, &c., in favour of me, my predecessors or authors," &c.

In March, 1777, the trustees expedite a special service of Colonel Erskine as nearest and lawful heir of his father, on the retour of which a precept was obtained from Chancery, and he was infest on 7th April following. On the same day the trustees also took infestment under the precept contained in the Colonel's trust-disposition.

In 1787, the trustees executed a re-disposition of the lands of Kirkbuddo to Colonel Erskine, in which, after reciting the trust, the deed proceeded, "and now seeing the said Colonel Erskine has made payment and satisfaction to us of all the money we advanced, &c., and we being paid and relieved of all the advances, &c.," incurred "in the management of the trust-right;" "therefore, witt ye us to have re-disposed and conveyed, as we by these presents re-dispose and convey, to and in favours of the said Colonel Erskine, his heirs and assignees whatsoever, all and whole the foresaid lands and barony of Kirkbuddo," &c. "And we hereby grant and confess ourselves to be fully denuded of the foresaid trust-right over the said lands and barony of Kirkbuddo, and declare the said lands, and others, to be absolutely freed, relieved, and disburdened of the foresaid trust-right, in all time coming." The deed then granted a procuratory of resignation ad remanentiam in the hands of Colonel Erskine "to the said the right of property thereof in our person may be consolidated with the right of superiority thereof in the person of the said Francis Erskine, and that the whole may remain his absolute property, as if the said trust-disposition had never been granted, nor the infestment following upon the precept of sasine therein contained, past and expedite."

This procuratory of resignation was duly executed in 1787.

Colonel Erskine died in 1834, without issue, and without executing any settlement. It appeared that at different times, particularly in 1811 and 1818, he had made inquiries at his law-agent regarding the manner in which his succession would descend, if he made no settlement. The agent informed him that he had full power to destine his whole succession as he

No.  
—  
May 26.  
Ogilvy  
Erskine



then raised an action against Mrs Watt, libelling on the marriage, 1754, and the obligation there undertaken by Francis of Kirkbuddo, to settle that estate on the heir-male of his failing on the heir-female of that marriage, "the eldest always without division." The pursuer contended that this obligation was in force, and that the defender was bound to concur with him in settling it, and should be ordained to do so.

Defences were lodged and cases were ordered.

*Pleaded by the Defender—*

1. The defender admitted it to be settled by a train of deeds where a party had, in his own person, separate titles to an estate, the titles being unlimited, his possession upon one of the titles, adverse possession in reference to the other dormant title, and the dormant title did not suffer prescription. But that doctrine was often regretted by the Court, and would not now be extended beyond its present limits.

In all the precedents, the dormant title had rested on an act in pursuance of the estate, in apt words, *de presenti*. Even in the case where though the deed contained no procuratory or precept, yet *de presenti* conveyance were employed, in such terms as were apt, and habile by the conveyancers, of that period. In all these cases the dormant title rested on a conveyance with procuratory act. But in the present case, the dormant title, instead of being an estate, was a conveyance of any kind, was a mere obligation to convey. It was not reached by former cases; and there was nothing to prevent from holding that the personal obligation in the marriage

under the marriage-contract, and adopted solely that of the feudal investiture. No.

2. Colonel Erskine could gratuitously have discharged the obligation in the marriage-contract, at any time ; and, therefore, it was extinguished in his person, *confusione*,<sup>1</sup> as he was both debtor and creditor in it. May 26  
Ogilvy  
Erskine

3. There was a separate specialty in the present case. Colonel Erskine, in 1777, executed a trust-conveyance of it with powers of sale. If a sale had been effected, the trustees were taken bound to make over the reversion to the truster, "his heirs and assignees;" and if no sale was effected, they were taken bound to re-convey the lands to him "his heirs and assignees." The conveyance embraced "all right, title, interest," &c., in, or to, the estate, and all writs relating to it; it, therefore, carried to the trustees the whole right under the marriage-contract. The trustees possessed, under their conveyance for ten years, and then re-conveyed to the grantor "his heirs and assignees." This was a destination different from that in the marriage-contract; and it was under this re-conveyance that Colonel Erskine had subsequently held the estate, so that the destination in the marriage-contract was thereby evacuated. If the trustees had sold the estate and merely re-conveyed a reversion of the price to Colonel Erskine, such reversion would not have been affected by the destination in the marriage-contract; and the estate itself, when re-conveyed, was equally free from it.

*Pleaded by the Pursuer—*

1. It was fixed, by a series of judgments,<sup>2</sup> that where a party can make up his right upon either the one or the other of two titles, both of which are unlimited, his possession upon one title does not expose the other to prescription, because there is no adversity between the active and the dormant title. In some of the former cases, especially that of *Zuille*, the dormant title did not consist of a disposition with procuratory and precept, but merely a destination under a marriage-contract, by which the estate was to be "provided and secured" to that order of heirs; which imported nothing more than a personal obligation. So that the dormant title, in that case, was at least as remote as in the present instance from being an actual disposition of the estate by apt words, *de presenti*, with procuratory and precept. And without overturning the principles on which all these cases proceeded, it could not be held in this case that prescription had run on the dormant title.

The single indication given by Colonel Erskine in 1811, which was 22 years before his death, that he did not wish his nephew to succeed

<sup>1</sup> Ersk. 4, 23.

<sup>2</sup> *Edgar*, July 6, 1736 (3090); *Edgar*, July 21, 1738 (*Elchies*, voce *Service and* *manation*, No. 6; *Smith and Bogle*, June 30, 1752 (10803); *Durham*, Nov. 22 (11220); *Zuille*, March 4, 1813, (F.C.)

both in heritage and moveables, could have no effect whatever on the present case. And as little could it be available that in 1811 and 1818, his law-agent erroneously advised him that the obligation under the marriage contract was prescribed.

2. Colonel Erskine was not the sole creditor in the obligation contained in the marriage-contract; all the heirs of that destination were creditors; and though their right might have been defeated had the Colonel chosen to do so, yet, as he did not, their right remained, so long as the obligation was unprescribed. The principle of confusio had been contended for, and repelled, in previous cases, especially that of Zuille.

3. The temporary existence of the trust-right did not affect the question. It was granted primarily for the purpose of paying the debts of the father of Colonel Erskine, and was neither intended, nor calculated, to affect the succession of the estate of Kirkbuddo. It was a mere temporary burden on the radical right of Colonel Erskine, and, by the reconveyance from the trustees, every thing was left in statu quo; as would indeed have been the case, if the trustees had merely executed a renunciation. The peculiar form of the procedure made this result more evident; as the trustees never made up a title to the dominum directum of the land, which continued always in Colonel Erskine, under his crown-infeudment. And by the express words, as well as according to the true intent, of the procuratory of resignation ad remanentiam executed by the trustees, the dominum utile was resigned into the hands of the Colonel, "that the whole may remain his absolute property in the same manner as if the said trust-disposition had never been granted." It was conveyed to "his heirs and assignees," in order that it might be equally at his disposal with the dominum directum. And thus, the temporary existence of the trust-burden had no effect in evacuating the destination in the marriage-contract.

The Lord Ordinary reported the Cases.\*

\* M-Millan, March 4, 1831 (ante, IX. 551).

\* "NOTE.—As this cause has been argued in Cases, which are already printed, and as the declared object of the parties is to obtain a judgment of the Court on the points in dispute, the Lord Ordinary thinks it most convenient to report it at once; but, in doing so, he may be permitted to express the opinion he has formed on the questions raised in these papers.

"On both of these he is disposed to adopt the conclusions maintained by the pursuer.

"The first question is, Whether or not the destination in the marriage-contract, founded on by the pursuer, has been extinguished or effaced by the lapse of time, or by the concurrence of the rights and obligations created by it, in the said individual, from the death of Francis Erskine, the contracting party in 1776, until the death of his son in 1834.

"Now, whatever difficulty there may at one time have been in regard to this point involved in this question, the Lord Ordinary is bound to consider it definitively settled by a long train of decisions, the last of which, that of Morrison, 4th March, 1813, it is impossible to distinguish from the p

did not call on counsel for the pursuer to address them. No. 250.

IES.—I may regret that the decisions, founded on by the pursuer, <sup>May 26, 1837</sup> *Ogilvy v. Erskine*.  
 ounced. But there they are, and we cannot get over them. I can

particular. In that case, the lands were provided and secured to of heirs in a marriage-contract, containing neither procuratory nor a clause could import nothing more than an obligation, and so ars, from the report of the opinions, to have been considered by the Court. But still it was held to afford a title of possession, cap- ing the case within the operation of the rule established in the , such as those of *Elshieshiells—Smith and Bogle v. Gray*, 30th and *Durham v. Durham*, 24th November, 1802.

nd question, viz. Whether the trust-deed executed by the late Francis he reconveyance to him by the trustees, altered or evacuated the ntained in the marriage-contract, is perhaps attended with more it in regard to it, too, it appears to the Lord Ordinary, that a een fixed in various cases, turning on the effect and operation of hich necessarily leads to the determination of it against the

no doubt that the late Francis Erskine, who held the right under in the marriage-contract, as well as that of heir of line of his o made up titles in the last mentioned character, had the power of or altering the destination in the marriage-contract. If, for instance, ly conveyed the lands to another series of heirs, or if he had created ure, by resigning for new infeftment in favour of himself and his nees, that effect would have been produced; and agreeably to the e case of *Molle v. Riddel*, and some others, it would have been held inquire how far the new investiture was specially intended as an the destination or not. But the difficulty, on the part of the , arises from the nature of the deeds on which she founds as an the trust-deed and reconveyance. In the first place, it cannot be at those deeds were specially intended to produce that effect. The ely a trust executed by Francis Erskine for the administration of his accomplishing certain purposes; and containing, indeed, a power of ver was exercised; and, finally, binding the trustees to reconvey, in on the termination of the trust, to the granter, his heirs and assig- eed was followed by a base infeftment, and ultimately by a recon- a resignation, ad remanentiam, in the hands of the truster as the

, If it could be shown that a deed of this kind divested the granter, r the reconveyance by the trustees the origin of a new investiture, of resignation, the arguments of the defender would be entitled to

But it has been fixed by a long train of decisions, that a trust-deed effect—that it leaves the radical right still in the person of the t only to the burden of the trust-deed, and the purposes therein d it seems to follow from this principle, that the reconveyance by ch a case, does not operate positively by creating a new title, but vely, by extinguishing the trust, and thus disencumbering the original n the person of the truster. According to this view, the trust-deed case neither divested Mr Francis Erskine of his feudal title to the of line, nor of his personal right under the marriage-contract. It of only burdening both as still remaining in his person. And the and resignation ad remanentiam, operated merely in extinguishing n those titles respectively,—and left them precisely as they formerly nter's person; each affording a title of possession according to the ned to on the first branch of the cause; and the latter, that is, the

...the pursuer is, therefore, entitled to decree in terms of ...  
**LORD COREHOUSE.**—I concur with Lord Gillies and Lord Mackenzie whether we have regard to strict legal principle, or to expediency, in the decisions which have been pronounced by our predecessors, and which to in the pleadings, rest on very doubtful grounds indeed. But it is no longer an open question; a series of judgments has been pronounced, and we are bound to give effect to them, if they are really precedents in the present case. I have been unable to draw any sound distinction between those cases which have been cited. At one time, I thought that there might perhaps have been some arising out of the trust-conveyance of the estate of Kirkbuddo, which was made by Colonel Erskine in 1777, with very ample powers to the trustees, and in the subsequent reconveyance by the trustees in 1787, I am unable to see any ground for that conclusion. The trust-disposition by Colonel Erskine was no more than a mere burden on his right. The radical right was always in him, as ever, and the burden of the trust-right, from its nature, was temporary, and became extinguished. I see nothing to warrant me in holding that the subsistence of the trust had the effect of evacuating the destination of the marriage-contract; and I perceive literally nothing else in the case which would take it out of the series of precedents relied on by the pursuer. I must therefore give effect to the effect which these decisions have produced on the law of Scotland, and leave alive latent and antiquated rights; but it is the legislature alone which can give a remedy.

**LORD PRESIDENT** concurred.

**THE COURT** found that the obligation in the contract of marriage was still in force, and that the pursuer was, therefore, entitled to decree in terms of the libel.

THOMAS SCOTT, Advocate.—*Sol.-Gen. Rutherford—J. M. Bell.*  
 CURLE and JAMES ERSKINE, Respondents.—*Robertson—*  
*G. G. Bell.*

No. 251.

May 26, 1837.  
 Scott v. Curle.

*ion—Bill-Chamber—Process.*—1. A bill of advocation of the final of a sheriff was passed on 13th August; a certificate, that the letters expedite, was obtained on 3d September:—Held that the letters of advocation subsequently expedite, were irregular, being without a warrant, as the bill was not expedited; and advocation therefore dismissed. 2. Terms of a certificate of non-expedite, which were held sufficiently to identify the individual bill of advocation, notwithstanding an allegation that it described the parties differently. 3. Question, whether the mere lapse of 10 days, after the passing of a bill of advocation, without expediting the letters, caused the bill to be null and void; whether the 10 days are reckoned from the date when the bill is “issued, or when it is to be issued, by the clerk to the bills to the complainer’s agent;” or whether the bill does not fall till a certificate be obtained from the signet office that the letters have not been expedited.

THOMAS SCOTT of Abbotsmeadow presented a petition to the Sheriff May 26, 1837. through, which resulted in a final judgment against him. He then presented a bill of advocation, describing his petition as having been presented against “Curle and Erskine, writers in Melrose, and James Erskine, one of the partners, and Mrs Barbara Erskine or Pott, widow deceased Charles Erskine, writer in Melrose, and also against James Erskine, now one of the partners of the said firm of Curle and Erskine.”

1ST DIVISION.  
 Ld. Corehouse.  
 S.

This was a correct description of the parties. The bill of advocation was passed de plano, on 13th August, 1836. Intimation of the passing of the bill was given to the respondents on 24th August, by the sheriff-clerk on 3d September. On the same day, the respondents obtained a certificate from the signet office, in these terms: “I have searched the signet books, from the 22d day of August last, to the 10th day of September current, both days inclusive, and found no bill of advocation there entered as having passed the signet, during the above period, at the instance of Thomas Scott of Abbotsmeadow, Messrs Curle and Erskine, writers in Melrose, and Mrs Erskine here.”

On 10th September, Scott expedite letters of advocation under the bill. These were called on December 15th, and no appearance being made, they were enrolled for obtaining decree in absence. The respondents then appeared, and pleaded, that, if ten days elapsed after the passing of the bill, without expediting the letters, or at least so soon as a certificate of the non-expedite letters was obtained, at the signet-office, the bill was null and void, in terms of A. S. June 14, 1799, § 5, and A. S. July 11, 1799, §§ 7 and 18. There was thus no warrant in existence for expediting the letters, on 26th September, and they ought to be dismissed as irre-expedite. The respondents farther pleaded, that the description of the parties, as given in the certificate from the signet-office, was substantially the same with that set forth in the bill of advocation.

in Melrose, and also against James Erskine, now one of the said firm of Curle and Erskine." But the certificate was in favour of parties as "Curle and Erskine, writers in Melrose, residing there," which was an essential variation, as not only against a company, but also against the interdict, was not the same with a process directed against a company, and a lady "residing in Melrose."

The Lord Ordinary "found that the advocacy had been brought into Court; dismissed the same, and decreed the respondents entitled to the expense of the present application, and awarded the same to two guineas."

Scott reclaimed.

LORD GILLIES.—I think the certificate is sufficiently explicit, and as the bill fell after that certificate was issued, the interdict was not expedient, and the Lord Ordinary did right in dismissing the bill.

LORD MACKENZIE.—It is clear that the words of the Act, § 5, declare the bill to fall so soon as ten days elapse after the interlocutor passing the bill. On the other hand, it seems from A. S. July 11, 1828, § 18, that some effect is ascribed to the certificate; and it is said that, in practice, the bill does not fall by the ten days, unless the certificate be also issued. It is not necessary in this case, whether the bill would have fallen without the issue of a certificate as actually obtained, which I think was expedient to strike at the bill, and that was only done after the ten days elapsed. I think the interlocutor of the Lord Ordinary should have been more explicit.

LORD PRESIDENT.—I think the certificate sufficiently i



SIR JAMES GRANT SUTTIE, Pursuer.—*Maitland—Whigham.*  
 GEORGE GORDON, Jun. and GEORGE GORDON, Sen., Defenders.—  
*D. F. Hope—Forsyth.*

No. 252.

May 26, 1837  
 Suttie v.  
 Gordon.

*Property—Possession—Sea-Shore.*—1. Circumstances in which the rule was  
 ed, that a party, holding a bounding-title, cannot, by possession, acquire the  
 erty of adjoining land in the face of his title. 2. Observed, that, if one of the  
 idaries, in a bounding-title, were the “unappropriated sea-shore, a party might,  
 ere was no interjected property, have extended his boundary towards the sea,  
 out violating the right of any one.”

SIR JAMES GRANT SUTTIE, Bart., was proprietor of the lands and May 26, 1837  
 ny of Prestongrange and others. The barony was bounded on the 1st Division  
 h by the sea, and in 1649 a predecessor of Sir James had granted a Ld. Corehouse  
 charter of two small subjects, forming part of the barony, the bound-  
 s of which were thus described in the subsequent conveyances:—  
 ll and Haill that tenement of land, back and fore, under and above,  
 a houses, biggings, brewhouses, and yard of the same, with the perti-  
 ts lying overagainst the harbour of Millhaven, now called Morrison’s  
 ven, betwixt the said harbour on north and west, the common high-  
 r on the south, and the Links of Prestongrange on the east parts,  
 taining 40 ells in length and 20 ells in breadth; as also that salt-  
 el, with the lofts above the same, and close thereof, having 2 ells of  
 te ground betwixt the said salt-girnel and common highway, in all  
 s, on the south, the Sea Craig on the north, and the Links of  
 stongrange, upon the east and west parts, containing in length,  
 rixt the east and west, 50 ells, and in breadth, betwixt the north and  
 h, towards the east end thereof, 13 ells, and in breadth, betwixt the  
 h and south, towards the west end thereof, 18 ells, as the same is  
 aded betwixt the march-stones thereof, all lying within the barony  
 Prestongrange, constabulary of Haddington, and sheriffdom of Edin-  
 gh.” In 1808, Robert Gordon, potter, purchased these subjects, and  
 ined a disposition describing their boundaries in these terms.  
 The highway, which was stated to be the south boundary of the feus,  
 been removed in 1753, and carried along a line considerably nearer to  
 sea. After the highway was thus removed, there still remained a stripe  
 asture-ground, of considerable breadth, lying between the highway  
 the sea, and terminating on the sea-ward side, in a rock or craig. On  
 south of the highway there remained as large a superficial area of  
 and as was contained in the feu-charter, according to the measure-  
 t therein expressed. Upon this area, which was undoubtedly the  
 erty of Robert Gordon under his feu-right, a pottery, or glass-work,  
 a salt-work, had been in operation for a long series of years.

tack. In support of this plea, Sir James founded on the precise measurement of the extent of the subjects, as consisting of in length and breadth, which, being set forth on the face of rendered it impossible for Robert Gordon, by any possession a right of property beyond the boundaries, and as the whole ground, so described remained, entire to Robert Gordon, without the stripe of ground which lay between the highway and necessarily resulted that no right of property in that stripe acquired by Robert Gordon.

Sir James did not deny that possession of the stripe of been enjoyed by the Gordons for above seven years; but he this arose, not from their feu-right, but from the lease of failed, however, to produce the lease, though called on by him to do so.

Gordons denied that the possession of this stripe of was ascribable to any other title than Robert Gordon's feu. They that the northern boundary, as expressed in the feu, being that was tantamount to the sea-shore, and that Robert Gordon notwithstanding the limitation in the feu-right, to gain from him to extend the boundary in that direction. They alleged that the public works erected on the feu, had formed an accumulation increasing during a long series of years, and had gradually a superficial extent of Robert Gordon's property towards the therefore contended that they were not liable to interdict, Gordon was proprietor of the stripe of ground in dispute. pleaded that as they had enjoyed seven years' possession

ice of any other title to which it could be ascribed, except the feu- No. 252.  
; the circumstances that, so far as appeared, the sea-craig, which May 26, 1837  
tated as the northern boundary, was just a part of "the unappro- Suttie v.  
d shore," and that "as there was no interjected property, the advo- Gordon:  
might have extended his boundary towards the sea without violating  
ght of any one:" which it rather appeared he had done by the  
ant accumulation of debris from extensive public works. His Lord-  
therefore conceived that, *hoc statu*, the interdict ought to be recalled.  
James reclaimed, and also raised a declarator of his right of property  
e ground in question. The advising of the reclaiming note in the  
ss of advocacy was delayed until the declarator should be ready for  
ment. In the declarator George Gordon, senior, was called as well  
obert Gordon. In this last process, the lease was at length recovered  
roduced by Sir James, showing the existence and terms of the title  
ich he alleged that Gordon's possession of the stripe of ground was  
referred. An old plan of the ground prior to 1753 was also produced,  
h showed the existence of a considerable stripe of ground, as at that  
between the space now covered by the highway and the sea, thereby  
ng that there was no such addition made, as had been alleged, to the  
nds towards the sea, by the accumulation of any debris from public  
s. This also appeared, from the nature of the sea-coast, as the  
of ground terminated, on the seaward side, in a perpendicular cliff.  
this altered state of the proof, Sir James maintained that all the  
nds were removed upon which the Lord Ordinary had previously  
dered it possible for Robert Gordon to acquire property beyond the  
s of his bounding feu.

re Lord Ordinary (Corehouse) "having considered the closed record,  
, productions, and whole process, found that the authors of the  
ider, George Gordon, junior, obtained right to the feus in question  
rants in which the boundaries are specified, and the measurement of  
feu in the length and breadth is minutely stated; that the piece of  
nd in dispute is not included within the specified boundaries of either  
ese feus; that the sea-shore is not the northern boundary of either  
but that the sea-craig, the name given to the northern boundary of  
eus, appears to have been applied to the ground in dispute, because  
a perpendicular face of rock towards the sea, while it admits of being  
red upon on the side next the land; that in these circumstances the  
iders could not acquire the ground in dispute by possession in the  
of their bounding title, and that it was not gained by occupancy as  
of the shore: Therefore decerned and declared in terms of the libel,  
found the defender, George Gordon, junior, liable in expenses of  
ss since the action was brought, and the defender, George Gordon,  
r, liable in expenses, subject to modification." \*

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\* **NOTE.**—In consequence of the investigation since the declarator was raised;

and awarded additional expenses against the defenders.

In the advocacy, Sir James insisted that the interlocutor Ordinary should now be altered both on the merits and expenses.

LORD COREHOUSE.—I decided both the advocacy and the declarator in the Outer-House. It does not appear to me that a reversal of the interlocutor Ordinary follows as a necessary consequence from our decision in the declarator in terms of the libel. It rather appears to me that the decision in the advocacy, which merely involved a possessory question, was not a reversal of the declarator, which could have been pronounced, and that it satisfied the merits of the case. The case is entirely altered since then. Various most important documents have been produced. In particular, the lease was produced only in the declarator, and it shows that the possession of the stripe of ground was ascribable to the declarator right altogether from the feu-right. I asked parties, in the advocacy, if they could produce any more documentary evidence than they had already produced, and they informed that they could not. I was obliged, therefore, to decide the case on the evidence laid before me. Besides the lease, there has also been produced by the declarator the old plan of the subjects, dated in 1753, showing the position of the stripe of ground towards the sea, stood then just as it does now, and in the same condition, and has not grown up out of accumulated debris, as was

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and the productions which have been made in the course of it, much light has been thrown on the questions at issue. It appears from the evidence that a stripe of ground of considerable breadth, has, since an early period, existed between the feus and the sea, and that the stripe is covered with soil and is used as pasture for cattle. It could not possibly have been included in a lease of the subjects in length betwixt the east and the west fifty ells, and in breadth betwixt

lon. But in truth the only question of any importance which can now remain No. 252.  
 gard to the advocacy is the question of expenses.

ORD MACKENZIE.—I think the finding of expenses should be recalled. There May 30, 1837  
 Kerr v.  
 Barbour.

have been a considerable omission on the part of Sir James to produce the  
 , so soon as he should have done, but the tenants always knew of the existence  
 e lease, and they acted in bad faith in their statements respecting it. I think  
 nses should be found due to neither party.

ORDS PRESIDENT and GILLIES concurred with Lord Mackenzie.

THE COURT, in the advocacy, adhered on the merits, but recalled the  
 finding of expenses, and found neither party entitled to them.

J. and A. SMITH, W.S.—W. ALLAN, S.S.C.—Agents.

CHARLES KERR, Suspender.—*G. G. Bell.*

No. 253.

JAMES BARBOUR, Respondent.—*Thomson.*

inding—*Bill of Exchange—Process.*—1. A charge of horning was given in  
 ch, 1833—Held competent to poind thereon in April, 1836, without giving  
 ew charge. 2. Held that the indorser of a bill of exchange, who does not  
 payment thereof to the holder of the bill, has no right to control the holder  
 e use of diligence against other parties to the bill.

JAMES BARBOUR, writer and private banker at Castle-Douglas, May 30, 1837  
 ounted a bill for £50, which was indorsed to him by Charles Kerr in 1st Division.  
 kerbie. The bill was not retired when due, and, in March, 1833, Ld. Fallerton  
 our raised letters of horning on it, and gave a charge to Kerr. Kerr B.  
 d that his connexion with the bill was merely by way of giving an  
 mmodation to one Graham the proper debtor. Barbour then allowed  
 r to obtain possession of the letters of horning, which he put into the  
 ls of one Bell, a messenger, directing him to poind the effects of  
 ham. Bell executed a poinding of Graham's effects to the value of  
 , 13s. 6d.; but, on 10th April, 1833, Barbour wrote to Bell,  
 eting him "to delay prosecuting any diligence against Graham at my  
 pnce." This prevented farther procedure in the poinding. Barbour  
 this step because Graham owed him nearly £200 on other bills, and  
 did not wish that the proceeds to be realized by a poinding at his  
 pnce should be imputed solely to the bill for £50, in which he had Kerr  
 d along with Graham. Kerr notified to Graham that he held himself  
 ted in consequence of the prejudice which he had suffered by the  
 ruption of the poinding; and Barbour answered, that, as the sole  
 to the debt and diligence was his own, he was entitled to use the  
 way or not, entirely at his own discretion, and that Kerr had no  
 to complain though he should refrain from doing diligence. Parties  
 at issue whether Barbour had ever authorized Kerr to cause the

Harbour answered, (1.) That Kerr had no right to insist on with the poiding, unless he chose to pay the debt assignation to it and the diligence; and as it would have been to the charger to go on with it, he was entitled to stop it as That the poiding was regular and conform to practice, 1 years had elapsed from the date of the charge.

The Lord Ordinary "repelled the first and third pleas in by the suspender, and the reasons of suspension founded and decerned; and in respect of the second plea in law for the appointed him to give in a note of objections to the state at division, given in by the respondent." \*

Kerr reclaimed.

THE COURT, without calling on counsel to support the unanimously adhered.

W. STEWART, W. S.—W. KISSACK.—Agents.

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\* "NOTE.—It is doubtful whether or not the charger authorized of the effects of Graham. But even if it should be held that be undeniable that that measure was one adopted for his own behoof, and subject to his own discretion. So long as the suspender did not te of the bill, he had no right to control the measures which the cre adopt for the recovery of it from the other co-obligant. Now the assign reasonable grounds for his declining to proceed with that poin Graham was owing him nearly £200 on other bills, on all of which I poided, and that the only effect of going on singly with the poidin would have been to give the suspender the benefit of the whole arising, a benefit which he was under no obligation to afford to the s is clear that the suspender had always the means of getting con diligence by paying the bill, and not having done so, it appears to the I that he cannot found any claim to be relieved, on the mere circum charger having stayed the proceedings, a step which was within his d with which the suspender had no right to interfere."

ICK MACLEOD, Raiser.—*Sol.-Gen. Rutherford—Craufurd.* No. 254.

WILSON and OTHERS, Claimants.—*D. F. Hope—J. Anderson.* May 30, 1837.  
M'Lend v.  
Wilson.

—In a competition among the creditors of a party deceased,—held executor nominate, who was himself a creditor, not having been cited, and interpellated by legal diligence on the part of any of the creditors, within six months from the party's death, and not until he had himself expedited as executor, was entitled to a preference over the executry funds for debts as he could instruct to have been justly owing to himself by him, and to impute or retain in payment thereof any part of the funds in his hands prior to diligence being used, or a judicial claim made at the instance of the other creditors, in so far as he could not be shown to have renounced such preference by acts or omissions of his own.

On the 30th of May 1837, Charles Murray Macleod, advocate, died at Southampton in the 2nd Division. Lord Jeffrey.  
leaving certain personal property, including a collection of books, and nominating Roderick Macleod, younger of Cadboll, his executor and universal legatee. Mr Macleod was at the time of his death indebted to various sums to different individuals. Mr Roderick Macleod was not cited or interpellated by diligence on the part of any of the creditors of the deceased, within six months from his death. Some time after he expedited confirmation as executor. He took no steps for settling the estate of the defunct, and exhibited no articulate accounts. He caused the greater part of the books to be conveyed to his residence at Invergordon, to be kept in his custody. Thereafter a dispute took place between certain tradesmen in Edinburgh, creditors of the deceased, and Macleod, in the course of which it appeared that the latter had a claim against the estate, and that neither himself nor the executor was aware of the exact value of the estate, nor of the amount of debts owing to it.

In the circumstances Macleod raised a process of multiplepoinding and citation, in which he gave up, for the first time, in his re-revised petition, a state of the effects in question, and sums recovered by him, and alleged a sum of £861 to be due to himself from the estate, for charges incurred in recovering the same, and partly for debts owing to himself by Charles Macleod, prior to his death. For this he claimed a preferable right over the funds, and particularly over the funds sent to Invergordon; in support of which he pleaded,—that the other creditors having cited him or urged their claims for six months after the common debtor's death, he being executor, he was entitled to a preferable right, in virtue of which he was entitled to retain, in satisfaction of his own claims, any fund which might be realized.<sup>1</sup>

<sup>1</sup> M'Dowal, Dec. 22, 1744 (M. 10007.)



The Lord Ordinary pronounced the following interdicts: 1mo, That the raiser being the executor-nominate of C. M. Macleod, the common debtor, and not having been compelled by legal diligence, on the part of any of the said C. M. Macleod, within six months from his death to had himself expedite confirmation as such executor, was to have a preference over the executry funds, for such debts as he had to have been justly owing to himself by the defunct, and to retain in payment of such debts any part of the said funds which were actually in his hands prior to any diligence or judgment of the other creditors, in so far as he cannot be said to have renounced such legal preference, by any acts or omissions: Finds, 2do, That the correspondence between the said raiser and the agents of the other claimants referred to in the interdict import any renunciation of the said legal preference, and that part of the funds which consisted of the personal bond of F. A. M. Fraser, out of the free proceeds of which, if the raiser has undertaken, and is bound to pay the debts of the said claimants in this process: Finds, 3tio, That the tenor of the correspondence, taken along with the other written documents admitted in the record, does not instruct such misconduct or neglect on the part of the raiser, as to subject him to any obligation to satisfy the claims of the said other claimants, though they be founded on by them in any proof which they may use: Finds, 4to, That the said correspondence does not instruct the verity and amount of the debt alleged to be

Wilson reclaimed.

No. 25.

**LORD GLENLEE.**—There is nothing in the interlocutor which precludes Mr Wilson from being heard on the whole matter. The Lord Ordinary merely finds that there are no termini habiles to cut Macleod out of his right of retention as executor. The last finding leaves every thing open; and it still remains to be settled whether the effects taken to Invergordon were taken by Macleod to be retained in payment of his debt, or in what way.

**LORD MEDWYN.**—Something very distinct would require to appear, if the executor is to be deprived of a privilege he is entitled to. I cannot see grounds in any part of the correspondence to justify me in going farther than the Lord Ordinary has done.

**LOKDS JUSTICE-CLERK and MEADOWBANK concurred.**

THE COURT accordingly adhered, finding additional expenses.

GORDON and STUART, W.S.—GORDON and MACKAY, W.S.—Agents.

**ROBERT ADIE, Pursuer.—D. F. Hope—Thomson.**

No. 255

**DUNCAN M'MARTIN and DONALD M'MARTIN and OTHERS, Defenders.**

*Sol.—Gen. Rutherford—Whigham.*

**Prescription Quinquennial—Mora—Personal Exception—Arrestment.**—The sheep belonging to an outgoing tenant, were acquired by the incoming tenant at a price which was applied partly in paying the rent due to the landlord, who had used sequestration, and partly in paying a debt due to the outgoing tenant's pouding creditor; the proceedings under which this transaction was completed, were partly judicial, and partly extrajudicial; for seventeen years the outgoing tenant acquiesced in the transaction; thereafter, a creditor of his resorted in the hands of the incoming tenant, and attempted to set aside the proceedings, and make the incoming tenant pay the price of the sheep over again to him: Held that the quinquennial prescription applied, and that the arrester, being in no better situation than the common debtor, was barred from challenging the proceedings, in respect of the mora which had occurred.

THIS was a case of a special nature. In 1833, Robert Adie, writer at Perth, used arrestments in the hands of Duncan M'Martin and Donald M'Martin, farmers in Liangartan, as indebted to John M'Dougall, residing in Croftentyan, and formerly tenant of the farm of Liangartan. He stated that M'Dougall had left that farm at Whitsunday, 1816, and the stock of sheep upon it, which belonged to M'Dougall, had then been made over by him to M'Martins at a valuation, fixed by two appraisers, and that the price had never been accounted for to M'Dougall. He brought a process of forthcoming against M'Martins, before the Sheriff of Perth, and they pleaded that they were not indebted at all to M'Dougall. They stated that they had not bought the sheep from M'Dougall; that they had bought one part of them in June, 1816, from

May 31, 185

1st Division  
L. 1, Cockburn  
S.

from Stewart that they (M<sup>r</sup> Martins) had bought the sheep

Adie pleaded that the diligence of Achallader was not the length of a sale under the sequestration ; that the act of selling any part of the stock, for payment of rent, to him was unwarranted ; and moreover did not take place, according to his own statement, till June, 1816, whereas the whole stock was delivered by M<sup>r</sup> Dougal to them as early as Whitsunday, under which contract alone they had acquired the stock. He alleged the sale under the poinding to have been collusive and liable to the objection of having taken place as late as September. M<sup>r</sup> Martins denied these allegations, except as to the date. He acquired the stock from the respective factors of Achallader and Breadalbane. Adie raised an action of reduction-improvement, for the purpose of setting aside the whole steps of diligence, as being null and void, and an action against the trustees of the Marquis of Breadalbane, the heir of Campbell of Achallader, now deceased, and his son Stewart, who bought part of the sheep at the sale under the poinding and resold them to M<sup>r</sup> Martins ; and John M<sup>r</sup> Dougal, the co-defender, and the M<sup>r</sup> Martins themselves. M<sup>r</sup> Dougal made no appearance, other than to dispute the existence of the poinding, and stating various other defences, contended that Adie, as a creditor, could not be in a better situation than M<sup>r</sup> Dougal, the co-defender, and that by M<sup>r</sup> Dougal's long acquiescence in the proceeding, his stock was applied in payment of his rent, and of the debt of the poinding creditor, he would now be barred personally from attempting to bring a challenge, and Adie was equally barred.

In the reduction his Lordship assented, with expenses, and explained the leading facts of the case in the subjoined note.\*

Adie reclaimed.

May 31, 1847  
Currie v.  
Jardine.

THE COURT adhered, and awarded additional expenses against him.

J. COURT, S.S.C.—W. SPALDING, S.S.C.—DAVIDSONS and SYME, W.S.—J. A. CAMPBELL, W.S.—Agents.

DR CLAUD CURRIE, Objector.—*More.*

No. 251

PETER JARDINE, and Miss M. B. CURRIE, Respondents.—*Forsyth.*

*Husband and Wife—Goods in Communion—Expenses.*—A surviving husband and not entitled to state as a debt against the goods in communion the expenses incurred by him in resisting certain actions of reduction of deeds by his deceased wife, raised after her death, although he was partially successful in the litigation; not found entitled so to state the expenses incurred in opposing a process for having her cognosced as insane.

THE objector, Dr Currie, was the son of Margaret Baldwin, by her first husband, on whose death she was married to the respondent, Jardine. Mrs Jardine, who was liable to fits of insanity, executed a deed in favour

May 31, 1847  
2d Division  
Ld. Moncrie  
T.

NOTE.—The case is bristled with defences, which the pursuer has not been successful in putting down. It is impossible to detail them here; but a simple and conclusive general view arises against the pursuer from his own mora.

He is a creditor of John M'Dougal, who was debtor for rent to Achallader, in bills to Lord Breadalbane. He was sequestrated under the Bankrupt Act, and these two creditors attached his effects. The pursuer says that the diligence which they did so, was irregular; but the fact that the one sequestrated, and the other pointed, is not denied, but, on the contrary, is complained of. In this action the matter was settled between them and M'Dougal, and two persons, M'Martin, the incoming tenants; the import of the arrangement being, that the M-Martins bought M'Dougal's stock at a sale sanctioned by the Sheriff, paid the price to his two creditors, and the Sheriff approved of the whole proceedings. All this took place on or before 1817. M'Dougal was sequestrated 1815; the transference of the stock was in 1816; the Sheriff's approval was 1817.

Now, the debts due to the pursuer by M'Dougal, were prior to all this; so he was in a situation to have vindicated his rights before any thing had taken

Nevertheless, he did nothing, either by action, or by diligence, or protest, or any thing, till the year 1833; when he asked, and got a decret from the Sheriff, constituting one of his debts, and arrested; and his case is, that he, as creditor of M'Dougal, is entitled, after a pause of seventeen years, to break up a transaction concerning moveables, which has been acted and relied upon, and which no one of the parties is attempting, or has ever attempted, to disturb. His statement that the transaction was collusive, and that the price was not paid by the M-Martins to Achallader and Achallader without objection by M'Dougal, are contradicted by the whole admitted or undoubted facts.

If such a transaction can be disturbed by a third party, at such a distance of time, landlords and tenants had better take care.

There are many insuperable obstacles in the way of the reduction, independently of this general view."

of reduction to have the verdict in the cognition, so far  
lucid interval in 1818, reduced, and another process, to be  
above-mentioned set aside. The jury sustained the v  
lucid interval, and the deed of 1818, but reduced the de

In a question subsequently arising between Dr Ca  
hand, and Jardine and Miss Currie on the other, as to h  
incurred by Jardine in these litigations should be stated  
between these parties respectively, the Lord Ordinary  
interlocutor:—"Finds Peter Jardine entitled to state the e  
by him in the process of cognition, against the goods  
Finds him also entitled to state the expenses incurred l  
ing the process of reduction of the verdict of the jury, and  
incurred by him in the submission before Mrs Jardine's d  
goods in communion: But finds him not entitled to st  
incurred by him in resisting the process of reduction of  
nor the expenses incurred in the submission after Mrs Ja  
the £30 found due by Mr Reddie, or any part or proportion  
against Dr Currie's share of the goods in communion: .  
account of the expenses, as thus found competent, to  
accounting against the goods in communion, to be given  
Both parties reclaimed.

THE COURT pronounced as follows:—" Find that  
not entitled to state the expenses incurred by hi  
of reduction raised after the death of the wife agai  
communion, in so far altering the interlocutor of

WILLIAM RANNIE, Suspender.—*Wood*.  
IN FALCONER TAYLOR, Respondent.—*M'Neill—Dunbar*.

No. 257.

May 31, 1837.

—*Suspension—Bill of Exchange—Forgery*.—In a bill of suspension of Rannie v. Taylor.  
an acceptance, in which it was denied that the bill was signed by the  
was averred that it was either a forgery, or, if genuine, that the signature Campbell v.  
been obtained by gross fraud, but produced no genuine subscription for Aiken.  
—Bill (which the Lord Ordinary had refused) passed on caution.

E, a farmer near Turriff, presented a bill of suspension of a May 31, 1837.  
the instance of Taylor, messenger there, upon a bill for £195, 2<sup>D</sup> DIVISION.  
to be accepted by Rannie to Taylor. In the bill Rannie denied Bill-Chamber.  
signed any such bill, and stated forgery as the principal ground of Lord Jeffrey.  
n, “averred most deliberately and solemnly that the bill is either T.

, or if it shall be produced and found to contain the complainer's  
on, that it has been procured by the grossest fraud and circum-

No genuine subscriptions by the suspender were produced  
bill, for the purpose of comparison.

, in his answers, denied the allegation of forgery.

Lord Ordinary, “in respect that forgery is not positively  
nor any genuine subscriptions produced for the purpose of com-  
efused the bill,” with expenses.

reclaimed.

THE COURT remitted to pass the bill on caution.

J. BENNETT, W.S.—W. MARSHALL, W.S.—Agents.

ROBERT CAMPBELL, Pursuer.—*Robertson*.  
AIKEN, and JOHN HAMILTON, Defenders.—*Forsyth—Wood—*  
*Cowan*.

No. 258.

*licata*.—In a reduction of certain decrees for expenses, which were alleged  
en for random sums, this ground of reduction held to be barred by the  
nounced in a suspension of a charge for payment of such expenses, in  
letters were found orderly proceeded.

was a reduction, in which certain decrees for expenses were called May 31, 1837.  
reduced, on the ground principally that the sums decerned for 2<sup>D</sup> DIVISION.  
dom sums, the expenses in question never having been modified. Ld. Moncreiff.  
th article of the summons, there was also called for a decree of F.  
1818, pronounced in a process of suspension, at the instance of  
cessor of the pursuer, of a charge by the author of the defenders,  
ent of the sums contained in the above decrees, in which the  
d been found to be orderly proceeded.

which can be otherwise involved in the demand to resume consistent rectness of such decrees. The parties who are defenders in the red Campbell, and Cathcart, state themselves to be onerous assignees to the extent of all that is comprehended in the decree of 1818. Mr. author, had charged Dugald Campbell for that amount, founding on decrees, and his bond of corroboration, thus giving him the opportunity every objection which he could state against the debt as constituted himself of the legal process for doing so, by raising a suspension of the parties came to issue *in foro* before Lord Alloway. If the decree to objection on the ground that the random sums of expenses were that objection appeared *ex facie* of the decrees themselves. It is now here, whether it was actually taken and maintained. The Lord Ordinary to think that it must have been taken, or at least palpably presented. For the suspender claimed against Mr Hamilton to have the benefit which he received in acquiring the debts; and it does not appear that any ease except in this very thing, that he was only required to pay expenses to the creditor. But at any rate, if it was competent to state the same thing. Now, the Lord Ordinary is of opinion that it was state such an objection, both because the fact appeared *ex facie* of the decree because he thinks that the Court has always power, without any reduction a decree taken for a random penalty, or expenses to the actual expense (Bell, Com. 1, 657, and the case of Pardon Gray against Buchanan, though it does not follow that in all circumstances they must do so frequently much expense incurred which cannot enter an ordinary decree. Lord Ordinary forms no opinion on this in the present case; but if competent to state the objection, it is plainly competent and omitted, sufficient to bar any trial of the question afterwards.

"The pursuer says that Dugald Campbell had granted a bond of entail—that random expenses beyond the actual expenses were not entailed that Dugald could not make them so, to affect a subsequent heir of the decrees determined the amount of the debts expressly as entailing the expenses awarded; and if the pursuer means to say that the *was res inter alios*, merely because Dugald was an heir of entail, the pursuer fears that it would be a very dangerous doctrine. He represents



in these conjoined processes, and heard parties' procurators on the No. 258  
the decree of this Court, of dates the 27th November and 15th May 31, 1835  
ber, 1818, called for in the eleventh article of the summons of Clyne v. ...  
on, and having made avizandum—Finds, that no relevant grounds Clyne's Trust  
en stated for demanding reduction of that decree: Finds, that that tees.  
standing unreduced, and not challenged on any sufficient grounds  
and having been a decree in foro, pronounced between the author  
principal defenders, himself also called as a defender in the reduc-  
d the predecessor of the pursuer then standing in the full rights  
eir of entail, in possession of the estate of Skerrington, constitutes  
bar against any challenge of the other decrees called for, in so far  
formed the grounds of the decree then pronounced, for the sum of  
s. 6d. of principal debt; either on the ground, that in such decrees  
of expenses decerned for ought to have been modified to the amount  
l expenses incurred; or on the allegation, that the decree, of date  
July, 1792, was not a decree in foro: Sustains the defences stated  
eduction on this ground, and appoints the cause to be enrolled, in  
at it may be further proceeded in; and in the mean-time reserves  
tions of expenses."

Lord Ordinary in a subsequent interlocutor as to certain other  
n the cause, found no expenses due to either party.

pursuer reclaimed on the merits, and the defender Hamilton on  
it of expenses.

THE COURT adhered on the merits, but remitted to the Lordordi-  
ary as to Hamilton's note.

ROBERTSON, W.S.—HUNTER, CAMPBELL, and Co., W.S.—JAMES HAMILTON, W.S.—  
Agents.

DAVID CLYNE, Pursuer.—*R. Robertson.*  
CLYNE'S TRUSTEES, Defenders.—*Moncreiff.*

No. 259.

*and Client—Attorney's Certificate—Expenses.*—Objection repelled to an  
report on an account of expenses of process, that during part of the cur-  
the account the pursuer's agent had no attorney's certificate.

as objected by the defenders to the auditor's report on the pursuer's May 31, 1835  
of expenses in this case, that during the first portion of the pur- 2d Division  
account running from January to November 1835, charges were T.

and the Court, throughout the process 1818, as having been a decree in

THOMAS ROBERTSON (Trustee of Lord Fife and his Creditors)  
and Claimant.

JAMES SOUTER (Trustee of Personal Creditors of Lord Fife)  
Claimant.

June 1, 1837. *Trust—Clause.*—This was a case of a special nature, depending on the construction of a trust-deed executed by Lord Fife for his personal creditors. There was a surplus of funds in the hands of the trustee, after paying the current heritable annuities, and the question was whether the same should be applied in redeeming these annuities, or in keeping up the interest on the personal debts of the Earl. The Lord Ordinary found for the former purpose to be enjoined by the trust-deed, but the interest was not altered, and found that the interest on the personal debts was not paid.

1st Division.  
Ld. Cockburn.  
B.

H. INGLIS and DONALD, W.S.—J. SOUTER, W.S.—Agents.

No. 261. ABERDEEN BANKING COMPANY, Suspenders.—*Sol.-Gen. H. Inglis and Donald.*

MABERLY, CANE, and COMPANY, Chargers.—*D. F. Hope.*

*Foreign—Bill of Exchange—Process.*—1. In a suspension by the Aberdeen Banking Company of a charge for payment of a bill drawn by them on a Bank in favour of an English party,—circumstances in which, in conformity with the law of England, as obtained on remit to English counsel, the Scots Court found liable for the contents of the bill to the onerous holders.—2. On appeal being made, parties not allowed to submit argument, either oral or written.

Glynn and Co. of London, in favour of John Maberly, and afterwards indorsed over to Maberly, Cane, and Co. of London. No. 20

After various procedure, it appeared that the parties were agreed as to the facts; the point in dispute being the liability of the drawers under the circumstances of the case, which was considered by the Court to depend upon the law of England. June 1, 1832  
Aberdeen  
v. Maberly

In obedience to a remit from the Court to the Lord Ordinary, the following special case, stating the circumstances under which the question rose, was prepared by the parties for the opinion of English counsel:—

“ John Maberly carried on business at Aberdeen and London as a banker, under the firm of John Maberly and Company, for some time previous to January 1832; and it is admitted that Maberly being indebted to the Aberdeen Bank, he did, by his agent at Aberdeen, on the 20th December, 1831, draw a bill upon his house in London, in favour of the Aberdeen Bank, for £450. This bill became due on 2d January, 1832; but Maberly having stopped payment in London on the morning of that day, payment of the bill was refused. It is also admitted that, on the 7th December, 1831, another bill for £900 was, in like manner, by his agent at Aberdeen, drawn on John Maberly of London, in favour of the Aberdeen Bank, of which payment was also refused on 9th January, 1832.

“ Maberly's Bank and the Aberdeen Bank had weekly settlements of notes of their respective banks, which had been taken in the course of the week, and for the balance respectively due a bill was given on London. On the 3d January, 1832, the Aberdeen Bank, on such weekly settlement rendered on that day, became indebted to John Maberly in the sum of £780, and the bill now in question was drawn for this sum upon Sir Richard Carr Glynn and Company of London, payable on the 6th January, 1832, in favour of the said John Maberly. This bill was transmitted to Maberly, and received in London on 6th January, indorsed by his agent at Aberdeen, and afterwards by John Stevens (who is a clerk in the banking-house of Maberly in London), ‘ per procuration of John Maberly and Company,’ and was by Maberly handed over with other cash to E. Y. Bartley, who was also a clerk in Maberly's banking-house, and manager of the Horse Bazaar in London for Maberly. This bill was afterwards indorsed over by Bartley on the 13th January, 1832, on the part of the Horse Bazaar, to Maberly, Cane, and Company, in the manner which will be found stated in the special verdict to be afterwards mentioned.

“ It is admitted that the bill for £780 was not presented for acceptance previous to its becoming payable; and it is also admitted that John Maberly and Company stopped payment in London upon the 2d January, 1832, and that upon the bill for £780, granted by the Aberdeen Bank, being presented to Sir Richard Carr Glynn and Company, they refused to accept it, in consequence of instructions from Aberdeen to that effect,

**£267.** the Aberdeen Bank having been advised that their bills for £450 and £900 had been previously dishonoured by John Maberly and Company, **1. 1837.** Proceedings thereupon took place in the Scotch Courts at the instance of Maberly, Cane, and Company, for the purpose of enforcing payment from the Aberdeen Bank, of the bill or draft drawn by them upon Richard Carr Glynne and Company.

" In this action various proceedings took place, when the following issue was directed to be sent to a jury for the purpose of ascertaining the facts attending the indorsation of the draft for £780 to Maberly, Cane, and Company, who are styled defenders in the issue:—'Whether the last-mentioned bill or draft for £780 was, on or about the 13th January, 1832, indorsed and delivered by the said John Maberly and Company, or by others acting for them, to the defenders: And whether, when the defenders received the said draft or bill, the stoppage of payments by the said John Maberly and Company was known to the defenders.'

" The issue having gone to trial, the following verdict was returned:—'Agreed, that John Maberly was the sole partner in the banking-house of John Maberly and Company: That the said John Maberly was the sole proprietor of the Horse Bazaar: That the said banking company and the said Horse Bazaar were separate concerns: That the said Horse Bazaar was not carried on under the name or firm of John Maberly, or John Maberly and Company: That E. Y. Bartley, who was a clerk in the said banking-house, was also the sole manager of the bazaar, but became personally liable for the debts of the Horse Bazaar: That the said John Maberly and Company stopped payment upon the 2d day of January, 1832, but were not made bankrupt until 28th of January, 1832, when a commission of bankruptcy was issued against the said John Maberly, banker, trading under the firm of John Maberly and Company: That the said Horse Bazaar was a solvent concern, and continued business until the bankruptcy of the said John Maberly on the said 28th of January, 1832: That the said bill for £780 was received in London on the 6th January, 1832, and was handed over, along with other bills, by John Stephens, who was in the employment of the said John Maberly and Company, to the said John Maberly, indorsed by him, per procuration of the said John Maberly and Company; and that the said bill, along with a considerable sum in cash, was handed over by the said John Maberly to the said E. Y. Bartley, for the purpose of the business of the said bazaar, but without any special directions as to the appropriation of the said bill: That the said E. Y. Bartley carried the said bill to Maberly, Cane, and Company, the same not being then accepted, who were then in the knowledge that the said John Maberly and Company had stopped payment, and requested the said Maberly, Cane, and Company to receive the said bill in payment of an account due by the said Horse Bazaar to the said Maberly, Cane, and Company, and

to pay over to him the balance, which was done accordingly by a cheque upon the bankers of the said Maberly, Cane, and Company, and discount for prompt payment was allowed, as it was before the usual term of credit had elapsed: That on no other occasion did the said E. Y. Bartley settle with the said Maberly, Cane, and Company in cash, but by a bill at three months: That the said John Maberly did not at the time know or direct that the said bill should be so delivered over to the said Maberly, Cane, and Company: That the said E. Y. Bartley employed the remainder of the funds which he so received from the said John Maberly in discharge of other debts of the said bazaar: That the debts of the said bazaar were paid in full, and the balance of the proceeds handed over to the assignees of John Maberly."

With reference to these facts, counsel was at the same time requested to state how the law of England would apply, in answer to the following queries:—

"I. Can an onerous indorsee or holder recover payment from the drawer of a bill which has been indorsed in the circumstances above explained, although, prior to indorsation, the payee has, to the knowledge of the indorsee or holder, stopped payment, but has not committed an act of bankruptcy, and the bill has not been accepted?

"II. Will the answer to the above question be altered on the supposition that the party receiving the bill, although he knew of the stoppage of payments by the original payee, did not know that he was insolvent?

"III. Under the circumstances of this case, does the law of England hold that Mr Bartley, the manager of the Horse Bazaar, for the debts of which he held himself personally liable, and which continued solvent notwithstanding the bankruptcy of Maberly and Company, must be viewed as a third party, independent of Mr Maberly?

"IV. May a set-off be pleaded by the Aberdeen Bank against Maberly, Cane, and Company, in respect of Maberly's two dishonoured acceptances?

"V. Did Mr Maberly, by voluntarily delivering over the said bill of exchange for £780, and cash to his clerk, Bartley, for the purposes of the Bazaar, make a fraudulent delivery of his goods and chattels; and was the delivery of the said bill to Maberly, Cane, and Company, and in part discharge of debt, the term of credit of which had not elapsed, and without any application for payment, such a fraudulent and illegal act as will bar them from recovering payment of the said bill?

"Lastly, Having in view the whole circumstances of the case, the court and special verdict, counsel is requested to say whether, if the present action had been brought by Maberly, Cane, and Company, in the Court of Westminster, against the Aberdeen Bank, the drawers of the bill, then sued, according to the principles of the law of England, have been held entitled to recover payment?"

but as this question proceeds upon the assumption that, as the bill was indorsed, the payees had not committed an act of fraud, I am of opinion that a holder for value might, under the circumstances stated, maintain an action against the drawer of the bill.

" 2. I think the state of facts here suggested would answer to the first question.

" 3. The law of England would consider Mr Bartley personally liable for the debts he had contracted in his capacity as the agent of Mr Maberly, for carrying on the business of the firm, but personally liable for the debts he had contracted in his private capacity. As regards this transaction of the bill, he could not be treated as a partner altogether distinct from Mr Maberly; but I do not think the question of the liability of the drawer of the bill is materially affected by Mr Bartley's position.

" 4. Upon the state of facts before me, I think this set-off cannot be pleaded. Maberly, Cane, and Company are stated to have received the value of the bill indorsed previous to any act of bankruptcy on the part of the drawers, therefore, cannot, as against them, set off a debt as indorsers.

" 5. These are questions of fact for the determination of the jury, not of law; but upon the statements in the special case, I find no evidence to establish a case of fraudulent transaction, or such a fraudulent and illegal act as would prevent the recovery.

" 6. If this action had been brought in England, and the facts at the trial had been those stated in the special verdict,

the Aberdeen Banking Company reclaimed, and contended, that the No. 261.  
 t were not bound by the 5th Answer in Sir W. Follett's Opi- June 1, 1837.  
 which, according to his own statement, related to matter of fact, Aberdeen Bank  
 could not, therefore, in a question of law, be received as autho- v. Maberley.  
 ve.

RD JUSTICE-CLERK.—I agree with the Lord Ordinary. Here there has  
 a statement of facts agreed upon, and, in order to find what is the law of  
 and as applied to these facts, certain queries are put to Sir William Follett.  
 ng to the careful way in which the questions have been prepared, and the  
 r-like manner in which they have been answered, I can find no fault. As  
 a fifth answer, in particular, was it irregular in counsel to say, allowing the  
 t of it to be a question of fact, I, as an English lawyer, hold the facts not to  
 at to fraud? If a judge had so directed the jury, and the jury notwith-  
 ng had returned a verdict contrary to this direction, would we not have been  
 d to set aside the verdict? I do not think it was out of Sir William  
 t's province to make this answer. Then, as to the sixth query, does it not  
 ce every thing in the case? He answers to this emphatically, that if the  
 had been brought in England, and the facts proved at the trial had been  
 stated in the special verdict, he thinks the party would have been entitled  
 over. Under the circumstances in which the case comes before us, we  
 no other alternative but to come to the same conclusion as the Lord Ord-

RD MEDWYN.—I agree with the interlocutor on the merits, but with refer-  
 to the pleadings of the parties, and the way in which the transaction in  
 on was managed, I cannot concur on the point of expenses.

RD GLENLEE.—I have no doubt, as the case stands, that the interlocutor  
 is on the merits, and that according to the law of England, whatever our law  
 have held, this was a good transaction. The expenses are a different matter.  
 ule, "actor sequitur forum rei," does not bar the chargers recovering from  
 awers under the law of land; but the question of expenses may be judged  
 ding to the law and practice of our own Courts. I do not think, looking to  
 statements on the record, that the suspenders are entitled to the whole  
 ses of process, which depend in a great measure on the way in which a cause  
 en conducted.

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f England, can give no other judgment than the above. It was observed at  
 r, that the questions put in the 5th query are said, in the corresponding  
 is, to be questions not of law, but of fact, and that the answer consequently  
 not establish the law of England, but merely shows the opinion of a learned  
 al, as to whether a matter of fact is or is not proved. But the answer to  
 5, that whether strictly matter of law or of fact, *it is necessarily left as law*  
 case, by the act of the parties themselves, who have embodied *all* the facts  
 they hold to be proved in the agreed verdict, and now require merely judg-  
 on *their legal effect*. The point to be determined, too, if not properly and  
 matter of law, is obviously very near akin to it, *being, in truth*, whether  
 overt acts afford *legal evidence* of fraud and dishonesty, which are things  
 by law; and accordingly, the concluding part of the answer to this query  
 is a judgment on the *legal effect* of those overt acts."



No. 262.

ROBERT ALLAN (Thomas Allan's Executor), Ra  
ROBERT CHRISTIE (Robert Allan's Trustee), Claimant  
MRS HOSKINS and OTHERS (Thomas Allan's Creditors),  
*D. F. Hope—Penney.*

*Partnership.*—Special case involving a question whether certain  
to the estate of a company, or to the private estate of an individual  
company.

June 2, 1837. SEQUEL of the process mentioned ante, XIII. 998. TH  
for Division. of a multiplepinding in name of Robert Allan being the  
Ld. Fullerton. several questions arose respecting various subjects, whether  
2. to the individual estate of the late Thomas Allan, who was  
Robert Allan and Son, or to the company estate of Rol  
Son. Three of the disputed subjects, were, respectively  
of the Bank of Scotland, a share in the Encyclopædia Brit  
entire property of the Caledonian Mercury newspaper. C  
chiefly upon entries in the books of the company: which w  
part of the other claimants, with the fact, that similar entr  
the company books, respecting various funds which we  
part of the individual estate of Thomas Allan: and that th  
circumstances proving the subjects in dispute, to be part  
estate.

The Court, after considering cases which were reported  
Ordinary, found that all the three subjects belonged to the  
of Thomas Allan. The question raised was entirely of a

DONALD STEWART (Judicial Factor on Harris) and OTHERS, Pursuers. No. 263.

—D. F. Hope.

EARL of DUNMORE'S TRUSTEE, Defender.—Sol.-Gen. Rutherford—  
Tait.

June 2, 1837.  
Stewart v.  
Earl of  
Dunmore's  
Trustee.

*Lease—Ranking and Sale—Ameliorations.*—An estate was sold, in a ranking and sale, on 5th March, 1834; the purchaser's entry was at Whitsunday, 1834; the purchaser became bound, as to the current leases, to pay the ameliorations due to tenants at the expiry of their leases; the last term in several of the leases was Whitsunday, 1834, when the lease of the incoming tenant commenced: Held that the purchaser was liable for the ameliorations due under those leases, because they were current at the date of the sale, when the purchaser undertook the obligation, and because the outgoing tenant does not give full entry to the incoming tenant at Whitsunday, but retains possession of the arable part of the farm till the crop is reaped, so that his right under his lease was still current, to many important effects, at Whitsunday.

UNDER a process of ranking and sale of the estate of Harris, belonging to Alexander Norman Macleod, the estate was sold on 5th March, 1834, at a price of £60,200, to the late Earl of Dunmore. The term of entry was Whitsunday, 1834. It was stipulated by one of the articles of roup, that "as the lands and other subjects under sale are to be sold under the burden of the current tacks or missives of tack thereof, or of such parts thereof as are under lease, the purchaser must implement all the conditions and obligations therein that were binding upon the said Alexander Norman Macleod, Esq. of Harris, the common debtor, and the purchaser shall have no recourse upon the said Alexander Norman Macleod, or upon his creditors, or any parties in their right, for or on account of any ameliorations or improvements which may have been made by the tenants or others, it being expressly stipulated, that all such meliorations shall be a burden upon the purchaser alone, and that he shall free all concerned of such claim." In another and relative article it was farther provided, that "the purchasers shall be bound to implement the whole conditions and obligations in these leases, that are or may be binding upon the creditors of the said Alexander Norman Macleod, and to free and relieve him of all such conditions and obligations, reserving to the purchaser all actions whatever against such obligations as shall not infer liability against the said creditors." Various leases had been granted by Alexander Norman Macleod, under which he bound himself to pay to the tenants an equivalent for ameliorations, at the end of each lease. The last term in several of the leases was Whitsunday, 1834, when the lease to the incoming tenant commenced. In these leases, the tenants retained the amount of the meliorations out of their rents, which they refused to pay to the judicial factor; and the judicial factor, after attempting unsuccessfully to obtain payment of the rents from them, raised an action against the Earl of Dunmore, as having become liable for the amount, in consequence of the above quoted articles of roup.

In the process, Lord Dunmore died, and his trustee was sisted. It was in defence that the estate was sold only under the burden

of the defender's crop, was rendered so, and right of the common leases had not then expired. They had a crop still on the ground, they did not reap until the harvest after the defender's end of the lease. On that account also, the terms of the articles of roup rendered these meliorations.

The Lord Ordinary "repelled the defences, and decreed against the defender in terms of the conclusions of the libel, and found him entitled to expenses."

The defender reclaimed. The Court did not call on counsel for the interlocutor.

LORD GILLIES.—I think the interlocutor is right. At the close of one lease, and the commencement of another, there is an interval during which there are two occupants of the ground, *qua* tenants, and the outgoing, tenant. The incoming tenant takes possession of the ground at Whitsunday; the outgoing tenant, whose crop is already reaped, retains possession of the arable part of the farm, until he reaps it. The right of the old tenant therefore has not come to an end, but is subject to various important effects, after the right of the new tenant has begun. That the defender, in terms of the articles of roup, became liable for the expenses due to the tenants in those leases, which have given rise to the present litigation.

LORD MACKENZIE.—I think the interlocutor right. The lease was not existing at the date of the roup, when the defender's obligation arose.

LORD PRESIDENT concurred.

LORD COREHOUSE.—The grounds on which I pronounced the interlocutor under review have been anticipated in the opinions which have now been delivered. Though the term of the lease ends at Whitsunday, the incoming ten

**L CHARLES SOMERVILLE MACALISTER and OTHERS (Caledonian No. 264**  
**y Company Directors), Pursuers.—Sol.-Gen. Rutherford—**

**Ivory—A. M'Neill.**

June 2, 1831

Macalister v

Alexander.

**D ALEXANDER and OTHERS, Defenders.—D. F. Hope—M'Neill**

**—Anderson—Graham Bell—Cook.**

**Partnership—Joint Stock Company—Contract—Homologation.—1.** In an action by the directors of a joint stock company against the other partners for advances made and engagements contracted for behoof of the company—on the following defences were repelled:—(1st), That the directors were only liable, inter se, to the amount of the shares severally subscribed; (2d), That the directors had no right to begin business or power to bind the other partners till the whole capital had been subscribed for and secured; (3d), That the power to borrow money was expressly limited by a certain clause of the contract of copartnership, the provision in which they had violated.

In the year 1824, a prospectus was circulated for the establishment of a joint stock company for supplying the inhabitants of Edinburgh with other dairy produce. A committee of management was there- June 2, 1831  
 2D DIVISION  
 Lord Jeffrey  
 T.  
 ned of those who were favourable to the undertaking, and the Wheatfield, in the neighbourhood of Edinburgh, were purchased for a price of £12,000. On 2d February, 1825, a “meeting of subscribers” took place, at which directors were named and certain resolutions passed with a view to constitute the company, the capital fixed at £50,000, divided into 2000 shares of £25 each. The directors were authorized to complete the purchase of the land required for the undertaking and to erect suitable accommodations, and a contract of copartnership was appointed to be prepared. The committee read a statement setting forth that the whole capital had at that time been subscribed and had the thanks of the meeting voted to them for making the purchase of Wheatfield. The lands of Meadowbank and an adjoining ground were soon afterwards bought at a price of £9700.

After a contract of copartnership was prepared, and was approved by the directors. By the 1st article it was declared that the partnership should be held to have commenced from and after the 28th of January 1825, and it was farther declared that the subscribers “shall be entitled to the profits, and be liable for the losses, arising from or upon the business, and shall be bound to relieve each other of all the debts and engagements of the company, but that only to the extent of and in proportion to their respective shares therein.” By the 2d article it was declared that the subscribers “shall have right to the profits, and be bound to relieve each other of the losses of said business, and shall be bound to relieve each other of all the debts and engagements of the company in proportion of their respective interests or shares in the capital stock.” The 3d and 4th articles provided for an annual general meeting on the last Monday

and other writings relative to the business of the company, and all times be open to the directors, and superintending members thereof respectively, but to no other members of the company, unless ordered by the annual general meeting," and also that the directors "shall have full power to make the purchase of land, or premises which they shall deem necessary for the concern, and be authorized to complete and carry into effect the purchase of lands of Wheatfield and Meadowbank, and to take all required steps for the erection of suitable accommodations for the dairy, and to enter into all contracts or deeds necessary in the business of the company, and otherwise to carry into effect and execution the business of the company, and to take all such steps as to them may seem and beneficial in forwarding the prosperity of the estate, according to their sound discretion, to dispose of the lands or feu them, and also to feu such parts of Meadowbank as they think proper." It was farther declared "that the directors, in the above-mentioned and all other parts of the business, subject to such limitation, extension, or alteration, as a general meeting shall think fit—all which acts of administration shall be effectual and obligatory upon the company, and whole individual parts thereof, and that it shall be in the power of the directors to borrow money on the credit and security of the company to the extent of £10,000, which they are hereby empowered to do by way of cash, or by some bank or banking company, provided there is stock or securities subscribed for and unpaid to that amount." It was provided

date fixed for payment, and until payment thereof is made; and in no event shall it be in the power of the directors to call upon the partners for a sum beyond that subscribed for by them respectively." By the 18th article the directors were not to be "liable for omissions, nor for the sufficiency or responsibility of securities or property on which they may lend out or otherwise invest the funds of the company; nor for the actions or intromissions of the manager, banker, clerks, or accountant, or any other officers or agents of the company, or any other persons trusted with the business of the company; nor shall they be liable in solidum nor pro rata for one another, but each only for his own actual omissions." The 21st article provided that "each of the partners shall assign, as he hereby assigns and conveys to the company, and the directors thereof for the time being, his own particular share and profits in the concern, in security of the debts and engagements of the company." The 23d article it was provided that "previous to the last Monday of May, 1826, on which day the general annual meeting of the stockholders is to be held, and in every year thereafter, the books of the company shall be balanced, and a statement or abstract of the company affairs shall, under the inspection of the directors and auditors, be made up and signed by the accountant of the company and secretary: And the directors, or the accountant or secretary, shall be obliged to lay upon the table, at the said general meeting to be held upon the said last Monday of May, the said statement or abstract, for the inspection of the partners present, the substance whereof shall be stated at the said court by the chairman or preses; and the said statement or abstract shall lie at the disposal of the secretary, open for the inspection of any of the partners, during the space of one calendar month subsequent to the said last Monday of May."

Thereafter the contract was subscribed by shareholders to the extent £20,000. The directors, while it was in the course of subscription, took measures for the erection of the necessary buildings, the contract being about £5400, though they ultimately cost about £9000.

There having been a previous call of five per cent, a call of ten per cent was made upon the shareholders in June, 1825, and another to the same extent in July following, but these calls were only partially paid. The sum thereby realized was inadequate to meet the engagements of the directors, and they borrowed money for payment of the price of the lands above-mentioned and for current expenses, partly on their personal credit and partly on an heritable bond granted over Meadowbank by some of their number as trustees for the company.

On 29th May, 1826, the first annual general meeting took place, as required for by the contract of copartnery, at which there were present sixteen shareholders, five of whom were directors. The meeting received a report by the directors of their proceedings, in which the various difficulties they had to contend with were detailed, and

by an accountant it appeared that in January, 1828, the calls on the partners had been £8600, while the debt was £3600. Annual meetings were held, and reports by the partners thereat, in 1827, 1828, and 1829. The meetings were barely sufficient in number to form a quorum. In 1830, a general meeting was held at which it was resolved to call up the subscribed capital, and wind up the company. Steps were taken accordingly.

Thereafter Colonel Charles Macalister and others, individual partners of the company, raised action against Alexander and others, being the whole solvent partners and pursuers, libelling on the terms of the contract, and setting aside the formation of the company and its subsequent unsuccessful operations. The amount of subscribed capital recovered and the value of the property was about £30,000, which sum was inadequate to payment of the debts and losses of the company, there being a deficiency of upward of £10,000. And that large advances had been made by the pursuers from private funds for the purpose of liquidating the debts and losses of the company, and concluding, first, to have it found and decreed that the pursuers were only liable rateably, according to the shares held by them of the company stock, for its losses and debts, and entitled to be relieved from all farther proportions of such losses and debts by the remaining solvent partners rateably according to the shares such partners had in the concern, and then to have the defendants ordered to make payment to the pursuers, conformably to the amount of their shares.



the contract libelled on, and with reference particularly to No. 264  
 ion at the end of the first clause, and also to the ninth clause, June 2, 1837  
 rs are not entitled to recover from the defenders, as in a *Macalister v.*  
 ter socios, beyond the amount of the sums for which they *Alexander.*  
 subscribed.

ursuers had no right under the contract to begin business, and  
 to bind the partners for any debts or obligations on behalf of  
 y, till the whole capital of £50,000 had been subscribed for  
 l.

owers of the directors in regard to the borrowing of money  
 ed by the contract, and particularly by the 8th clause, and as  
 part of the debt concluded for was contracted by means of  
 bligations entered into in violation of the contract, and on the  
 sponsibility of individual directors, the pursuers have no claim  
 he company to be relieved of such advances.

d Ordinary pronounced the following interlocutor, adding the  
 note:—"The Lord Ordinary having heard the counsel for

—The first of the above-mentioned defences appeared to be that  
 on. It was rested mainly on the provision in the close of the *first*  
 contract, 'that the partners should be bound to relieve each other of  
 d engagements of the company, *only to the extent of*, and in proportion  
 ective shares therein,' and partly upon passages in the 8th, 9th, and  
 , which were said to confirm the construction put by the defenders on  
 vision. According to that construction, this provision was specially  
 protect the body of partners from the consequences of over-trading, or  
 rudent dealings on the part of *the directors*, and was equivalent to an  
 hat they should at no time put more than the subscribed capital at  
 er pain of being *personally* answerable, and without relief, for the con-  
 any more extensive speculations. Now, if any thing be clear in this  
 rd Ordinary takes it to be, that *this* limitation of the provision to *the*  
*directors* having occasion for relief, is totally inadmissible. It is in  
 is a provision limiting the right of relief of *all the partners*, as against

The case of directors is not once named or alluded to in any part of  
 and it is not less (but more) extravagant to say, that *it applies exclu-*  
*m*, than it would be to say that they alone were *exempted* from its

If it had really been intended to impose such a restriction upon the  
 he directors to bind the company, it is inconceivable that the parties  
 introduced it into *this* first article, which merely sets forth the uni-  
 ommon law rights and liabilities of the partners, instead of bringing it  
 ation of the great general powers given to those directors by article 8  
 contain a special limitation as to *borrowing*), or as a qualification of  
 munities conferred on them by article 21.

ue meaning and effect of the restraining words now cited, be, there-  
 defenders contend, it necessarily follows that no one partner of the  
 ho has been obliged by a creditor to pay any of its debts or engage-  
 ho is distressed by such a creditor, will be entitled to any relief from  
 rtners, beyond the amount which may remain unpaid upon the sub-  
 ital of each; and if all have paid up their whole subscriptions, he will  
 to *no relief at all*. Now, the first question is, Whether it is conceivable  
 istrous and unjust a provision could be intended, or could by possibility  
 l to effect? The Lord Ordinary has never been able to get over this,

gers—assume (contrary to the fact) that the directors would go beyond the capital, and suppose that a private partner, having management, is obliged to pay a debt so contracted, is there any sense in saying that he shall not be relieved by the other partners liable to such distress? or, under the words relied on, would claim relief from the directors who over-traded? Those directors for each other. The individuals who subjected the concern to insolvency, and the whole subscribed capital may have been. Then the directors are all necessarily *partners*;—and it is *not* they should not have the benefit of the provision in question as. There is confessedly no provision, nor any thing like a provision that the individual directors, who over-trade, shall be bound to who may be consequently distressed by the company creditors. The defenders seem to go on, in this attempt to escape from the construction, is really something more than some vague notion assumed common-law liability of the directors, to an award of ration as the penalty of their so over-trading. In any ordinary case would plainly be no such liability; and, in the cases most like would be no shadow even of equity in seeking to subject them. There is, in point of fact, it must always be remembered, no contract that no engagement shall ever be entered into beyond capital. Now, suppose the whole of that capital paid up, and it fits, under an admirable system of management, and that the directors increase those profits, contract for 100 more cows, and a correct new cow-houses, could it ever be said that this was a *malversa* the event of any ultimate miscarriage, they would be made liable in their own persons, and without relief from their partners? *And* plainly be no such liability at common-law, how is it possible to it out of a provision in the contract which makes no distinction and other partners; and, instead of imposing any extraordinary members, consists wholly in a declaration (as the defenders, at they shall all be freed from the common and natural liability of

“But the radical fallacy of the defenders’ attempt to palliate sequences of their doctrine is, that it is not true, in point of fact,

of copartnership alleged by the defenders to import an absolute No. 264:  
 n of the liabilities of the partners inter se, to the amount of the

June 2, 1837.  
 Macalister v.  
 Alexander.

orth of new buildings; these undoubtedly would be engagements within  
 ers, and the line of their duty, even according to the rigid and imaginary  
 of the defenders. But suppose the bank to fail—the cows to die of  
 —the houses to be destroyed by fire, and the whole concern to be broken  
 the prices of these articles were paid, and then suppose that the sellers  
 actors should sue an individual partner for those company debts, and  
 creet against him, could it be seriously maintained that he should have  
*whatever* against his partners, but be obliged to pay £7000 of company  
 of his own pocket, from the mere accident of his having been selected  
 pany creditor in preference to all or any of those who were equally  
 their diligence? Yet, if the defenders' reading of the provision in ques-  
 e right one, this would be the inevitable consequence. The partners are  
 elieve each other, *to the extent* of their subscribed capital, still unpaid;  
 the supposed case, it is all paid, and the debts having been contracted  
 re was abundant capital in the hands of the directors to answer them,  
 shallow pretext of handing him over *to them* for indemnity would be

It is needless, indeed, to go to such an extreme case as has now been  
 , for the purpose of testing the doctrine of the defenders, since, unless it  
 that no company is to contract *any* debts or engagements after its sub-  
 apital is paid up, however ample the stock in which that capital has been  
 may be to answer them at the time, it is obvious that unavoidable mis-  
 may reduce the creditors to the necessity of coming on individual partners  
 action, and that the most unheard of injustice must be done, if they were  
 eluded from all claim of relief on their associates.

Lord Ordinary is satisfied, therefore, that *this cannot* be the meaning  
 t of the provision relied on by the defenders; and the next question,  
 , is, what then is its meaning, and how are the words of it to be satisfied?  
 ords no doubt are awkward and ill-assorted, but to him he will confess  
 y seem of very little importance; the whole passage from the word  
 'g,' in the first line of the page to the end of the article, being, in his  
 little more than an idle amplification of the elementary principle of all  
 rships, and which would be implied, though not once mentioned in the  
 viz. that the partners should share profit and loss according to their  
 in the concern, the words, 'but only *to the extent* of, and in proportion'  
 shares therein,' being merely a clumsy and tautological way of expressing  
 tional liability, and which, with a slight variance, might have been more  
 rded, as follow, 'but each only to an extent proportional to his share in  
 c of the said company.'

though the Lord Ordinary inclines strongly to think this, and no more,  
 meaning of the words in question, he conceives that the peculiar form of  
 on may be explained by one or two suppositions equally inconsistent with  
 s of the defenders, and either of them far preferable to their interpreta-  
 The clause, it will be observed, sets out with declaring generally, and with-  
 ification, that the partners 'shall have right to the *profits*, and be liable to  
 es arising upon the said business,' and it is only after having made this  
 and *absolute* provision that it proceeds to say, 'and shall be bound to  
 each other of the *debts* and *engagements* of the company, but only to  
 nt of, and in proportion to their shares. Now, the Lord Ordinary would  
 that the debts and engagements of the company thus contradistinguish-  
 its *losses*, may have been meant of such debts and engagements only  
 t be satisfied *without loss* to the company, as being within the amount  
 unpaid up shares of the several partners, and that the limitation meant no  
 n this, that when any individual partner was distressed for debts of this  
 ion, he was to be entitled to proportional and total relief from the rest,  
 he extent only of those unpaid shares, by means of which the matter might,

the defenders being either truly and literally losses, or debts as which remain after all the subscribed stock has been applied to satisfaction.

"The second supposition (which is not inconsistent with the which a just and reasonable meaning may be given to the words that they were intended not to cut off the inherent right of a debtor to equal relief from the others, but only to oblige him to seek it and proportionally from them all; to deprive him, in short, of the right to an extraneous creditor of the company, of selecting one to bear the common burden, and to make it necessary at once to convene all to come against each *only to the extent* of the proportion indicated of his share in the concern. This, it is conceived, was a proper object, and will fully explain and satisfy the words of the provision.

"Understood in this sense, too, it has been carefully attended to by the court in framing their summons, the conclusions being directed against the solvent partners of the company, and only for their rateable shares of the sums demanded.

"If the case had admitted of no other solution, the Lord Ordinary adopted either of these constructions in preference to that of the defender, indeed he is strongly inclined to the views on which the last of them is based. But he has already stated, that he considers both as unnecessary, on the whole, that the words so much relied on are mere surplusage, nothing more than what was already expressed, and would be implied, if the whole clause had been omitted. One main reason for this is derived from the tenor of that part of the *second* head or article in which the whole of the passage, already referred to in the first article, is *fully repeated*, with one or two slight verbal changes, and the remainder of the words, 'but only to the extent of,' on which the whole case depends. From the words, 'bind and oblige,' in the fourth line of the article, to 'shares of the capital stock,' in the ninth line, the whole is *repeated* of the passage in the first article, including the obligation of so much has been said, and the material thing is, that this obligation is expressed in the second edition, without any limitation, except the proportion to the interest in the stock. It now runs thus:—'and the

s or directors of the said company had no right to begin business, No. 264  
power to bind the partners for any debts or obligations, on behalf

June 2, 183  
Macallister v  
Alexander.

clause, the partners are bound to relieve each other only *to the extent* of, proportion to their subscribed capital unpaid, and by the other, they are to relieve each other *in proportion to their interests* in that subscribed capital. The meaning of the last, there can be no doubt, and that meaning is entirely conformable to justice and common law. The former is in some measure ambiguous and admits, as has been seen, of various interpretations; and, according to different constructions, it is utterly repugnant to justice, and without example. If it admitted of no other construction but this, one of the contradictions must give way, and the Lord Ordinary conceives that it cannot be which stands *last* in the deed, and is alone conformable to equity and general principle. If it does admit of construction, however, there can be no better guide to the meaning than the immediate subsequent clause, in which the whole matter is settled, with direct reference to the specific capital which had not been previously

his leading defence is not maintainable on the first article of the contract itself, it is plainly in vain to hope that it may be aided by any of the rest. A special restriction upon borrowing in the close of the 8th article, will be noticed in due time to the last defence. But as to any bearing it may be supposed to have, first, it is enough to observe,—1st, that it relates expressly to the *directors*, and not to partners generally; and, 2d, that it would obviously have been unnecessary if the first article had imported what the defenders now allege.

The *ninth* article again plainly relates exclusively to *calls* on the partners for payments of their subscribed capital, *and to nothing else*. It regulates in great detail the forms of such calls, and the subsequent *proviso* that the *directors* shall have power thus to *call* for any sum beyond that subscribed, manifestly relates to calls only, and not to actions of relief by partners distressed for company money in seeking to equalize the burden of its losses, after its business is at an end. The *proviso* was probably unnecessary; but it was apparently suggested by the wording of an earlier part of the same article, in which the directors are directed to make their calls ‘at such times, *and to such amount as they shall think proper*.’ In fact, it is precisely equivalent to a parenthesis like this after the word ‘amount’ ‘(but never exceeding the sum subscribed by each such partner),’ which would have been a better way of expressing, what might very well have been implied, and would obviously have afforded no room for the strained construction of the defenders.

The only other article referred to in relation to this first defence was the 13th, which, when fully considered, it appears to make strongly against the views of the defenders. It relates to the right of a partner allowed to retire, or to sell his shares, and to be relieved of all antecedent debts, &c., of the company. It first provides, that he shall be entitled to relief *of the whole of such debts*, and then the other partners are obliged to oblige themselves severally to relieve him *in proportion to their shares, to the extent of their liability herein before expressed*. Now, at the very most, this clause only falls back on the original definition or measure of liability, and tends in no way to limit or define it. But looking to the clear and unqualified right of the retiring partner to be at all events relieved of the whole debts and obligations, and finding that *on the defender's view* of this original liability, *he could have no relief at all*, in the very probable case of the whole subscribed capital being paid up, and the creditors came to him for payment, it seems obvious that this liability cannot be so limited as they allege, without imputing to this provision the most glaring inconsistency, as well as the grossest injustice.

With regard to the defence rested on the allegation that the directors had no power to begin business, or undertake engagements for the company, till the whole of £50,000 was subscribed, it is not necessary to consider, whether there be any cases where such a ground of pleading might be admitted. It is

As the Lord Ordinary it appears, that no party signing this contract to pretend ignorance of what had been done or sanctioned at these meetings. But the matter is not left to implication, for, in the 8th article, deliberately subscribed by the defenders, the directors are, in empowered 'to complete and carry into effect *the purchases made* 'Wheatfield and Meadowbank, and to take measures *for the erection and accommodation* for the establishment, and to enter into *all contracts necessary*, &c. Now, the lands of Wheatfield had been already bought for £12,000, and the lands of Meadowbank for £9,750; and yet the directors, on their responsibility, to carry into effect those purchases, grant all necessary deeds for that purpose. It is quite in vain to say, who thus expressly recognised and adopted, as acts of the company, four months before, and when there was not one farthing of actual capital must be held (upon mere implication) to have meant that nothing be done till £50,000 had been actually collected: And that when buildings to be erected on the lands so purchased, they had no notion of any contract being entered into for that purpose, till this was secured. If they declared it right and laudable to lay out £20,000 of capital at all, it is extravagant to say, that they would have reproached themselves with contracting for necessary buildings to the extent of £9000, with subscribed capital of only £20,150. The directors accordingly entered into such a contract, and the buildings were actually in progress before the defenders subscribed. The Lord Ordinary cannot think it doubtful, but fully warranted in so doing, by the express terms of the contract as recited. But in this way the company was bound, by the express acts of the defenders and the other subscribers, and before a single subscription to the extent of more than £30,000, which was the true origin of the loss, and in fact, with the other unavoidable expenses of the company, authorized, the source of the whole losses which have been sustained.

"This alone might dispose of the defence, that the directors have exposed the partners to hazard, or to bind them in any obligation, before capital was subscribed. But there is another provision in the contract separately conclusive upon this head: This is the latter part of the

provision of the contract by which the defenders allege that the powers of the directors to borrow money, on the responsibility of the company

No.  
June 2,  
Macalis  
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of substance and effect, *they were so retained*, and as completely at the disposal of the company and its managers, as if a minute to this effect had been formally engrossed in the books. That it was not so engrossed may be an impeachment of their book-keeping or accuracy in entering their transactions, but can never deprive them of the substantial power, under which they have really acted, or subject them to forfeitures as for breach of an imaginary interdict against entering on business till all the shares are actually taken by individual partners, in the very face of this express license and permission to the contrary.

"The last defence disposed of by the preceding interlocutor, is that founded on the concluding part of the 8th article of the contract, by which the directors are empowered to borrow 'on the credit and security of the company,' to the extent of £3000, provided there is subscribed capital unpaid up to that amount at the time. This, though properly an *empowering* clause, is contended to import a prohibition to borrow, except on those conditions, and this prohibition, the defenders say, the directors have violated, by borrowing to a much larger extent, and when there was no such unpaid capital, and they maintain they cannot be called on to relieve them of the consequence of such borrowings.

"Now, the short answer to this is, that there have been no borrowings 'on the credit and security of the company' to a greater extent than is permitted by the contract;—that the greater part of the transactions complained of under that name consisted merely in granting new securities for debts previously existing, and recognised in the contract itself, and the remainder in raising money on the personal credit of individual partners or directors, and afterwards advancing it to pay off the most pressing of the existing debts of the company. According to the Lord Ordinary's impression, there is no one case in which money has been raised, directly or indirectly, on the company's account, in order to extend its business (the case evidently contemplated in the provision referred to), or for any other purpose than to satisfy the claims to which the company was liable from the very beginning, or which ought to have been defrayed by the withheld instalments on the subscribed capital. It is needless to go here into the details of those proceedings; but with the exception of the sums actually advanced for those purposes out of the private funds of individual directors, the Lord Ordinary is not of opinion that any farther investigation is necessary. With regard to these, a question may no doubt be raised, whether the condition of the company was not such as to have made it the duty of the directors rather to have allowed the creditors, whom they thus pacified with their own money, to have proceeded with diligence against its property, than to have delayed an inevitable catastrophe by such interference. If the defenders can make out any case of gross and pernicious imprudence of this kind, it will be open to them to do so under the preceding interlocutor, which merely finds that these were not acts of borrowing on the credit and security of the company in contravention of the contract. To him it certainly occurs that it would be next to impossible to make out such a case. By paying the most urgent debts of the company with their own money, they may have done no real service to the concern. But they would seem entitled, at all events, to come in the place of the stranger creditors, whose proceedings they thus arrested, and against whose claims it is admitted that the defenders would have had no protection.

"In these circumstances, it is needless to inquire into the justness of the legal presumption, that the grant of a limited power in a contract of this description implies a penal prohibition against exceeding the limit, as in every case to infer the forfeiture of equitable rights, otherwise competent at common law, to persons in the situation of the pursuers; and it is equally unnecessary to consider the effect of the declaration, which immediately precedes this implied prohibition, viz. 'that powers of the directors shall, in all particulars, be subject to such limitations,



is not provided for by the general law of partnership. If any departure from common law is intended it must be clearly expressed and without ambiguity. It is not, however, a correct rule of interpretation in case of ambiguity to introduce something for which provision is already made by the common law. It must necessarily be contrary to the common law. Looking at the contract as to the first point of the liability of the parties inter se, the limitation as the defenders contend for had been meant to be introduced. I expect this to have been done in the most specific terms, and in a clause not objected to by any other. I should not have looked for it in the first or second clause of the contract. The first describes the company generally, and is where the details are given that such a limitation is to be looked for. The second declaration is only in majorem cautelam, and its words apply to profits as well as to the losses and engagements of the partners. In the first clause the words "to the extent of" are left out. The true interpretation of the expression in question in the first clause is that it refers only to the shares, and there is no other clause leading to a different interpretation. The parties do not seem to have contemplated loss, but if they meant that entering into engagements beyond the amount of their subscribed capital was not to have relief, there should have been a distinct provision limiting the Acts of the directors as sanctioned at meetings of partners to an extent not exceeding the sums ever paid up. I see nothing in the 8th clause which has been contended for. It gives power to borrow £3000 without calling a meeting. The 9th clause alludes solely to calls upon the partners for shares, although that matter was provided for at common law. The context shows the meaning of the words used, and both the first and last parts of the clause show such calls. The 13th clause follows up the 11th, which gave a power to call, and contains a provision beyond the common law. I entirely concur with the Lord Ordinary in regard to the first defence. As to the second defence

and nothing but the power to recover by calls; I do not say that the directors No. 264  
 d have borrowed more than £3000, but in a question of indemnification for  
 ls and advances, the limitation contended for does not apply. The Lord June 2, 1837  
 inary reserves all special objections, and only repels these general Anderson v.  
 nces. Buchanan.

ORD GLENLEE.—I cannot hesitate in being of the same opinion as to the two  
 findings; and as to the third finding, the Lord Ordinary only repels the  
 nce on the clause as to the power of borrowing; in so far as a defence is main-  
 ed that the debt in question was not one for which the pursuers were entitled  
 claim against the partners, that is not disposed of but is still reserved. The only  
 t omitted in the discussion is whether the directors might not have left the  
 itors to attach the property.

ORDS JUSTICE-CLERK and MEADOWBANK concurred.

THE COURT accordingly adhered, reserving all questions of expenses.

is HUNTER, JUN., W.S.—ALEXANDER DOUGLAS, W.S.—TOD and HILL, W.S.—THOMAS  
 INNES, W.S.—Agents.

MRS TORRY ANDERSON and SPOUSE, Pursuers.—*Penney.* No. 265  
 WILLIAM BUCHANAN and OTHERS, Defenders.—*A. Wood—Ivory—*  
*W. Bell.*

*Husband and Wife—Trust—Revocation.*—A trust having been constituted by  
 oman before her marriage, in gremio of a marriage-contract, whereby the jus  
 iti was excluded, in regard to her own heritable property, and for her behoof  
 usively, no rights or interests being created by the trust in favour of third  
 ies, and it being declared to be irrevocable,—Held that such trust was not  
 cable during the marriage, at the pleasure of the granter, with consent of her  
 and; but observed, that it might be revoked on the death of the husband, the  
 s of granting being then removed.

HE pursuers, Mr and Mrs Torry Anderson, were married in 1828, June 2, 183  
 latter being possessed of entailed property to a considerable amount. 2D DIVISION:  
 In a view to the marriage, they executed an antenuptial contract, in Lord Jeffrey  
 ie of which a trust was constituted for behoof of Mrs Anderson. T.  
 contract set forth that she had made certain settlements on her  
 ded husband, to take effect on her death; but that it had been  
 wanted and conditioned, “and expressly agreed to by the said  
 as Gordon Torry, that during her life he should have no title to,  
 interest or concern in, the rents, issues, and annual profits of the  
 s and estates of Tushilaw,” &c., and that the said subjects should not  
 ble to his debts or deeds, &c. Upon this narrative, the deed pro-  
 as follows:—“And in order to give full effect to the foresaid  
 on and agreement, the said Thomas Gordon Torry renounces,  
 upgives, and overgives to and in favour of the said Mrs Ann

integrity and ability of the persons after-mentioned, for it has given, granted, and disposed, and does hereby, with advice and assent of the said Thomas Gordon Torry, alienate, and dispose to, and in favour of William Buchan &c.

The purposes of the trust were thus set forth :—"Provided as it is hereby specially provided and declared, that these [granted to the said William Buchanan, James Buchanan, and Gardner, and to the survivors or survivor of them, as aforesaid always, for the sole and separate behoof of the said Mrs A Simmons Gaskin Anderson, and for the purpose of preserving alone, and in her own person, the whole right, title, and interest in the subjects before disposed, and thereby giving complete effect to the stipulations before written, and rent the said Thomas Gordon Torry, of the rights and privileges [otherwise belong to him, in consequence of the said intention for effectuating which ends and purposes, it is hereby declared said William Buchanan, James Buchanan, and William C the survivors or survivor of them, shall be bound and obliged in acceptance hereof, they expressly bind and oblige the hold just count, reckoning, and payment to the said Mrs A Simmons Gaskin Anderson, for their whole intromissions with subjects before conveyed, rents, issues, and annual profits [particularly, that they shall be bound and obliged yearly, and during all the days of her life, to pay over to her the free the said rents, malls, duties, and annualrents after deduct

sents shall not be revocable by me on any ground or in any form No. 265  
 .” The trustees received no power, either expressly or by June 2, 183  
 on, to resign the trust or to assume new trustees. The trust Anderson v.  
 a to the survivors or survivor of them. Buchanan.

16, Mrs Anderson, “with consent and concurrence of Anderson,  
 and, and he for his interest,” raised action against the defenders,  
 William Buchanan and James Buchanan, trustees under her  
 contract, and against the late Mr Gardner, W.S., the agent for  
 proceeding on the narrative, that “the pursuer having become  
 for various reasons, to put an end to the said trust; and being  
 on that her property would be better and more expediently  
 , and equally well secured for her behoof, without the interven-  
 the said trust, did accordingly, with her husband’s consent,  
 to the said trustees, that she revoked and recalled the said trust-  
 n, and declared the trust, at least as constituted in their favour,  
 , and called on them to denude of the same, simply in favour of  
 r at least in favour of such other trustees as she shall name and  
 but the said trustees have in reply maintained that they were  
 and bound to maintain and keep up the said trust, and to  
 the possession and management of the property in terms

Thereupon, after a recital of the trust, the summons concluded,  
 it should be found and declared that the trust-disposition,  
 anted exclusively for behoof of Mrs Anderson, was and is  
 by her at pleasure, and has been duly and validly revoked by  
 consent of her husband, and that the trust was extinguished and  
 d, and farther, that the trustees should be decerned to reconvey  
 erty to her; or, 2dly, And alternatively, that she had full power,  
 sent of her husband, to invest such new trustees as they may  
 and appoint, instead of the defenders, with the whole trust-

There was likewise a conclusion for count and reckoning,  
 as departed from on the subsequent decease of Mr Gardner.  
 ence against the declaratory conclusions it was pleaded generally  
 trust was not revocable, but that if the contrary should be held,  
 ees were entitled to a decree of the Court declaring their  
 n with the trust-estate to have been brought legally to an end,  
 ering them of their actings under the trust.

Lord Ordinary reported the question on cases, adding to his  
 tor the subjoined note.\*

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e Lord Ordinary is inclined to hold that the trust may be revoked by  
 in this case, especially considering the consent or non-repugnantia of  
 ee. He takes it to be a principle of universal application in the law and  
 of Scotland, that no party can judicially resist, or enforce, any demand,  
 ing able to qualify an interest, as well as a formal title, so to enforce or

resist. Now a trustee has, as such, no legal interest but that whose benefit the trust has been created. But in this case, truster herself, and she only resumes her own property, when trustees or commissioners to denude. That the deed bears, *irrevocable*, would seem to be of little consequence, where the interest concerned but that of the party by whose free will inserted, and who may afterwards will to recall them. In the entirely *sui juris* at both periods, such words truly amount to expression of present purpose, which may of course be supersede of altered purpose, whenever that may occur. If it be said that is in one sense a different person, and one requiring more protect individual, who, for the very purpose of being so protected, ma trust, while she was yet unmarried, it may be answered, 1st, T only person for whose benefit the trust subsists; 2d, That the is it considers sufficient protection to such persons, by making all husband and wife revocable; and, 3d, That a wife, with the co husband, is by law, as entire a person, and in all respects as cap a single woman can ever be. In fact, a man (or an unmarried disposition, has much less protection against the influence of than a married woman, and if a trust created by such perso exclusive interest, may be recalled at pleasure, though in tern irrevocable, it is not easy to see why the same rule should not b a case as the present.

"The case of voluntary interdiction may offer some analogy revocable at the mere will of the party, it may be recalled with interdictors, and the trustees here are quite willing to denude.

"But though this be the leaning of the Lord Ordinary's c disposed to decide a new question of this magnitude on his o and thinks it desirable, on every account, that it should at on deliberate judgment of the whole Court. In England, it is a trust of this kind would be clearly irrevocable; and even with interdiction some judicial enquiry is generally requisite to show

er separate property, is competent to act in all respects as if she were *femme seule*.”<sup>1</sup> No. 26

Supposing the trust to be *sua natura* revocable, the clause declaring it revocable—the *clausula derogatoria* of the Roman law—must be operative on two views, first, That where the law affixes a certain intrinsic character to a deed, such as revocability, no mere declaration by the party can effectually control the declaration of law on the subject; and, second, That where the matter is one in which the granter of the deed is exclusively interested, and no other person is concerned, there is no act involved, by means of which the declaration is capable of being resisted, and a contrary declaration resisted at the instance of any party ever.

June 2, 1836  
Anderson v  
Buchanan.

*argued for the Trustees—*

The object of the trust was to protect the wife against the influence of her husband by the absolute surrender of her own power over her property, in order to prevent that power being exercised upon his suggestions or under his influence. But if it be nevertheless competent for her to resume her power, then the consequence is that that very influence of the husband is let in which it was the primary purpose of the trust to exclude, and the deed is rendered useless by those very means, the operation of which it was intended to annihilate, the presumption being that, when the woman comes to wish to recall the deed, she does so through the suggestions or influence of her husband. Even if he has obtained his *jus mariti* and right of administration, she might by his suggestions be persuaded to surrender any benefit that might thence have accrued to her—she might consent to the renunciation being revoked, and her estate to be applied by her husband to his own purposes, at which event the trust was meant to provide.

The cause was put out for advising December 22, 1836, when the Lord Ordinary, “in respect of the novelty of the case, and the opinion expressed by the Lord Ordinary in his note, directed the question to be laid before the whole Judges for their opinion.”

lancy's Law of Husband and Wife, p. 292; Roper's Law of Husband and Wife, c. 16.

Voet,\* ii. 14, 20, and xvii. i. 17; Dig. 32; iii. 22; Bacon's Maxims of the Law of England; Wood's Institutes of the Law of England, p. 288; Black's Law Dict. voce Revocation; Bankton, i. 23, 4, and iv. 45, 62; Erskine, Questiones Juris, lib. 3, cap. 6.

The rule of the Roman law is thus laid down by Voet:—“*Jurtilia sunt, quibus dominus sibi de re sua arbitrium ac moderamen adimit, quoties inde alterum utilitas pervenit.*”

there would be no room for a question. It is upon the reason of a woman, in such circumstances, thus effectually to protect her from the influence or solicitations of her husband, that the judges, who were the defences, are understood to have rested their opinions. Now, in deference to these opinions, I find it impossible to concur in them. In this place, I have great difficulty in understanding how the mere reasonableness of an object can justify us in dispensing with settled rules in the way of its attainment. If it be unquestionable that, in all cases for the sole behoof of the grantor may be recalled by the grantee, with no precedent or authority for holding that the case of a married woman, would the mere expediency of such an exception be a good reason, could a court of law be warranted in introducing it? Such a decision would be a novelty; and I cannot find that it would have any analogy of any of the provisions which the law has actually made. Our law, in this respect, has been peculiarly provident and wise in empowering women, entering on matrimony, effectually to exclude their husbands; and to revoke, at any time, any act or deed, in the largest sense, be held to import a donation, appears to have done all that of its framers thought requisite for their protection. The doctrine and dicta on these subjects, form a large chapter in our jurisprudence. I am not aware that, in any part of it, there is to be found a trace of anything intended for by the defenders.

There seems to be no ground, therefore, for referring the privilege to any peculiarity in the relation of husband and wife; and therefore on its assumed reasonableness or equity in general. On its true foundation, it ought plainly to be extended to many other trusts constituted by a woman about to marry. A single woman's estate may frequently need all the protection which the law can



set forward by the defenders really is. The trust is declared in the contract absolutely "irrevocable, on any ground whatever;" and it is expressly constituted "for all the days of her life." Yet, it is not pretended by the defenders, it could be maintained against the granter, in these terms, or to this extent. It is held, upon some tacit and undefined canon of construction, to be really operative only against the husband; at least, it is only justified upon the alleged danger of solicitations. Is it to become revocable therefore, in spite of its express terms, the moment he dies? and, if not actually recalled till she marries a second husband, is it then to become irrevocable again? and though occurring only in her nuptial contract with Mr Gordon Torry, is it to be all-powerful to restrain her natural weaknesses towards Mr Somebody else? Then, is it a trust only that is to be thus irrevocable while the granter is under coverture? or why should not the same privilege be extended to all deeds of faculty or commission granted on a similar narrative, and in parallel terms: that is, irrevocably and for all the days of life? The ground of the defenders' case is, that if they now denude of the trust, the husband will gain some undue advantage: and that, in asking them to maintain it, the wife must be held to intend some lavish favour to him. This may or may not be, quod plerumque fit, even after ten years marriage; but is the probability so overwhelming, even if the mischief were intolerable, as to warrant, on its supposition, the introduction of a disability as yet unheard of in our law? Suppose it were notorious that there is a deadly quarrel between the spouses, and that the wife seeks to get back the management of her estate, chiefly, in order that she may give it over to her son of a former marriage, the bitter foe of her husband; or suppose there has been a judicial separation; and that the husband is restricted, by terms of it, to a fixed share of the common property. Is the wife, in this case, to be disabled from revoking a trust-conveyance of her separate estate, executed before marriage for her own mere use and convenience? I confess I am not prepared to answer these questions; and that I do not see the urgency which calls upon us to admit the principle, upon which alone we can be required to answer them.

As to the suggestion that the wife, who now seeks to revoke the trust, is, in law, a new persona from the single woman who created it, it seems a sufficient answer that she is still the only person by whom, and for whose sake, it was created; and that, by our law, however it may be in other places, she is still recognised as the same identical person. Marriage, with us, reduces the woman to the condition, not of a pupil, but of a minor only: she is thereafter under the curatory, but not under the tutory of her husband; and though his concurrence is necessary to the validity of her acts, still she is the only proper and primary agent in all that relates to her property; and deals with it precisely as she might have done before marriage, except for the necessary authentication of her acts by his formal concurrence. I do not presume to know how the law of England would deal with a case like the present; as that law has not been put in evidence to us, in any way of which we can take cognizance. But from all I can conjecture or gather from the authorities, I conclude, that, if it would hold a trust like this to be irrevocable, it would be only because it holds a married woman to be utterly incapable of affecting or changing her investments of her heritage, even with the concurrence of her husband; a principle which most certainly is not recognised in our law.

As to the notion that the revocation of this trust should not be sanctioned, because it could only be effected with the concurrence of the husband, and that in

No. 26.

June 2, 1841

Anderson v

Buchanan.

intended, not to benefit, but to vex and annoy the husband, cannot be a worse predicament. If the wife, therefore, is entitled, with the legal curator, to make a direct disposition in his favour, I am unable to see how a mere surmise that the curator may derive a contingent benefit from it, while another person is prejudiced, can possibly affect such a revocation.

The fundamental question, therefore, continually recurs :—On what for whose interest do the defenders say they are bound and entitled to preserve the pursuer's property? They must answer that they hold it for the wife, and, unless it can be shown that her marriage has entirely extinguished her power of acting, so as to disable her even from granting receipts, it is not easy to see how it should prevent her from receiving exclusively her own, and over which no living creature has any sort of actual or contingent interest. The trustees, indisputably, have no right to do so personally; and being accountable only to those who have the benefit, they must necessarily be safe when the only person, having that benefit, must necessarily exonerate and discharge them. To allow them to hold against the interest of that person, I think would be a solecism in law; and that effect would, at the same time, afford the only instance, I believe, in which it has been found possible for a person, effectually to limit his property without constituting any right in it, present or future.

LORD COCKBURN.—I concur in the foregoing opinion.

LORD MONCHEIFF.—After giving all the attention in my power to the arguments of the parties in this cause, and to the views expressed by the learned counsel in consultation, I am of opinion, with Lord Jeffrey, that this trust is a gratuitous act of will, by Mrs Anderson, for the management of

an only say, that I have found no authority and no precedent in the law of  
 and, for holding that, in any case, a voluntary trust, the sole interest in  
 either was from the first vested, or has come to be vested, in one individual,  
 it be put an end to by the consent, or at the desire, of that individual; and I  
 I have a strong apprehension of much inconvenience, and great hardship, in  
 cases, arising from the introduction of a principle, which appears to me to  
 tirely new in the law of trust in Scotland.

No. 265

June 2, 1837

Anderson v.  
Buchanan.

re case is argued on the footing simply of this being the case of a married  
 an, and of the marriage subsisting. But I apprehend, that it cannot be cor-  
 y decided without necessarily involving a broader principle. It must be held  
 the pursuer could not recal the trust, and that the trustees could not denude,  
 though the husband were dead; for, if it could be extinguished in that case,  
 ow of no principle on which it can be held that the same may not take place,  
 gh the woman is in the married state. I am of opinion, that a married  
 an, though under the curatory of her husband, in a certain qualified sense, is,  
 gard to her separate heritable estate, as fully enabled and entitled by law to  
 l legal acts with his consent, as any unmarried person. Such acts may, no  
 t, be to her detriment, and in some cases may be liable to revocation by her,  
 hey may also be to her great benefit, and very often of the most essential  
 rtance to herself and the members of her family. And if a trust constituted  
 rself for her own interest alone, is not in its own nature irrevocable, I appre-  
 , that it is not the province of this Court, upon any views of expediency or  
 nsions of the undue influence of husbands, to put a restraint upon the  
 exercise of rights of property, which the law does not impose in any other

ARD FULLERTON.—I agree with Lords Jeffrey and Moncreiff, in the opinion  
 this trust may be revoked by the pursuer, Mrs Anderson.

ere may be cases in which a trust, though existing for the sole benefit of a  
 ular individual, is yet beyond the reach of her recal; as, for instance, when  
 rust flows from another party, or when the creation of the trust, and the  
 tion of power thence arising, truly form conditions of the grant. And again,  
 a party by her own deed, creates, through the means of a trust, separate  
 ndependent interests, the trust will subsist for the protection of those interests.  
 he present case falls under neither of those descriptions.

ie trust here was the act of Mrs Anderson herself, for, in so far as I can see,  
 sed no separate interests, either immediate or eventual, but was purely and  
 ntely for her own benefit.

these circumstances, I think it must be within her control. For though it is  
 red to be irrevocable, there is neither any separate person, nor any separate  
 est, in regard to which the obligation not to revoke can be said to be  
 acted.

the trustees held the subjects and the deed itself only for her behoof, it  
 to me, that the clause is, in relation to her, of no greater force than if it  
 contained in a conditional deed.

owed merely as a trust-deed, then, I think the deed was necessarily subject  
 vocation; and the defence seems to me to involve the attempt to enforce,  
 the form of a trust, a species of interdiction, for which I can see no autho-  
 our practice.

THE PRESIDENT, GILLIES, and CUNINGHAME.—In order to form a correct

substance of the marriage, and that the said subjects should not debts or deeds, nor subjected to the legal diligence of his creditor that may thereafter be contracted by him.

Upon that narrative, the contract and trust-conveyance proceed order to give full effect to the foresaid stipulation and agreement, the said Gordon Torry renounces, surrenders, upgives, and overgives to and the said Mrs Ann Vernona Simmons Gaskin Anderson, and the named, his *jus mariti*, right of courtesy, and all other right, title, privileges in, and to the means and estate of his said promise heritable and moveable, to which he might otherwise be legally entitled of the said contemplated marriage. *In pursuance of which renunciation*, the said Mrs Ann Vernona Simmons Gaskin Anderson, desirous, for various weighty and sufficient reasons, to vest the same in certain persons in trust, for her sole and separate use as after-mentioned of any *jus mariti* or other right on the part of her said intended husband, having full confidence in the integrity and ability of the persons appointed for that purpose, has given, granted, and disposed, and does hereby, with the special advice and assent of the said Thomas Gordon Torry, give, grant, and dispose to and in favour of William Buchanan, Esq., and James Buchanan, Esq. residing in Forth Street, Edinburgh; and William Buchanan, Esq. and the survivors or survivor of them, a majority to be a quorum, and the powers, and for the uses, ends, and purposes after specified, all the lands of Tushilaw," &c. (Here the trust-subjects are described).

The purposes of the trust are set forth in the following terms:—always, as it is hereby specially provided and declared, that the same be granted to the said William Buchanan, James Buchanan, and William Buchanan, and to the survivors or survivor of them, as aforesaid, in trust always and separate behoof of the said Mrs Ann Vernona Simmons Gaskin

conveyed, rents, issues, and annual profits thereof, and particularly that they be bound and obliged yearly, and each year during all the days of her life, to pay over to her the free proceeds of the said rents, mails, duties, and annual- after deducting the expenses of collecting the same, including a reasonable allowance for trouble to factors or agents whom they may employ, and the whole expenses incident to the execution of this trust, and of the powers hereby committed to them, and that the simple discharge of the said Mrs Ann Vernona Simmons in Anderson, by herself alone, without the addition or consent of the said Thomas Gordon Torry, her intended husband, shall be a complete and full exoneration to them in the premises, at all hands, and against all persons.

No. 265  
June 2, 1837  
Anderson v.  
Buchanan.

There was a subsequent clause to the following effect:—"And I declare that these presents shall not be revocable by me on any ground, or in any form, whatever."

The contract did not give the trustees any power, either expressly or by implication, to resign the trust. There was not even any power given to the trustees, or any of them, to assume any new trustees. But as shown above, the power was given to the survivors or survivor of the trustees.

Upon the faith of this contract the marriage was solemnized in 1828.

No deed of revocation has been produced, but the present action was brought in April, 1836;—and the summons runs in the name of the said Mrs Anderson, with the consent and concurrence of the said Thomas Gordon Torry Anderson, her intended husband, and him for his interest." This summons, it is material to observe, contains the following narrative:—"That the pursuer having become desirous, for various reasons, to put an end to the said trust, and being of opinion that her property would be better and more expediently managed, and equally well secured for her behoof, without the intervention of the said trust, did accordingly, with her intended husband's consent, intimate to the said trustees, that she revoked and recalled the said trust disposition, and declared the trust, at least as constituted in their favour, to be at an end, and called on them to denude of the same, simply in favour of herself, or at least in favour of such other trustees as she shall name and appoint; but the trustees have in reply maintained that they were entitled and bound to maintain and keep up the said trust, and to continue the possession and management of the property in terms thereof."

Upon that narrative, and upon a recital of the trust, the summons concludes, That it should be found and declared that the trust is extinguished and at an end, and that the trustees should be decerned to reconvey the property to her; and, And alternatively, that she has full power, with consent of her husband, to vest such new trustees as they may nominate and appoint, instead of the said trustees, with the whole trust property.

It is in this case that our opinion is asked on the right of the pursuers to revoke the trust. And we are humbly of opinion that she has no such right.

The trust having been created by the truster in contemplation of her marriage, and expressed in the contract, and manifestly to provide against the interference and influence of her husband, we should have held it to be very questionable, if it could have been recalled during the subsistence of the marriage, even if there had been no special clause barring revocation. But the present case is placed beyond doubt by the express declaration in the contract, "that these presents shall not be revocable by me on any ground or in any form whatever."

of effecting this is, by a well arranged trust. Accordingly, such trusts, their terms and objects, according to the situation, rank, age, and the contracting parties, now form a numerous and important class of business of the world.

But the security of these trusts would be essentially impaired, and substantially abrogated, were they held to be revocable under an act by the granters, during the subsistence of the marriage. In the cases it would be invidious to state specifically the circumstances either of husband or wife, which render a trust of the whole or of a part of either expedient in a marriage contract. It has been hitherto thought that to create the trust in an antenuptial contract of marriage, the mode known in the law of Scotland, to render the security permanent, and irrevocable, during the marriage. But if it were found relevant for both spouses, to recall the trust, on new views emerging, or possibly on a change of purpose in the truster, then no trust of the kind could exist for one day, that it was the temporary interest of the spouses. The security would be extinguished at the very time, when it was to preserve it.

There is another important consideration which ought to be taken beyond the reach of the trusters. It is manifest, without reasoning, in favour of third parties, created by a wife in contemplation of marriage, to be presumed as intended to protect her from the anticipated husband, and to preserve her property more securely for her own use, after the marriage subsists. This security, however, can only be available so long as it is irremediably beyond the power of the wife herself, after the marriage. If its subsistence depends on her pleasure, it will of course be cancelled if the husband finds it convenient to ask it; or if in a few rare cases be

a similar trust. It appears to us, however, that it is incumbent on the No. 265  
 requiring the aid of the Court, to sanction the recall of this trust, to show June 2, 1837  
 authority for their demand. No precedent to this effect has been cited. On Anderson v.  
 trary, it has been stated, without contradiction, that, in the practice of Buchanan,  
 where trusts have been longer known, and far more generally adopted  
 than us, it is settled that such a trust, as the present, could not be recalled.  
 We apprehend that there are well recognised principles in our law to preserve  
 the entire in the present case.

In the first place, we hold it to be a rule of law, quite incontestable, that  
 any trust is constituted for a legitimate and useful purpose, it must subsist  
 till *the purpose is fulfilled*. Such a trust cannot be arbitrarily renounced or  
 altered by the trusters *re infecta*. Hence, a trust for children must subsist till  
 they are in a condition to take or dispose of the trust-fund. The trusters cannot  
 alter; and if they fail, this Court will name a judicial factor for holding and  
 managing the fund.

In the next place, we conceive that the purpose of the trust, in the present  
 case, is as yet *unfulfilled*, and must be so during the subsistence of the marriage.

A trust constituted before marriage, in special and express terms, to  
 the wife of all management of particular estates, and to vest the same in  
 her trustees, and thus render more effectual an exclusion of the future hus-  
 band *jus mariti*. It must be presumed, that that was made advisedly and for  
 good and sufficient reasons. Hence, the parties must be held to have meant that  
 the trust should subsist, and be in operation *during the subsistence of the mar-*

Till the marriage is dissolved, therefore, the circumstances or considerations  
 which were held to continue in full force, which gave rise to and induced the trustor  
 to create the trust.

Although it is possible that many cases may have arisen in which parties who  
 have executed a trust rashly, and declared it irrevocable, will be entitled to  
 recall it, the present case falls, in no respect, within that class. Not only was the  
 purpose of the trust legitimate and proper, in the present case, but there cannot be  
 any recall so long as the marriage subsists, any consent to recall it, of the same  
 nature, and adhibited under the same circumstances under which the original trust  
 was constituted. The trust here was created by a party, *sui juris*, when she  
 was free and unfettered. It is now proposed to be recalled by an alleged  
 consent given by her, when she is not in that condition, but when, on the contrary,  
 she is under curatory, and *sub potestate mariti*.

There cannot, therefore, be the same consent at present to the dissolution of the trust  
 as there was to its original constitution.

Finally, there is another consideration founded in the principles of the law of  
 Scotland, which, we think, not only renders it very difficult for the pursuer to  
 obtain a valid revocation of such a trust as that now in question, constituted by  
 deed before marriage; but would make it most hazardous for the trustees or others  
 to assent to it. Any deed revoking the trust must, according to our law and prac-  
 tice, be executed also by the husband as the curator of the wife. The revocation  
 must be null without such consent. But as the trust manifestly was created  
 in consequence of a distrust of the husband, and in bar of his right of administration or of his  
*quoad* the properties conveyed in trust, his consent given to the revoca-  
 tion would be a consent *for his own benefit*, and as he would thus be *auctor in rem suam*,  
 we doubt if it would be valid to any extent.



**LORD MACKENZIE.**—I concur in the above with this exception, I doubt that a wife may recall a trust constituted by her for the management of her estate, but not declared irrevocable. I have only further to observe, that the trust, in this case may, by fair and reasonable interpretation, be limited to the duration of the existence of the marriage. And that it appears to me that such a trust, constituted in a marriage contract, may be as different in kind from an ordinary trust constituted by one person for his own purposes. A marriage contract has effects that extend even beyond the death of both husband and wife, of which the exclusion of the legitim by a husband affords a striking example. But even looking to these two parties to the trust as this, which vests in the trustees a right as against the husband for the protection of the wife from the acts of both, or either, of these parties to the marriage, seems to be of a different kind from ordinary trusts constituted by A and B.

**LORD CORNHILL.**—I concur in the above opinion.

The case was this day put out for advising.

**LORD JUSTICE-CLERK.**—I had formed an opinion in accordance with the opinion of the Lord Ordinary, and still retain that opinion. The circumstance of a trust occurring in the marriage contract ought to have no weight. The trust is regulated by the contract independent of the trust-settlement. The trust is established solely for behoof of Mrs Anderson, who is alone benefited by it. I am at a loss to know on what principle she should not have it in her power to recall it as in any other case of a trust.

**LORD MEADOWBANK** concurred with the opinions of the consulted

voke it. I am also moved by hearing that in England the same course would be allowed in regard to such a trust. I think the trust, therefore, not able. No. 265.  
June 3, 1837.  
Maben v. Perkins.

**LORD GLENLEE.**—On looking to the Lord Ordinary's note, he states the authorities which have prevailed with me to think this trust irrevocable. If a husband had no other cause of granting than the mere pleasure of the granter, it would be held to hold it not revocable ad arbitrium of the granter, notwithstanding of a husband declaring that it should be irrevocable. But it is different if there have been a just and proper cause originally, and that cause still subsists, and this meets the observation of some of the Judges. I do not think it is the worse of being a species of interdiction. The Court will not allow a deed of interdiction to be recalled unless the cause of it is removed, as in cases where they have sent one of their own number to visit the parties, and see if they are rei suæ providi. On the whole, I am for finding that the deed is not revocable, and I agree in the opinion drawn by Lord Cuninghame. Supposing the husband dies the cause has ended, and the deed may be revoked.

**THE COURT**, in respect of the opinions of the majority of Judges, found that the deed in question was not revocable, and assoilzied the defenders from the conclusion of the libel thereanent.

**F. J. SMITH, S.S.C.**—**J. and J. M. BALFOUR, W.S.**—**J. F. SMITH, W.S.**—Agents.

**JOHN MABEN** (Arnott's Trustee), Pursuer.—*M'Neill*—*G. G. Bell.* No. 266.  
**JOHN PERKINS** and **ALEXANDER MILLER**, Defenders.—*Anderson.*

**Bankruptcy—Process—Res Judicata—Interest.**—1. The clerk or shopman of a bankrupt was employed by the trustee after sequestration; he made a claim which included arrears of salary incurred prior to sequestration, as well as an advance for his services since that period; the trustee, with the sanction of the commissioners, paid him a sum of money and obtained a settlement of the claim: it was held that such payment could not be sustained, in so far as it was made on account of wages or services prior to sequestration, and that the sanction of the commissioners did not warrant the trustee in giving a preference, out of the funds of the estate, to an ordinary debt of the bankrupt. 2. A bankrupt, with concurrence of his trustee, petitioned for discharge; some of the creditors successfully opposed the petition, and the Court found the bankrupt liable in expenses, and the trustee also liable "qua trustee:" the trustee afterwards resigned, and a new trustee raised an action against him for these expenses, alleging that he had acted secretly and in collusion with the bankrupt, in getting up the petition for discharge: Held that the former judgment had not the effect of barring the trustee from seeking relief against the ex-trustee, personally, if sufficient grounds were shown for subjecting him. 3. Where a record was closed, and it appeared necessary for the due administration of justice between the parties, that a farther inquiry and investigation should be made on one branch of the cause involving allegations of fraud and collusion—Remit made to the Lord Ordinary to open up the record in regard thereto, and to receive a more special and articulate condescendence on the facts in proof of the fraud and collusion alleged. 4. Where a trustee had paid sums which were not due, and besides debiting him with these sums the penal interest of 20 per cent, upon them, was claimed from him—Held, that if he made the payments in mala fide, he was not liable in such interest.

the bankrupt prior thereto. The payment was sanctioned by the commissioners. Maben objected, that, in so far as the payment was for services to the bankrupt, they just formed a common charge against the bankrupt, upon which no more than a composition along with the other debts, and the commissioners had no power, by their sanction, to authorize payment of more than a composition upon any ordinary debt. The defenders attend that the arrangement made with Cameron was of the nature of a composition, under which a claim, including arrears of salary, amount, had been adjusted for a smaller sum in virtue of the sanction of the trustee and commissioners to transact doubtful claims. The claimant pleaded separately that as the commissioners had sanctioned the arrangement, the trustee was entitled to credit for it in account with the creditors.

2. One of the commissioners was a professional accountant who had paid to him an account of £38, 6s. for professional business of the trust-estate. Maben objected to credit being allowed for the payment, alleging that the business fell properly within the province of the commissioner, and also that a commissioner ought not to be employed, if any professional assistance was required. The defender alleged that the business was not within the province of a commissioner, that it was necessary to employ a professional accountant, that the trustee was entitled to employ a commissioner, at the usual rate, if he performed the business; and that the account incurred to him was due, and payment of it had been sanctioned by the other commissioners.

A petition to that effect was presented by the bankrupt with No. 266. force of Perkins. Some of the creditors opposed it, alleging that and the bankrupt were acting in collusion; that the offer of June 3, 1837. tion was inadequate, and that the affairs of the estate were not Maben v. Perkins. closed, &c. The petition was refused, and the opposing creditors and entitled to their expenses. Perkins was found liable for the of expenses "qua trustee." In the subsequent action of ng, Maben, the new trustee, contended that for these expenses ing to £96, 17s. 11½d.) Perkins was personally liable. Al- in the bankrupt's petition for discharge, the Court had merely d the trust-estate, that did not foreclose the creditors, in the action, from seeking relief to the trust-estate, against Perkins lly, if they would instruct, as they offered to do, that he had acted ion with the bankrupt, and by his misrepresentations and conceal- gave rise to the judicial proceedings out of which this amount of s arose. Perkins answered, that, under the original petition, if rt had seen cause, they might have subjected him personally in s. But as he was merely subjected "qua trustee," this was in judgment that he was not personally liable in any question with litors, and that the trust-estate alone was so. He also pleaded re were no grounds for subjecting him in personal liability. here were various periods during which Perkins had a sum ng £50 in his hands, and on which therefore the penal interest er cent was due. But Maben farther contended, that, every sum ad been improperly paid away, such as the account paid to n, the account paid to the commissioner as accountant, &c. should ed as if still remaining in the hands of Perkins, and should be ed as bearing the penal interest of 20 per cent, if it raised the in Perkins's hands above £50. The defenders answered that the of the statute was only meant to apply to money actually kept in tee's own pocket while it should have been in the bank: and, in ar, that it never was meant to subject him in that penal liability ey which he had bona fide paid away, with the sanction of the ioners, on account of claims against the estate.

Lord Ordinary, on 7th March, 1837, found, "Primo, That in with the pursuer, the defender is entitled to have credit for the sums paid to Andrew Cameron, in so far as it can be shown that ere either due to him for wages on account of his services subse- to the sequestration, or in so far as the payment was sanctioned by missioners. Secundo, That the defender is not entitled to credit sum of £38, 6s., said to have been paid to Mr William Galloway, the commissioners. Tertio, That the pursuer is only entitled to e defender once with the sum of £29, 16s. 3½d. sterling, or with it thereof, on account of goods belonging to the bankrupt, but et appropriated by Perkins, the late trustee. Quarto, That the

266. pursuer is not entitled to debit the defender with the sum of  
 1837. 11½d. sterling, or any part of it, being the expenses incurred in  
 the application for the bankrupt's composition and discharge, &c.  
 of fraud on the part of the late trustee, on which this claim  
 being set forth in the condescendence with sufficient relevancy  
 tion to entitle the pursuer to a proof upon this point."

In regard to the second finding, it was understood to rest on  
 ground that the business for which the account was charged, was  
 within the province of a commissioner, and ought to have been  
 tously performed. It was not reclaimed against.

His Lordship afterwards, on 9th March, 1837, after hearing  
 as to the claim for penal interest, "repelled the defender's objection,  
 claim, and found that Perkins, the late trustee, was liable in payment  
 for sums above £50 kept by him in his hands above ten days, as  
 defender, Alexander Miller, as his cautioner, is bound to satisfy  
 to the extent of his bond; but found, that in computing the sums  
 sums which have been found to have been improperly paid by  
 Mr Galloway, or others, are not to be held as having been in  
 his hand." \*

Maben reclaimed against the first, third, and fourth findings  
 interlocutor of 7th March, 1837, and against the finding, in the  
 interlocutor, which exempted Perkins from liability for penal interest  
 the sums which he had erroneously paid away. In regard to the  
 finding above-mentioned, it depended on the terms of the record,  
 the Court held to establish the true value of the goods bought  
 to be £29, 16s. 3½d., and that he was only liable to account for  
 once and no more.

LORD GILFILL.—This is a rather complicated case, but I do not  
 the findings of the Lord Ordinary. In regard to the sum paid to the  
 clerk, the first finding allows credit to the defenders on account of it  
 it was on account of services subsequent to the sequestration; and  
 right. But it farther sustains the payment, separately, "in so far as  
 was sanctioned by the commissioners." I am not prepared to go the  
 do not think that any sanction by the commissioners will entitle them  
 convert a common debt into a preferable debt, or to pay any of the costs  
 in full, at their pleasure. Their power of transacting doubtful claims  
 different thing from that. As to the fourth finding respecting the expenses  
 application for the bankrupt's discharge, I think it premature, and that  
 to be more investigation. When the bankrupt was found personally  
 expenses, and the trustee was subjected "qua trustee," that was just a

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\* NOTE.—"The defender candidly admitted at the bar, that upon  
 principles lately acted upon in the House of Lords in the case of *McTaggart*,  
 he believed, in consequence of the alleged negligence of the commissioners,  
 not be maintained under the facts of this case."

trust-estate was liable to relieve those creditors who had successfully opposed No. 266.  
petition. The decree against "the trustee" just rendered the whole body of  
itors liable, per aversionem, for the expenses. But after this was done there June 3, 1857  
other question whether they are not entitled to relief against the trustee. The Maben v.  
ment in the petition is not enough to make Perkins personally liable to them ; Perkins.  
neither is it enough to exempt him from personal liability, if otherwise he  
it to be subjected. And on this point I think there should be more enquiry  
re deciding. I am of the same opinion with respect to the question of penal  
rest. If Perkins made the several payments in bona fide, though acting under  
error as to the liability of the bankrupt estate, then I think there is no claim for  
d interest against him. But if he acted collusively and mala fide, then the  
n will lie.

ORD MACKENZIE.—I am of the same opinion with Lord Gillies. In regard  
he account paid to Cameron, if it had merely referred to services subsequent  
he sequestration, and it was alleged that too much had been allowed on that  
unt, I might consider that it fell within the province of the commissioners.  
the interlocutor finds, that, even as to services prior to the sequestration, the  
ment made is good if sanctioned by the commissioners. I cannot go so far as  
Payment of a debt due by the bankrupt is the most complete of all prefer-  
s, and I cannot hold that the commissioners possess any power of creating such  
rence. As to the expenses of opposing the petition for the bankrupt's dis-  
ge, it might very well happen that nothing appeared on the face of these  
eedings to warrant the Court in subjecting Perkins personally. There might  
only enough to warrant decree against the trust-estate. But after the trust-  
e was so subjected, the creditors were surely entitled to bring an action of  
f against Perkins, if it can be shown that it was through fraudulent or collusive  
act on his part that the judicial proceedings had been held which occasioned  
expenses. And as to the relevancy of the record on this point it appears to  
hat the averments made are broad enough, but that they are deficient in details.  
this account an amendment of that part of the record, the 8th article of the  
uer's condescendence, should be allowed, and the question decided after a fuller  
ment of the facts. As to the penal interest, I can understand that where a  
ee makes a mere pretence of payments, or acts mala fide, he may be liable to  
d interest, just as if the sums were in his hands ; but not if he acts bona fide in  
ing erroneous payments.

ORD COREHOUSE.—I concur in the opinions which have been delivered. The  
tors have a clear right to ask relief of the expenses of the unsuccessful  
ion, if they can show sufficient grounds to entitle them to it. On that subject  
verments in art. 8th of the pursuer's condescendence, state relevant matter  
appears to me, but are not sufficiently specific. It is in our power to open  
up record and allow a more specific statement in regard to what is there  
ed. And I may add in regard to the question of penal interest, that it must  
ade clearly to appear that the payments were made mala fide, otherwise I  
not hold myself warranted in subjecting Perkins to penal interest upon the  
re, as if it had always been in his hands.

MR. PRESIDENT concurred.

MR. CLARK pronounced this interlocutor :—" Adhere to the interlocutor of  
14th March, 1857, reclaimed against, and refuse the desire of the reclaiming

As to the article of £96, 17s. 11½d., as the amount of in opposing the bankrupt's composition and discharge, b to the Lord Ordinary with power to him to open the that article, and to require and receive a more spec condescendence of the facts in proof of the fraud and adhere to the interlocutor of the 9th March, 1837, reek refuse the desire of the reclaiming note as to the article therein disposed of; and remit the process to the proceed as shall be just, consistently with this interloc questions of expenses for future determination."

T. BAKER, S.S.C.—J. BIRSE, S.S.C.—Agents.

No. 267.      JOHN ATHOLL BANNATYNE MURRAY MACGREGOR,  
Patton.

*Lease—Curator Bonis.*—The curator bonis on the estate obtained a report from men of skill, bearing that under certain exorbitant rent was stipulated, and also specifying what was several lands; the report stated that in one of the leases a four stipulated when a five-shift rotation would be more beneficial curator petitioned for authority to reduce the rents, for the remaining lease, to the sum specified in the report, and to alter the crop farms to a five-shift rotation, or to accept renunciations of the service on the presumptive heir, and presumptive executors of besides the usual intimation, the Court granted the petition.



ended a change from the four-shift rotation specified in the lease to No. 26:  
 shift rotation. In regard to another farm, Wester Logierait, let to June 7, 183  
 I<sup>c</sup>Gillervie, the petitioner stated that it had been let by the late Duke Macgregor.  
 t of £204, 7s., but that the fair rent of the lands appeared, from a  
 y men of skill, to be only £173, 9s. And in reference to a third  
 peedyhill, let to Widow Robertson, a rent of £40 was stipulated  
 current lease, while the fair rent was reported to be £30. The  
 er alleged as to these last two farms also, that it was injurious to  
 rests of the estate to leave them under their present leases, as the  
 were unable to pay the rents. He prayed for warrant of special  
 of the petition on the brother and sisters of the Duke, as being  
 vely his presumptive heir and executors; and for authority to the  
 er, “as curator bonis to his Grace the Duke of Atholl, to reduce  
 rent of the farm of East Nether Benchil, possessed by Wil-  
 itchie, to a sum of not less than £116 sterling, and that for the  
 d endurance of the present lease of said farm from a four to a five-  
 tation: Also in like manner to reduce the rent paid by widow  
 son, for the possession of Speedyhill, to a sum not less than £30,  
 t during the term and endurance of the present lease of said farm:  
 e rent presently payable for the farm of Wester Logierait by James  
 ervie, to a sum not less than £173, 9s., and that for the term and  
 ice of the present lease of said farm;—all as expressed and con-  
 in the report of the said William and James Chalmers hereto  
 ed; or to reduce the said rents to such reasonable sum as your  
 ips may think a fair and proper rent for the said farms, or to accept  
 ations of said leases.”<sup>1</sup>

r the petition was thus served, and was also intimated as usual, it  
 vised by the Court.

o COREHOUSE.—I feel some doubt whether it is competent for the Court  
 : this petition. I remember an occasion when Sir Ilay Campbell, then  
 it of this Court, stated strongly and emphatically that the Court would  
 ertake the duty of altering leases, but that if such alteration required to be  
 he curator must do it on his own responsibility.

o GILLIES.—I think there are recent precedents where a similar petition  
 as been granted, particularly in the management of the Billie estate.<sup>2</sup>

o MACKENZIE.—I am satisfied that there are such precedents.

o PRESIDENT.—I remember them also: I think the prayer of this petition  
 be granted.

THE COURT accordingly granted the petition.

H. GRAHAM, W.S.—Agent.

Lean, June 25, 1828 (ante, VI. 1018); Peddie, Dec. 13, 1822 (ante, II.  
 new ed. 79); Robertson, Jan. 24, 1823 (ante, II. 150; or new ed. 137);  
 son, Dec. 13, 1823 (ante, II. 579; or new ed. 498).  
 lne, March 10, 1836 (ante, XIV. 681); Milne, Feb. 25, 1836 (ante, XIV.  
 Milne, Dec. 20, 1834 (ante, XIII. 222).

Greenock, was appointed factor loco tutoris. In 1837 Agn a petition stating that one of the children was now dead ; property left by the deceased James Galbraith, after payi was a tenement of houses yielding rents amounting to £50 besides one-sixth of a property, yielding £55 per annum, grandfather, under a settlement which, if successfully chall head of death-bed, by the eldest of the children, after he would cause the whole rental of £55, to fall to him ; that of the two children was eleven years of age ; that the p already in advance on their account for necessary disbu maintenance and education, to the amount of nearly £100 was necessary for him to obtain reimbursement. He prayed " to borrow the sum of £100, and grant security for the s heritable subjects under his management as factor loco tu apply the amount so borrowed in payment of his said adva loco tutoris for behoof of the said minors."

After a remit to the Lord Ordinary, his Lordship rep appeared to be necessary for the maintenance of the minors tion should be granted.

**THE COURT** granted the prayer of the petition.

**J. B. GRACIE, W.S.—Agent.**

altered the interlocutor in so far as to raise the modified sum to **No. 26**

June 9, 18

Stocks v.

ST, HUNTER, and WHITEHEAD, W.S.—SCOTT and BALDERSTON, W.S.—A. MACLEAN, Gardner.  
W.S.—Agents.

ROBERT STOCKS, Suspender.—*D. F. Hope—Marshall.*  
RS WHYTE OF GARDNER and OTHERS, Chargers.—*Sol.-Gen.*  
*Rutherford—Maitland.*

**No. 27**

*in Security—Interest—Accounting—Homologation.*—A heritable bond  
d that the rate of interest for the first five years should not exceed 4 per  
be full legal rate was exigible after that period: the creditor lived for  
years after the lapse of that period, and after his death a question arose  
his representatives and the debtor, whether the interest had been conti-  
the rate of 4 per cent: Held, in the circumstances, that the debtor was  
le for more than 4 per cent, in respect, inter alia, that the creditor had,  
objection, received an account, and a balance from the debtor, on the foot-  
the interest continued at that rate, and also that the market rate of interest  
he years in dispute, did not exceed 4 per cent.

REL of the case reported ante, February 13, 1836,<sup>1</sup> which see. June 9, 18  
argers, as representatives of the late Provost Whyte of Kinghorn, 1st Divisi  
heritable bond for £7000, dated January, 1826, granted by the Ld. Fuller  
ler Robert Stocks of Abden, which contained a clause restricting  
rest to four per cent for five years after Whitsunday, 1826. After  
e of that period, the legal interest of five per cent was exigible  
he bond. After the death of Provost Whyte, which happened on  
ne, 1834, Stocks intimated his intention to pay up the bond at  
nday, 1835, and a question arose between Whyte's representatives  
cks as to the terms on which the bond should be discharged. The  
ce arose chiefly on the question whether the rate of interest under  
id, had been continued at the restricted rate of four per cent  
Whitsunday, 1831, and until the death of Whyte. There had been  
transactions between Stocks and Whyte, and on paying over to  
gers the sum confessedly due, and consigning the disputed balance,  
rt passed the bill of suspension.

peared that Whyte, the creditor in the bond, was tenant of an  
elonging to Stocks, for which he paid £400 of rent. It also  
d that at Martinmas, 1831, being the first term after the expiration  
ve years specified in the bond, Stocks had rendered an account to  
which went back to Martinmas, 1829, and contained an entry of  
rest due at that term, and each of the intervening terms, including  
of Martinmas, 1831. Each of these, including the last, was

It also appeared that Stocks had again, on 15th May, before the death of Whyte, rendered a state of accounts, with interest at the same restricted rate of four per cent Martinmas, 1831, downwards. To this state Whyte had assented. But it was said by the chargers that he was then in bad health, and was unable to attend to his affairs. This state of accounts also was deposited in the repositories after his death. It further appeared that during the period subsequent to 1831, the market rate of interest was at four per cent. In these circumstances the Lord Ordinary was sufficiently instructed that Stocks was not liable for interest at a rate than four per cent, and pronounced this interlocutor, that the late Mr Whyte held a bond from the suspender, 1826, for £7000, which sum was to remain in the hands of the suspender for five years certain, from Whitsunday 1826, bearing interest at four per cent, it being provided that at the expiration of the said term the sum was to be payable: Finds that, on the other hand, Mr Whyte held a farm on lease from the suspender, at the rent of £400 per annum, for five years mentioned in the bond expired at Whitsunday 1831, that, on the 11th of November, 1831, the suspender rendered an account-current to the late Mr Whyte of their mutual transactions; and that in the said account he debits himself with the rent of the farm, for the last half-year from the Whitsunday preceding, only of four per cent: Finds that the balance on the account was £74, 17s. 8d., and that the said sum was sent by the suspender to the late Mr Whyte: Finds that the sum was retained by Mr Whyte, and no objection made by him to

must be held to have acquiesced in the said rate of interest: No. 270.  
 ore, in regard to the amount of the interest from Whitsunday  
 15th of May, 1835, sustains the reasons of suspension: Far-  
 ect the principal, with interest at the aforesaid rate of four  
 as tendered to the chargers, was refused, and was in conse-  
 ed in a bank by the suspender, with an offer to make over the  
 ipt when the chargers chose: Finds the suspender liable only  
 rest from the last date of the 15th of May, 1835, and decerns  
 ””

June 9, 1837.

Far-Stocks v.

Gardner.

—The Lord Ordinary has no doubt that, by the terms of the bond,  
 e of interest was exigible from the debtor after Whitsunday, 1831.  
 estion is, Whether there is not sufficient ground for the presump-  
 e creditor acquiesced in the continuance of the loan at the former  
 ither the debtor was not fairly entitled to rely on that presump-

idering this question, all the circumstances must be kept in view.  
 pendner was debtor in the half-yearly interest on the bond; but the  
 yte, the creditor in the bond, was debtor in the larger sum of the  
 ents of the farm which he held from the suspender. While the prin-  
 the bond was not called up, the suspender had thus to receive money  
 t to pay money to, Mr Whyte. This led to an occasional accounting  
 parties. On the 11th of November, 1831, there being then half a  
 t due on the bond from the Whitsunday preceding, when the period  
 bond had expired, the suspender furnished an account to Mr Whyte  
 date, in which the last half year's interest is distinctly charged at  
 only four per cent. The balance brought out is £74, 17s. 8d. In  
 joined to the account, the suspender writes—‘ I send you the balance  
 and it is not denied that this sum was received by Mr Whyte; but  
 t it was not received as a balance. It is no doubt true, that the ac-  
 not returned signed by Mr Whyte, agreeably to the request in the  
 te. But the balance was received, and no objection ever was made  
 of interest charged for the last half year, during the whole period that  
 survived. The second account was transmitted on the 15th of May,  
 h regard to it, the presumption of acquiescence is not so strong, as it  
 Mr Whyte was then on his deathbed. But, in estimating the true  
 e silence of Mr Whyte, it must not be thrown out of view, that the  
 of interest on heritable securities was, during that period, not higher  
 r cent.

ering the whole circumstances of the case, the Lord Ordinary thinks  
 rose here an implication on which the suspender was entitled to rely,  
 e of interest tendered by him was held sufficient. The mere circum-  
 party retaining an account without objecting, may not be in all cases

But here it is to be observed, 1st, That the entry in the account, as  
 was a clear intimation to the creditor that the suspender proposed only  
 per cent, even after the expiration of the period fixed by the bond.  
 s entitled to a definite answer on this point; for upon that answer it  
 nd whether he chose to pay up the principal or not. 2dly, It cannot  
 ; he was bound to pay half-yearly, and was consequently bound to  
 each successive half-year, whether the creditor chose to accept the  
 of interest or not. For as the rent payable by the creditor exceeded  
 t due on the bond, it was Mr Whyte, the creditor in the bond, who  
 each half-year; and as he did not, it appears to the Lord Ordinary  
 spender was entitled to rely on the principle of the accounting adopted  
 went to Mr Whyte, as long as no intimation was made to the contrary.

June 9, 1887. *Special Case.*—This was a property question as to a right  
2<sup>d</sup> Division. process raised before the Sheriff of Elgin, in an advocacy of  
Lord Jeffrey. Court adhered to an interlocutor of the Lord Ordinary containing  
special findings, "in so far as it advocated the cause and  
respondent from the conclusions of the original complaint,"  
found expenses due.

JOHN ROBERTSON, S.S.C.—HAIG, HAY, and PRINGLE, W.S.—Ag

No. 272. WILLIAM THOM, Advocate.—*Robertson*—A. McN  
JOHN TURNER, Respondent.—*More.*

*Reparation—Judicial Slander—Process—Summons.*—1. In  
damages before an inferior court for assault and judicial slander,  
slander was not libelled as a separate and substantive ground of damage  
as an aggravation of the assault.—Held, in an advocacy, that such  
ling the slander was not competent.—2. In such action the judicial  
libelled as having taken place in an action depending before the  
Glasgow, when the action appeared to have been before the Magistrate  
and the libel was not amended to suit the state of the fact,—Obm  
was an additional reason for holding the charge of slander to be inco

June 9, 1887. THE respondent Turner brought an action before the M  
2<sup>d</sup> Division. Glasgow against the advocate Thom; setting forth that T  
Lord Jeffrey. conceived groundless malice and ill-will against Turner had  
T.

towards the pursuer was much aggravated by the fact that in a ground- No. 272.  
 action which he lately instituted against the pursuer before the Magis- June 9, 1837.  
 trates of Glasgow, he put in replies containing the most false, scandalous, Thom v.  
 libellous attacks on the pursuer's character," &c., which statements Turner.  
 belled on, and alleged that they were made maliciously for the pur-  
 of injury ; and concluding for £200 damages " for the injuries sus-  
 d by the pursuer in his feelings, character, good name, reputation,  
 person, through the illegal and unwarrantable conduct of the defender  
 afore-mentioned, aggravated as aforesaid."

record was thereafter made up and a proof led, from which it appeared,  
 alia, that the action mentioned in the summons had been before the  
 istrates of Gorbals instead of the Magistrates of Glasgow. In his  
 escendence, the pursuer made a variation to this effect, but made no  
 ive amendment of his libel. He introduced into his condescendence  
 us irrelevant statements as to the defender's temper and other matters.  
 he Magistrates, looking to the proof both of the assault and of the  
 ler, decerned in favour of the pursuer for five guineas of modified  
 ages and for expenses.

hom then brought an advocacy in which the Lord Ordinary pro-  
 ced this interlocutor :—" Advocates the cause ; and finds, 1mo, That  
 e is no proof whatever of the first assault libelled ; and insufficient  
 f of the second assault ; none of the witnesses for the pursuer having  
 the beginning of the encounter between the parties ; and the witness  
 er adduced by the defender (whose testimony is not in any material  
 ect contradicted by the other), deponing positively that the first and  
 violent assault was made by the pursuer, whose conduct in pushing  
 ly after the defender as soon as they were departed, leads to corro-  
 te the supposition, that he had been the aggressor ; finds, 2do, That  
 udicial slander is not libelled as a separate and substantive offence for  
 h damages (under this libel) could be awarded per se, but only as an  
 avation of the assaults now found not to be proven, and separatim,  
 if competently libelled the present claim for damages on this account  
 ld have been restricted to the lowest possible amount, if not altogether  
 gnished by the utterly irrelevant and inexcusable imputations which  
 as made on the defender in the close of the first, and especially in the  
 article of his condescendence in this very process ; and therefore  
 the interlocutor of the Magistrates complained of, assoilzies the  
 ator (original defender) from the conclusions of the action, and  
 ens ; finds him entitled to the expenses incurred by him in this Court,  
 as an account thereof to be given in, and remits the same, when lodged,  
 to auditor for his taxation, and report ; finds him also entitled to modi-  
 expenses incurred in the inferior court, modifies the same to the sum  
 10, and decerns against the original pursuer for that sum accordingly." \*

**NOTE.**—" This is one of a series of actions between those parties, none of



*Foreign—Executor—Bona Fide Payment.*—A party domiciled there intestate; a banking company in Scotland then owed him which by desire of his relations they transmitted to England to his representatives; an English creditor of the deceased having obtained administration received payment of the money in question from the bank; it had been remitted; thereafter a Scotch creditor obtained decree against the bank for second payment. —Held that the bank was not bound to pay a second time to the creditor, the prior payment having been valid as made in England, the contribution, regularly and in bona fide.

June 9, 1837.

2d Division.  
Lord Jeffrey.

IN July, 1834, William Thomson, a Scotchman, died in London, the place of his domicile. At the time of his death the Aberdeen Banking Company, owed him a balance which was lying in their branch bank at Peterhead. In September they received a letter from his brother, residing in London, to transmit the balance in their hands to their London agent, it might be paid to Thomson's legal representatives. No objection yet been made or interpellation given on the part of any person in Scotland, the banking company remitted the money to Messrs G. and Company, and notified the fact to their own agents in London, and Company, with instructions to them to pay it over to the person who should appear to have the legal title.

The next of kin of the deceased having renounced, Messrs Gummersall and Gandell of London, who were the legal representatives, had obtained letters of administration from the Court of Canterbury in August preceding. In consequence

received from the brother of their debtor, they subsequently applied No. 27:  
Swain, Stevens, and Company for payment of the debt due by the June 9, 18:  
Aberdeen Bank. These parties, after examining into the title and ascer- Hutchison  
ing that the letters of administration had not been recalled, drew Aberdeen  
money from Glyn and Company, and on 20th September paid it over Bank.  
Gummersall and Gandell, upon a regular receipt from them as admi-  
rators of Thomson deceased.

On January, 1835, the pursuers, Hutchison and Company of Kirkaldy,  
creditors of the deceased, obtained decret dative as executors-credi-  
in Scotland, not being confirmed, however, till May thereafter. On  
February they gave intimation to the Aberdeen Bank of their claims  
of that character, and were informed of the circumstances above-mentioned.  
Whereupon they raised action against the Banking Company for second  
payment of the sum which had been due to the deceased, on the ground  
that the first payment having been unwarrantably made to parties holding  
no confirmation from the courts of this country.

Against this action it was pleaded in defence:—

. Even if the payment to Gummersall and Gandell would not have  
been available if made in Scotland, it was indisputably valid as made in  
London, to which place the funds had been regularly and lawfully trans-  
mitted, as the proper forum of distribution.

. The payment was equally good, though it should be held as made  
in Scotland, in respect that English letters of administration constitute a  
good title to pursue in this country, and that extrajudicial payments made  
*bona fide* to a party holding such a title are a perfectly good discharge to  
the debtor, though it might require confirmation to warrant the enforce-  
ment of a decree against an unwilling party.

The Lord Ordinary sustained the defences and assoilzied the defenders  
of their expenses, adding to his interlocutor the note subjoined.\*

“ The facts in this case are not disputed ; and they raise, very purely, the two  
points in law on which the defences are founded.” (The note then states the cir-  
cumstances of the case, the action and defence, almost in the terms of the above  
report.) “ The defence is twofold. 1st, That, even if the payment would not have  
been available if made in Scotland, it was indisputably valid as made in London, to  
which place the funds had been regularly and lawfully transmitted, as the proper  
forum of distribution ; and, 2d, That it was equally good though it should be held  
made in Scotland—in respect that English letters of administration constitute a  
good title to pursue in this country, and that extrajudicial payments made, *bona*  
*fide* to a party holding such a title, are a perfectly good discharge to the debtor,  
though it might require confirmation to warrant the conforcement of a decree against  
an unwilling party. These defences are separately conclusive : and the Lord Or-  
dinary thinks both well founded, though not without a shade of difficulty as to

The defunct being domiciled in England, there can be no doubt that the dis-  
position of his personal estate must be regulated by the law of that country, and  
that the place of his domicile was the proper and natural place for its administra-  
tion. This being the case, the Lord Ordinary conceives that persons holding funds

under consideration. The money, then, it will be recollected, was ~~not~~ to the administrators or next of kin, but to Glyn and Company, bankers of the defenders, to be held by them at the disposal of Sw Company, their London solicitors, with instructions to those last pay it over, not immediately on receipt, or to any one specified, but to the party who should make out an unexceptionable title to receive on the part of the defunct. These instructions too were correct; money lay for some time with Glyn and Company; and it was Stevens, and Company were satisfied that the next of kin had ~~not~~ Gummersall and Gandell (of whom the defenders had never heard) held regular letters of administration, that it was, upon their coming into their hands. Now, it is not disputed, that if the money was ~~not~~ to *England*, its subsequent application was unchallengeable; and every body humbly conceives that it was sent lawfully, and so as to infer no injury to any creditors afterwards coming forward in this country. If the defenders, instead of being debtors in a sum of money, had been persons with whom a chest of plate belonging to the deceased had been merely deposited, that, on his death, they had been applied to by his brother to transfer it to their own London bankers, that it might be within reach of those who were entitled to take charge of his property, it is difficult to see on whom it could be subjected to such a claim as the present by complying with the order, and merely sending it to London with injunctions to see that it was paid except to a party having a clear title to receive it? Suppose, again, that the defenders had been in the habit of sending all the balances in their hands at the end of the month to London, and intimating to the deceased's representative that they were at their order at a particular banker's, would they incur any such responsibility as is now asserted by making the usual remittance three months after, and intimating this to his near relations, and desiring their bankers to take the money, not paid over without a legal title? Or would the case be different if the defenders were accustomed to send the rents of a Scotch estate to a London banker domiciled in that city, and forwarding those that were in his hands at the end of the same quarter, with or without the order of his nearest surviving relative? There is no allegation (and there is none here) of any purpose to pre-

creditor appeared either as general disponee or next of kin, and so No. 27  
 on him a character which could be completed in Scotland to the June 9, 18  
 of entitling him to take payment, and were therefore not analogous Hutchison  
 present. Aberdeen  
 Bank.

THE COURT proceeding chiefly upon the Lord Ordinary's view in reference to the first defence, and considering the defenders to have acted in the transaction with perfect propriety and bona fides, adhered, finding additional expenses due.

R. LAIDLAW, S.S.C.—H. HANDYSIDE, W.S.—Agents.

to a person holding such a title, though without a confirmation, does it under  
 mer responsibility than that of being able to show that he was truly in right  
 t title, and might have confirmed, if that had been necessary.

The first of those propositions seems sufficiently made out by the cases of  
 law, 21st January, 1715 (*Mor.* 4500); Clerk, 20th December, 1759 (*Mor.*  
 —and 5, B's Supplement, 369), and Stewart, 21st November, 1826 (5th  
 ; 29),—from the tenor of which it is also apparent, that the notion of this  
 o pursue being limited to the case of debts payable in England, which seems  
 countenanced by Mr Erskine, (3, 9, 39,) is altogether groundless—the debts  
 sition, in each of those cases, being clearly payable in Scotland.

The second proposition is established as to payments made extrajudicially to  
 t of kin, or executors nominate, though unconfirmed, by the cases of Buchanan,  
 July, 1784 (*Mor.* 14, 378), and Sir William Forbes, 9th June, 1827 (5 *Shaw*,  
 ; and the only doubt is, whether the same rule can be extended to executors  
 ors with testament dative and license to pursue only, and to persons holding  
 sh letters of administration, which, it has been seen, are of equal value. But  
 at of those cases, (which is that more immediately in question,) appears to  
 een settled by a very precise decision, reported by *Fountainhall*, vol. i. p.

This is the case of Trent against Duff, 11th November, 1692, in which a  
 ; pursued by creditors of a defunct, defended himself by showing that he had  
 o one of the daughters of the defunct, who had English letters of administra-  
 and this was sustained, though it appeared that the payment was made *after*  
 aim of the pursuers had been intimated to him, there being no legal diligence,  
 oper interpellation. But, even without this authority, the Lord Ordinary

have inclined to hold, that the rule now settled as to nearest of kin, and  
 tors nominate, must apply to all other persons who held, like them, such an  
 ite legal title as would clearly give them right to take confirmation if the pro-  
 ig were in Court, and against a reluctant debtor; and it is quite clear, that a  
 suing in this country under English letters of administration would be enti-  
 and indeed required) to confirm before extract.

The pursuers alleged that letters of administration only gave right to sue for  
 ery of the funds of the defunct locally within the province or diocese in which  
 e was taken, and pressed for an order to have that matter established by an  
 n of English lawyers. The Lord Ordinary was at one time disposed to allow  
 efore answer, but came to be satisfied that it would not only be useless, but  
 per; the question here being, not what the effect of such letters are in *Eng-*  
 but to what effect they have been admitted, by the law and practice of Scot-  
 which is necessarily and purely a question of *Scotch Law*. If the pursuers  
 ght in their representation of that of England, it is manifest, at first sight, that  
 e decisions, from 1692 to 1826, are in direct opposition to *that* law. Since,  
 ministration in the province of York would be no title to recover funds in that  
 sterbury, nor letters from the metropolitan office to recover in Ireland, it is  
 enough, that no *English letters* could possibly have made a title to sue in

trust ; and that a question having arisen as to the validity of the assumption of new trustees, executed by one of the deceased trustees, the estate had been sequestrated, and the petitioner was appointed judicial factor. The petition farther stated that part of the estate consisted of feu-rights in the village of Eyemouth, and that the feu-casualties could not be adequately collected, unless a power was granted to sell, and grant charters and other necessary deeds was conferred on the judicial factor, which power was also necessary for the interests of the vassals, who might otherwise sell or burden their properties. He prayed that the Court should authorize him, as judicial factor on the estate of Billie, to receive vassals, in all and sundry lands and others, holden by the deceased George Home, Esq. of Wedderburn, or his predecessors, and now under the judicial management of the petitioner, to grant to them charters, precepts of clare constat, and other necessary deeds, and deeds necessary for that purpose, on payment of the feu-casualties and usual casualties of superiority."

LORD PRESIDENT.—I have looked into all the applications of the kind which have been made for some time past, and I see that where special powers have been applied for along with the appointment to the office, the Court have granted them, but where the judicial factor was first appointed, and he afterward applied for special powers, stating at the same time such circumstances as rendered these powers necessary for the administration of the estate under his management, the Court have granted them. I think this petition should be granted. In a recent, and remarkable case, we authorized the sale of the heritable estate of a deceased person, which was necessary for his support.

as to show that it is understood by the Court, and must be understood by the country, that the judicial factor is not exonerated of responsibility by obtaining the sanction of the Court as now prayed for, I have no objections to grant the petition. But if our judgment is to take off that responsibility, we should have the facts thoroughly investigated in each individual case, before we interpose our authority.

No. 274

June 10, 18  
Hamilton v  
Henderson.

THE COURT pronounced this interlocutor:—"Authorize and grant warrant to the petitioner to enter vassals, and to execute the necessary writs, all as craved, and decern."

SANG and ADAM, S.S.C.—Agents.

ROBERT HAMILTON, Advocate.—*Maitland—W. Bell.*

No. 275

JAMES HENDERSON, Respondent.—*D. F. Hope—Monteith.*

*Advocation—Process—Proof.*—Where a Sheriff's interlocutor allows a proof by scripto vel juramento, an advocation under 6 Geo. IV., c. 120, § 40, is competent.

ROBERT HAMILTON, wright in Limekilnburn, raised an action before the Sheriff of Lanarkshire, against James Henderson of Peasebanks, for payment of an account of £66. Henderson stated several pleas in defence, including prescription. The Sheriff pronounced this interlocutor:—"Finds that the defender has produced receipts for money paid pursuer for wages to himself and others, for wood, &c., one of which anterior in date to any of the charges in the account libelled on: and under these circumstances that the presumption is, that all prior debts were paid, and therefore that the account can only be established by writ or oath of the defender; before answer allows the pursuer a proof by scripto vel juramento of the defender; grants commission to the clerk of court to take the deposition and proof, and diligence against havers, to be reported within fourteen days."

June 10, 18  
1st Division  
Ld. Cockburn  
T.

Hamilton then presented a bill of advocation under 6 G. IV., c. 120, in respect that this was an interlocutor "allowing a proof," and, as the claim was above £40, the process was therefore liable to be removed to the Court of Session by bill of advocation, which must be passed at without discussion and without caution. The bill was passed, and the advocate stated, as his first plea in law, that there were no grounds for limiting the proof, to the writ or oath of Henderson, and that the petitioner should have been allowed a proof prout de jure. He also stated that the interlocutor of January 27, 1837, was otherwise erroneous. Henderson stated as preliminary pleas, that the process of advocation was incompetent, in respect that no "proof" had been allowed in pursuance of the 40th section of the Judicature Act, which applied only to proof at large, or such "proof" as might be made the subject of trial

scripto vel juramento. In the first part of the section it is provided that if proof has been allowed and taken in the inferior Court, the Court reviewing it, shall specify in their interlocutor the several material facts found to be proved, and express how far their judgment rests on fact, and that their judgment shall have the force of the verdict on the several facts specified in the interlocutor. Now I never understood in practice that, where the whole proof in the inferior Court was by writ, or a reference to oath, it was necessary for this Court, in reviewing it, to separate the fact from the law, and specify the several facts directed. It has never been understood in practice that the 40th section of the Judicature Act reaches such a case. And I think the practice in this Court is the true construction of the statute. If the advocate's mode of proving a case was to be sanctioned, it would become a simple matter to make a case by every process without exception. A defender may easily make a case as renders a proof of some kind necessary. Suppose, for example, a debt was raised for payment of the contents of a heritable bond for £1000. The defender denies the debt, and the pursuer produces a regular probative writ. That, however, is proving the case, *scripto vel juramento*. And, according to the statute, there would be room for advocacy immediately, because a proof has been allowed. Taking the whole 40th section of the statute together, it is evident that the word "proof," there used, means a proof *prout de facto*, *scripto vel juramento*, does not fall under it.

LORD CORNHILL.—I am of the same opinion. The terms of the Judicature Act are not so well chosen, as they might have been. It is provided that when "a proof at large" was allowed, it should be by writ, or a reference to oath. I think the advocates, who have been advocates, they would have expressed the true enactment of the statute more accurately than they now do, by using the single word "proof."



practice of our Courts, to use the word "proof" in that sense, and as distinguished from reference to oath or writ. No. 275

June 10, 18

A. B. v.

Berry.

THE COURT adhered, and awarded additional expenses.

J. CULLEN, W.S.—A. HAMILTON, W.S.—Agents.

A. B., Petitioner.—*D. F. Hope—Paterson.*

No. 276

GEORGE BERRY, Petitioner.—*Penney.*

Competing.

*Bankruptcy—Trustee—Affidavit—Personal Objection.*—In a competition for the office of interim-factor, and trustee, one of the competitors, in putting a value, upon oath, on a collateral obligation, preparatory to voting, under § 24 of the Bankrupt Act, put a mere imaginary and elusory value, which he knew to be false; alleged that this was consistent with the practice of others, in like circumstances;—Held that the practice, if it existed, was no justification of so gross an act, and that the competitor who had so acted could not be confirmed as trustee at sequestration, even although he possessed a preponderance of votes, in the election, after deducting all those on which the false value had been put.

In a competition for the office of trustee on the sequestrated estate of James Strathenry, flax-dealer, the competitors were George Berry, 1st Division, a merchant in Leith, and A. B., a bank-agent, who had been elected Lord Cuninghame. Berry was elected interim-factor, and who had the greatest apparent amount of votes for the office of trustee. D.

Among other grounds, George Berry stated a personal objection against his competitor, that, with a view to carry his election, he had made a false affidavit, under § 24 of the Bankrupt Act. That he declared that every creditor, who has other obligants bound to do along with the bankrupt, except where the bankrupt is the primary obligant, "shall be obliged, upon oath, to put a value upon such security upon the collateral obligation, so far as he may thereby be covered, and to deduct such value from his claim, and to give his vote in all matters affecting the bankruptcy, as creditor only for the balance, which balance shall be specified in his affidavit, without prejudice to his correcting his declaration afterwards, and without prejudice to the amount of his debt in all respects." Berry stated, that there was a list of bills in which the bankrupt was not the primary obligant, and in all of which the competitor put a merely nominal and fictitious value on the collateral obligation.

In particular, he alleged this as to a bill for £190, on which Messrs Arthur and Sons, merchants in Kirkcaldy, were obligants, and another bill for £207, on which George Wilson, flax-spinner, Fife, was obligant.

Proof was allowed, from which it appeared that, in the affidavit by the competitor, preparatory to voting for the appointment of an interim-trustee, he had valued the security of Arthur and Sons, as co-obligants in

or responsibility of that other obligant; and I may mention a recent occasion, where I was elected trustee on a sequestration of the Bank of Scotland, in opposing me, and who held a bill for £5000, valued their security on it for voting, at £50, although it was a proprietor of their own stock to the extent £5000.

"It was very wrong in any one to write you, and fault you to have believed that I valued the security of your firm in question, for payment, at only 5s. per pound. I only valued the security for voting at 5s. altogether, although at the moment and still consider your firm good for more than ten times the value of the bill in question."

At the election of a trustee, A. B. put a value of half-a-crown on the security of George Wilson as an obligant in the bill for £207. At the time Wilson was engaged in business to a very considerable amount, both prior and subsequent to this period he continued to discount bills by A. B. and other bankers to a large amount, on retiring them. But the bill for £207 lay over until the retirement of A. B.

On this proof, Berry pleaded, that the statute had enjoined the creditor, in every debt where the bankrupt was the primary obligant, to put a value, on oath, on the security bound with him, and to vote only on the balance of the debt deducting that value. This was so enacted, on the ground, that it was only as to such balance that the creditor was to be paid.

er competitors similar to this ; but if such practice existed, it was now Nö. 276  
 e for the Court to check it.

A. B. answered, that, independently of the two bills, in regard to June 10, 18  
 ch the under-valuation was made, he possessed votes enough to carry A. B. v. Berry.  
 appointment ; it was, therefore, immaterial whether these votes were  
 d or not. But, in truth, they were good, as he had only acted con-  
 ently with universal practice in putting a nominal value on the co-ob-  
 nts. And, for the same reason, he was liable to no personal objection  
 having done so. And nothing could more clearly show the bona  
 s in which he had acted than the explicit admissions in his ex-  
 iatory letter to Arthur and Sons, when they wrote to him on the  
 ject.

The Lord Ordinary “ found that the respondent, Mr Berry, has failed  
 establishing the objections stated by him to the eligibility of A. B., at  
 prior to the election, and as recorded in the minutes ; found no suffi-  
 it evidence adduced of any relevant personal objection against A. B. ;  
 efore confirmed the said A. B. in terms of his petition as trustee on  
 sequestrated estate of William Strathenry, and refused the petition to  
 same effect of George Berry ; and found, in terms of the statute,  
 said George Berry liable in expenses.” \*

In a note the Lord Ordinary disposed of various other pleas maintained by  
 parties, and then proceeded :—

But while the objections urged at the election are thus disposed of, a different  
 was urged at the last debate, which it is proper to report to the Court, as  
 ly of the serious and deliberate attention of your Lordships. The respondent,  
 Berry, founded very strongly on A. B.’s affidavits, first, in the election of  
 interim factor on this estate, and afterwards of the trustee, as showing an  
 ent disposition on his part to disregard or evade one of the most important  
 ations of the Sequestration Statute. In particular, he referred to A. B.’s  
 avits, on which he put a value on certain collateral securities, but instead of  
 lying properly with the 24th section of the Act, A. B., it is said, put on  
 merely nominal and elusory valuations on the securities enjoyed by him, in  
 ng the joint obligations of the bankrupt, along with some of the most  
 ectable and solvent merchants in the east of Scotland, who are drawers or  
 tors of sundry of the bankrupt’s bills. Thus, in the election of interim factor,  
 alued the joint obligation of Messrs Arthur and Sons of Kirkaldy, on a bill of  
 D, just as 2s. 6d. in whole, though that is a concern of great wealth, and  
 - then held, as a banker, a balance of Arthur’s funds in his own hands ; and in  
 election of trustee, he valued the joint obligation of George Wilson, a person  
 solvent and in extensive trade, as worth only 5s. on the bill of £207. The  
 ing of such claims and oaths the respondent argues was an act of such gross  
 opriety, and showed so strong a disposition on the part of A. B. to violate  
 misconstrue a plain direction of the Sequestration Statute (sect. 24), as to unfit  
 for any office which falls to be executed strictly according to the directions  
 down in this Act of Parliament.

Now, the Lord Ordinary must say, that he cannot too strongly express his  
 approbation of such valuations on oath as are here referred to. He does not  
 stand upon what quibble or gloss respectable men can reconcile it to them-  
 so to proceed on oath. And the only apology that occurs for an individual  
 has fallen into such a mistake is the universality of the practice. The Lord

sent to a committee last year by the Committee of Commerce in the proper remedies to be applied to the evil in the new Sequestration been under discussion in Parliament for the last two years.

"General as the practice may have been of making them eluder A. B. or any party procured a colourable majority by such an Ordinary would not have sustained a majority so obtained, whatever have been quoted in palliation. But these erroneous valuations in this election, as A. B. would have a great preponderance of even if the whole of the bills, which were the subject of the valuation struck out of the ranking.

"This being established, the Lord Ordinary does not think him find that a party who has joined many others in putting a wrong what is required of him by the 24th clause of the Sequestration Act disqualified from holding any office under this Act. More especially the Lord Ordinary hesitate to come to this conclusion in the following facts:—

"1. In the interval between the election of interim-factor and gave in a corrected claim and affidavit. This he did apparently in his claim to these bills, in which he was informed the bankrupt was debtor; on that affidavit alone he voted in the election of trustee.

"2. It has been now proved by the evidence lately adduced in the bankrupt was the principal debtor, in all the bills claimed in the election of trustee, though in the claim No. 3 (Appendix 1 p. 27), the bankrupt did not appear in the position of principal debtor entered in that state.

"3. By the express terms of the 24th section of the Sequestration valuation is required where the bankrupt is the principal debtor valuation at all might have been dispensed with. And when A. B. ferently, it rather justifies the idea, that he had some erroneous true meaning and object of the 24th clause of the Act, which it is consequence to trace. He certainly does not appear to have been decision in the case of Buchanan in 1827, in which it was found election of a trustee, it is no objection to the vote of a creditor if accepted jointly by the bankrupt and another, that he has not valued

pressly enjoins every creditor, "upon oath, to put a value" on his security and deduct such value from his claim, and vote only on the balance. But this is peremptorily ordered by the statute, it appears that this competitor is in the face of the statute. His letter bears that it is both the law and practice for a creditor "to value the security of the other obligants at any amount, merely to enable the holder to carry the election," and in such imaginary value to swear as if it were the true value. He justifies saying that he only did what others are in the habit of doing. If he be this statement, it is only the more necessary that this Court should interpose that this practice is brought under our notice. It is of no moment how many individuals, or how many hundreds of individuals, may have acted as he has done, all who may have done so are just as far wrong as he is. And I consider a man possessing common sense, or fit to be a trustee on a bankrupt estate, cannot entertain the slightest doubt of the true meaning of the statute. In the case of *John Brown and Others*, in 1808,<sup>1</sup> where there were two competitors for a trusteeship, who had entered into a private agreement to share between them the emolument of the office, this was brought under the notice of the Court as a corrupt and illegal agreement. The answer was made, that the practice was universal, and was admitted that many most respectable trustees in Glasgow had been guilty of it. But, notwithstanding this, the Court had no doubt that a corrupt practice did not become legal, even by becoming universal, and that the parties to such an agreement were disqualified from acting as trustees. The present practice, however, is much worse than that. The competitor of Berry has gone directly in violation of the plain words of the statute. I do not mean to say he committed a delinquency: he was under the delusion of holding himself excused by the practice of others who did the like in similar circumstances. But it is nevertheless certain that he deliberately swore that which was false. And I feel no doubt that this Court, as the guardian of the public morals, must put down such a practice as it will fail in its duty to the country.

**MACKENZIE.**—I concur. The enactment of the statute is just as explicit as can make it. It declares, as to debts in which the bankrupt is not the obligant, that the creditor "shall be obliged, upon oath, to put a value on such security or collateral obligation, so far as he may thereby be covered, and deduct such value from his claim, and to give his vote in all matters relating to the bankruptcy as creditor only for the balance." It is far beyond all question, that this enjoins the creditor to put a real and true value on the collateral obligation to the best of his belief, and that he should do this under the sanction of a solemn oath. Now, in this case, it is admitted that, in the teeth of the statute, this person put a value which was not true, but utterly false; a value, far from the truth, that he might as well have stated it at one farthing; and that he swore a solemn oath that this was the true value to the best of his knowledge and belief. This is said to be customary. It may be so; but what species of plea is it to be pleaded before a Court? It is nothing less than a shocking delinquency. It may seem difficult to account for the existence of it in the country, but I think it grew up in this way, that putting a value upon an obligation is a loose and common practice. The men who were required to do it, being excited by the eagerness of a

No. 27

June 10, 1808.

A. B. v.

Berry.

<sup>1</sup> Dec. 13, 1808. F. C.

sanction the nomination of this gentleman as trustee. As he adopts an abuse, in the face of the restraint of an oath, what other abuse may he adopt if it only be sanctioned by practice? If neither the injunction nor the solemnity of an oath, will restrain him, what can the Court be a restraint? I do not mean to say that he, or those other persons indulged in this practice, have committed perjury. But if the facts were the Criminal Court, on the face of an indictment charging perjury, I at the same time, that I at present feel it would be much more difficult want of relevancy, than would be at all agreeable. But still I do not think the guilt of perjury was committed here. I rather think that this gentleman under a very infatuated self-delusion, arising from the practice of also undoubtedly from some faulty deficiency in himself. But however be, it is enough for this case that I feel satisfied we cannot con- sider him a trustee.

LORD PRESIDENT.—I am of the same opinion. It may often happen that, in keen competitions, parties on both sides resorted to this practice equally culpable in that respect, neither of them brought it under the Court. In this way the practice might gain head before the Court; but now that it is brought before us, we can have no hesitation in putting it down. The words of the statute are too explicit to be misunderstood. The function of voting is the precise function, for the proper exercise of the statute required the true value of a collateral obligation to be made and deducted from the creditor's claim. The statute provides for a correction of the valuation afterwards, if necessary, but that does not in any degree weaken the necessity of making a true value according to the best knowledge and belief, at the time of deducting it from his claim, and to voting on the balance.

PETER MACLEOD, Pursuer.—*M'Neill—A. M'Neill.*  
 ARCHIBALD BUCHANAN and HAMILTON ROSE, Defenders.—*Sol.-Gen.*  
*Rutherford—Russell.*

No. 277

June 10, 1853  
 Macleod v.  
 Buchanan.

*Reparation—Wrongous Imprisonment—Stat. 6 Geo. IV. c. 129—Jurisdiction Process—Jury Trial.*—1. Circumstances in which questions of law decided before a jury cause to trial. 2. In an action of damages for wrongous imprisonment, the ground of the alleged illegality of certain proceedings under the Combination Act, which had been previously the subject of a bill of suspension and liberation at the instance of the pursuer before the Court of Justiciary,—Held, (1.) That the decision of the Court of Justiciary granting liberation imported no *res judicata* in this action, in regard to the legality of the proceedings under the consideration of that Court; (2.) That it was not relevant to infer damages that the petition to the Justices, by which the proceedings originated, referred only generally to the Act of Parliament authorizing the complaint; (3.) That it was not relevant to infer damages from the petition nor relative oath of the petitioner bore any date, the warrant of apprehension following thereon having a date affixed to it; (4.) That it was not relevant to infer damages against those legally responsible therefor that the pursuer was apprehended and brought before the Justices in virtue of a warrant granted by only one Justice; (5.) That it was relevant to infer such damages that the pursuer was incarcerated, not in virtue of the original conviction, but by a letter to the Justice from the Justice of Peace-clerk containing a copy of the conviction.

THE defender, Buchanan, one of the proprietors, and the manager of June 10, 1853  
 main cotton works at Catrine, in Ayrshire, with concurrence of the other  
 defender, Rose, deputy procurator-fiscal of the Justices of Peace of the 2<sup>d</sup> Division  
 County of Ayr, presented to the Justices a petition under the Act 6 Geo. Ld. Moncrief  
 T.

c. 129, complaining, inter alios, against the pursuer, Macleod, and  
 praying, in common form, to have the oath of the private petitioner  
 sworn, as required by law, and for warrant to apprehend the offenders,

The petition, and the oath of credulity following thereon, were not  
 read. The warrant for apprehension was signed by only one Justice.

Incarceration in the jail of Ayr, following on the sentence of  
 imprisonment pronounced by the Justices, took place in virtue of no  
 legal warrant transmitted to the jailor, but of a letter addressed by  
 the Justice of Peace-clerk to the Magistrates of Ayr, and the keeper  
 of the tolbooth, containing a copy of the conviction.

Macleod was afterwards liberated on a bill of suspension and libera-  
 tion presented to the Court of Justiciary.

Hereafter he raised an action of damages against Buchanan and

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This petition, and the subsequent proceedings, together with the clauses of  
 the above Statute bearing upon the present question, are detailed in the report of  
 the Commission for suspension and liberation, ante, XIII. 1153.



or retain it as his warrant, but that it was exhibited to him. In defence,—that the proceedings in question were regular in accordance with the statute 5 Geo. IV. c. 129; and, even if irregularities had inadvertently been committed, they were not such as to entitle him to damages.

The case having been remitted to the jury-roll, the following question was proposed by the jury clerks:—

“Whether, on or about the 18th day of December, 1833, or either of them, wrongfully caused the pursuer to be apprehended and imprisoned, and detained from on or about the said 18th day of January, 1835, or during any part of that period, or wrongfully caused him to be apprehended or imprisoned and detained as aforesaid, to the loss, injury, and damage of the pursuer, and to the loss of the said £1000?”

Thereafter a question arose, whether the points of law in the proceedings under the Act should be decided before the issue, upon which question, and also upon the questions of fact, the Lord Ordinary appointed the parties to give in evidence.

*Pleaded for Macleod—*

In the general case of an action of damages, such as the present, nothing ought to be left for determination at the trial, since it happens that any point can be brought out so purely as to be determined without reference to the whole *res gestæ*. The law has provided for the determination of points of law in the

res judicata. The pursuer having been committed to prison No. 277.  
 hereof, complained to the only competent tribunal, which was <sup>June 10, 183</sup>  
 of Justiciary, and by that tribunal the character of illegality <sup>Macleod v.</sup>  
 was finally fixed on the procedure complained of. Supposing, how- <sup>Buchanan.</sup>  
 points to be open;—

party founding on and taking benefit by a particular statute,  
 specially in cases where strictness of procedure is required, must  
 be different sections on which judgment is demanded, and it is  
 to refer generally to the statute as containing certain enact-

procedure is void, in respect that neither the petition nor the  
 any date. Summonses must contain a date given by the party;<sup>2</sup>  
 the same principle, it is indispensable in a petition. Sanctioning  
 the use of a date in such a petition as the present will give rise to  
 in practice, and may affect questions both of common law and  
 prescription. The same rule applies to the oath, which the  
 requires to be prior to the granting of the warrant, implying that  
 it has its own date. In Archbold's English Forms, the date  
 is mentioned in the forms of oaths. But if dates are required  
 they must appear from the documents themselves, independently  
 of evidence which may be afforded by reference to other pro-

on a right construction of the 7th section of the statute, the  
 apprehension, under which the pursuer was brought to trial,  
 have been granted by two Justices.

A letter of the Justice of Peace-clerk was no sufficient warrant  
 of detention; and, even if the allegation of the original conviction  
 of Justices having been exhibited to the jailor were true, that would  
 not remove the irregularity in question.

*See also Buchanan and Rose—*

One of the cases expressly provided for by the Acts 59 Geo.  
 § 12, and 6 Geo. IV. c. 120, § 33, making it competent for  
 the Court to decide questions of law or relevancy before trial; and,  
 on the nature of the questions, the propriety of their being so  
 decided is evident. The character and objects of the present proceed-  
 ings of the Court of Justiciary, differ so  
 that what was done in the one can never become necessarily a  
 precedent for what is to be held in the other. In the Court of Justiciary, the  
 question was, whether enough appeared to entitle the pursuer, on  
 the facts, to his liberation; and the question was influenced by the

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*See also Fairley v. Fairley*, March 1, 1823 (ante, II. 261; new ed. 232); *Parlane v.*  
*Parlane*, June 28, 1825 (ante, IV. 120; new ed. 123).  
*See also Buchanan v. Malcolm*, March 5, 1829 (ante, VII. 547).

77. common-law presumption in favour of liberty. At all events  
 1837. be necessary that the record of that Court should show, w  
 not, what were the points of law which it was intended author  
 determine, as it is insufficient to say that the judgment implic  
 that the imprisonment was irregular.\* As to the irregulari  
 selves;—

1. The petition itself proves that it fully set forth the se  
 which it was founded, and which recites the offences prohibite  
 was no necessity in law or practice for setting forth the section  
 the jurisdiction of the Justices, this not being a matter conn  
 the form of the complaint, or the description of the offence.  
 referred to by the pursuer do not apply.

2. The statute does not give the form of the petition, or re  
 it shall bear a date, but merely says, that there shall be “a  
 and information on oath;” the form being thus left to be reg  
 the common law as applicable to summary applications. A  
 matter of daily practice that no date affixed by the party is, in  
 nary case, necessary in summary petitions; and even an ordi  
 mons bears no date by the party, but only the date of the v  
 citation granted thereon. Again, the complaint or informat  
 the statute may be the foundation of a summons as well as of :  
 Suppose the petition in the present instance had prayed the J  
 summon the pursuer, an authority to cite would have been v  
 the petition and would have been executed by a constable. Suc  
 and the deliverance upon it, would not differ from any other  
 application, and the deliverance thereon authorizing service on  
 and there is no authority for holding that the common law  
 judicial practice of Scotland, requires more in the one case th  
 other. A meditatione fugæ warrant, or a committal by a S  
 breach of sequestration, would not be voided by the origina  
 having no date of its own; and yet these are cases in whic  
 stant apprehension may lead to instant imprisonment.† In suc  
 the present, according to English practice, however prudent a  
 a written petition may be, it is not essential,‡ which seems to

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\* The judgment of the Court of Justiciary was as follows:—“Su  
 sentence and warrant complained of simpliciter, grant warrant to and  
 Magistrates of Ayr, and keeper of the tolbooth to set the nuspeuder fo  
 liberty, and decern.”

† In *Dewar v. Mariani*, July, 1835, the Court of Justiciary, in a  
 of a warrant of imprisonment under the 4 Geo. IV. c. 34, disregarded  
 tion that the petition was not dated.

‡ The following statement of the English practice on this point is fro  
 fendens' paper:—“In England, according to the forms given in practica  
 there is nothing of the same kind with the original petition used in

a of a date being required. But, looking at the proceedings as a No. 277.  
 there can be no doubt of the date, the petition setting forth that  
 ence was committed on the 17th December, while the warrant <sup>June 10, 1837.</sup> Macleod v.  
 l thereon and the ensuing conviction bear date the 18th. This <sup>Buchanan.</sup>  
 ration applies likewise to the oath; and the question as to the  
 ty of its bearing a date is also a question of common law, and  
 on the statute, which says nothing as to any formalities being  
 d.

giving a fair construction to the statute, the warrant for appre-  
 a was legal, although granted by only one Justice; and this is  
 ent with the practice in regard to summary prosecutions in Eng-

The incarceration took place upon a sufficient warrant, as the  
 l warrant was exhibited to the jailor,<sup>2</sup> and the copy sent by the  
 s' clerk certified that officer authoritatively of the fact of convic-  
 But even assuming an irregularity as to this matter, the defenders  
 be affected by it, the execution of the sentence, and the responsi-  
 therefor, resting exclusively with the Court and its officers.  
 Lord Ordinary made avizandum with the cause to the Court, and  
 at the same time the subjoined note.\*

igned by the party himself. The information is a statement exclusively  
 the hand of the Magistrate, setting forth that a certain person has informed  
 certain things done by the party accused, and therefore granting warrant,  
 ing a summons, as the case may be; and it is laid down in regard to an  
 ation, that 'where it is not expressly directed to be in writing by the  
 creating the offence,' it is never required 'to be drawn up in form, except  
 s where the proceedings are at the suit of a common informer for a penalty.'<sup>1</sup>  
 statute in question does not expressly direct that the information shall be  
 ing, it would thus appear that in England no written statement would be  
 ed."

Archbold, p.p. 95, 97.

his was not admitted by the pursuer.

It appears to the Lord Ordinary that it would be wrong for him as a single  
 to pronounce any judgment on the important questions discussed in these  
 . But it may be proper that he should briefly state the opinion which he  
 med upon them.

. If it be thought right that the questions of law raised, or any of them,  
 be decided before sending the case to trial, it can form no objection to that  
 ding that the record has not been closed. When an opinion shall have been  
 to that they ought to be decided, the Court can order the record to be closed,  
 en proceed to decide the points.

. The Lord Ordinary has no doubt that it is competent, and may sometimes  
 edient, to determine questions of law before trial, although the decision of  
 may not necessarily supersede the necessity of a trial.

b. The Lord Ordinary is of opinion that this is a case in which it is pecu-  
 expedient, and in some cases necessary, that the Court should give judgment

<sup>1</sup> Archbold on Commitments and Convictions, p. 93.

from the perfect immunity, as to acts in the interim, that the question of illegality in the proceedings has been *finally decided*, and is not competent for this Court at all to consider it, *that plea alone* requires that the Court should give their own judgment upon it before trial.

" 4. The Lord Ordinary is of opinion that this action, in which complaint is made of *ad civilem effectum*, is not only competent, necessary, to consider and determine the effect of the legal objection, the petition, the warrant, and the imprisonment. The Court of Justiciary, a competent Court, necessarily judged of the grounds put before it by the prisoner. But when an action of damages is raised, the Court is the proper Court for trying the whole merits of it, must be entitled to consider *all* the elements on which the claim to damages, or compensation, may depend. They would not be bound even by a judgment of the Court itself in a question of *liberation*; and still less can they be bound by the judgment of the Court of Justiciary. The questions must be considered, with reference to the very different issue which is raised by the Judges, or even the same Judges, sitting in the civil court, may, in a different case, come to a different opinion from that on which the prisoner was liberated. The *judgment* of the Justiciary properly decided normally that there was ground for suspending the sentence and setting aside the warrant. But the *special grounds* of illegality, as they may be, may enter essentially into the question of damages.

" 5. The Lord Ordinary thinks it no good objection to the petition that it does not refer to the particular section of the statute founded on. The petition is a *statute*, and it proceeded in *fact* in sufficient form on the basis of it.

" 6. The question as to the want of *date* is very ably argued by the defenders. The Lord Ordinary is still inclined to think that it should appear *ex facie* of the proceedings on what day it was made. But he has more doubt than he formerly had, whether, connected in the body of the petition with the oath and the warrant written on the paper, it does not sufficiently appear that it was and *could only* be made on the 18th December.

with respect to the present action for damages, and that all the No. 277.  
 which were then discussed were now open for decision. Their June 10, 1837.  
 ops were equally clear that, in the circumstances of the case, it Macleod v.  
 only competent, but highly expedient, that the questions of law Buchanan.  
 be decided before any trial which may take place.

Court then took up the points of law in dispute.

MEDWYN.—In regard to the first objection to the proceedings, I think  
 rence to the Act of Parliament in the petition is sufficient. As to the  
 a date, I still retain my opinion that the objection is not well founded.  
 rrant is dated ; and as to the petition not being dated, I referred before to  
 is of summary applications in Mr Tait's Treatise, which show no date.  
 s or petitions in the single-bill roll have no date, and even a bill of suspen-  
 no date, except that of sisting, and of the order for answers. The next  
 , Was the oath defective, because not dated ? If it was taken in the course  
 rocedure, that is sufficient to fix its date ; just as an oath taken down at a  
 t has no separate date per se. On that point also, I have no difficulty. As  
 varrant of apprehension being granted by one Justice, I have changed my  
 I was anxious to get information as to the English practice, observing  
 e a statute applicable to the other end of the island, and I am now satisfied  
 o justices were necessary to grant the warrant for apprehending. The last  
 as to the jailor having no other warrant for imprisonment than the letter  
 clerk of the peace. I hold this copy of the conviction sent in the clerk's  
 o be equivalent to an extract of the conviction, and that the letter was  
 ous. In the case of Andrew v. Murdoch,<sup>1</sup> for wrongous imprisonment,  
 here was a warrant in the form of a letter, no objection was taken to the  
 ration, but the question was as to the bail. I still think, therefore, that  
 as no inaccuracy here.

D JUSTICE-CLERK.—As to the first point, I think there was a sufficient  
 ce to the Act of Parliament ; and as to the want of dates, I think, under  
 umstances, that is no legal objection. As to the third point, I have come  
 onclusion that the Act draws a manifest distinction between the power of  
 ning a party, which may be done by one justice, and the apprehension. I  
 at this is the way in which it is interpreted in England. I think, therefore,  
 s warrant for apprehension ought to have been signed by two justices. As

not be thought right or proper to decide the relevancy of the averment  
 trial.

The question whether the defenders are answerable for an illegal execu-  
 of the sentence, may deserve attention. But in general, the Lord Ordinary  
 that when a man has been illegally imprisoned, the party at whose instance  
 imprisonment takes place must answer for it.

J. The point as to the state of the jail may, if proved, affect the *amount* of  
 es, though it certainly may be a question partly for the jury how far the  
 ers should be affected by it. It may be found not to be true."

<sup>1</sup> Dow, II., 401.

generally to the Act of Parliament authorizing the complainant. That it is not relevant to infer damages in this case, that the petitioner, nor the oath of the petitioner, emitted in terms of any date other than that affixed to the warrant of apprehension. That it is relevant to infer damages in this case against the pursuer responsible therefor, that the pursuer was apprehended and taken to the justices of peace in virtue of a warrant granted by a Justice of the Peace, and that it is relevant to infer damages in this case against the pursuer legally responsible therefor, that the pursuer was brought and detained in the jail of Ayr, in virtue not of the conviction and under the signatures of the two justices of peace, bearing date on 18th December, 1834, but in virtue alone of the writing of the justice of peace clerk to the magistrates of Ayr, and to the tolbooth, mentioned in this process, and dated 'Ayr, 18 1834,' and that the Lord Ordinary thereafter proceed further as he shall deem just."

FISHER and DUNCAN, S.S.C.—GIBSON-CRAIG, WARDLAW, and DALZIEL, W.

No. 278. JOHN TAINSH and OTHERS, Objectors.—*Sol.-Gen. Ruthven Hamilton.*

ROBERT SCARLETT, Respondent.—*Thomson—Stewart*

*Teinds—Valuation.*—The barony of A. contained several lands



r 1697, the teinds of the barony of Arnot were valued. The decree No. 278.  
 ared "the just worth and constant yearly avail of the parsonage June 13, 1837.  
 ls of the foresaid lands and barony of Arnot, consisting of the Mains 1st Division.  
 Arnot, Easter and Wester Bows thereof, Faill, Craigside, Little Ld. Cockburn.  
 ot, lands of Scotlandwell, and acres thereof, pertaining to the said Tainsh v.  
 David Arnot of that ilk, to be now, and in all time coming, the sum Scarlett.  
 77 merks, 8 shillings Scots, besides certain victual." This cumulo  
 unt was then apportioned, by the decree, on the Mains of Arnot, and  
 several other lands composing the barony, and it set forth, "Item,  
 Sir David Arnot has forty acres about Scotlandwell, and that  
 acre is worth twenty-five merks yearly, extending the hail to ane  
 sand merks. It's the committee's opinion, that two hundred merks  
 e teind." At the date of this valuation, the lands passing under the  
 mination of Scotlandwell, and belonging to Arnot, amounted to  
 h more than 40 acres, and were apparently about 150 acres. In 1709  
 a-charter was granted by the proprietor of the barony of Arnot, of  
 land hail that part and portion of lands commonly called the Birks,  
 Scotlandwell, with the yard and house belonging thereto, now pos-  
 sed by James Reddie in Scotlandwell, lying within the parochin of  
 moak, and barony of Arnot." This charter conveyed "three acres"  
 g with Birks; and among the other boundaries of the feu, which  
 ended to about twenty acres Scots, one was "the march-stones at the  
 of the acres of Scotlandwell on the north-west, from Kinnestown  
 ch to the arable land that belongs to Birks, and from thence north to  
 highway."

ubssequently to this, other parts of the lands of Scotlandwell were  
 ired by John Tainsh and other feuars, in small portions of two or  
 e acres each. In preparing a scheme of locality of the parish of  
 moak, under a process of augmentation and modification of stipend,  
 common-agent allocated the portion effeiring to the lands of Scot-  
 well upon John Tainsh and others, and wholly exempted the lands  
 birks, now belonging to Robert Scarlett. These lands had not been  
 ed in the last locality, in 1802, which circumstance was alleged by  
 ish and others to have occurred in consequence of their having been  
 essed by a former minister of the parish from 1760 to 1796, during  
 h period the levying of stipend from them had been suspended, and  
 never resumed.

his explanation was repudiated by Scarlett, who contended that his  
 s of Birks, though forming part of the lands of Scotlandwell, were  
 art of those 40 acres which alone had been susceptible of valuation  
 he date of the decree; that, at that date, the lands of Birks were  
 "birks and moss land," and not liable to teind; that the entire  
 of Scotlandwell should be laid upon these 40 acres, which were  
 in the possession of Tainsh and others; and that no part of the  
 and should now be allocated on Birks. In reference to the words

by the proportion of cess imposed on each respective portion that the onus lay on Scarlett to prove that his lands of Birks part of the 40 acres in question, in the year 1697, which was possible; and indeed there was the strongest presumption of the same from the terms of the original feu of Birks, in 1709, which was "the arable land that belongs to Birks," and rendered it highly probable that his lands had not been all of the inferior sort which they were. They also alleged that the sub-feu, referred to by Scarlett, did not exceed one acre; that two acres, contiguous thereto, remained to be arable past the memory of man; and that this corresponded with the feu-charter in 1709, which expressly conveyed "three acres with Birks."

The Lord Ordinary "found that the lands of Birks as valued in the decree of valuation, dated 27th January, 1697, as a portion of the barony of Arnot, and accordingly, that they were in the same proportion of the cumulo teinds of the barony, as ascertained in the decreet of valuation, conform to the respective valued rent books, of Birks, and the remanent parts of the barony were to be decerned; reserving always to Mr Scarlett to insist that a proportion of the valued teinds effeiring to Birks shall be allocated upon his lands, and he shall be so advised, and to them their objections, as remitted to the clerk to rectify the locality accordingly; questions of expenses." \*

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\* "NOTE.—The valuation was anterior to the feu, and is a con-

Scarlett reclaimed and prayed the Court to find “the lands of Birks No. 278. exempt from teind, and the payment of stipend.”

James and others also reclaimed and prayed the Court to find that the lands of Birks should not be made liable for a proportion of the cumulo June 13, 1837. Tainsh v. Scarlett.  
of the barony of Arnot, but for a proportion of that part of the teind which was allocated by the decree on Scotlandwell. The Court, “in respect it is admitted by both parties that the respondents’ lands of Birks form part of the lands of Scotlandwell, before further consideration, remitted to the Lord Ordinary to ascertain whether the said lands of Birks, presently belonging to the respondent, include any part of the forty acres described in the decree of valuation, 1697, as belonging to David Arnot, and to report.”

The Lord Ordinary made a remit to Thomas Oliver, Lochend, to examine the lands and report. He reported that, close to the village of Scotlandwell, and exclusive of Birks, there were certain portions of arable land, called acres or half-acres, which had, from a very early date, been known by that designation; that the ground so denominated, contained 36 nominal acres exclusive of Birks, but amounted, within the third part of an acre, to 40 Scots statute acres. He reported alternatively, that, if the 40 acres in the decree of valuation referred to nominal acres, then there were 4 acres wanting to complete the 40, and these 4 acres were more likely to be part of the lands of Birks, than any where else; but if the 40 acres referred to Scots statute acres, then the 40 acres could still be made out as exclusive of Birks. The Lord Ordinary thereon reported that he was “of opinion that the lands of Birks must be held as including any part of the 40 acres described in the decree of valuation.”

The Court resumed the case along with this report.

**MR. GILLIES.**—I entertain very little doubt on this case. The lands of Birks are either valued or unvalued. If unvalued, they are liable to teind for one-fifth of the whole rent. The party claiming exemption from this locality, does not contend for this, as indeed it would be the worst result which could befall him in such a situation. But if the lands are valued, it must be as part of the lands of Scotlandwell, or part of the other lands of the barony of Arnot; there is no other alternative. And as both parties are agreed that they are part of the lands of Scotlandwell, I think they must be localised upon for such part of the teind of Scotlandwell as properly effeirs to them. Unless they are wholly unvalued, this seems to be the necessary result. As the reclaiming note for Scarlett prays the Court expressly to find the lands of Birks “exempt from teind,” we should refuse that note, and find the lands liable in teind, and remit to the Lord Ordinary to rectify the scheme of localisation prepared by the common agent.

**MR. MACKENZIE.**—It is clear that the lands of Birks were part of the barony of Arnot, and of that portion of it called Scotlandwell; and that is admitted on all hands. The lands of Scotlandwell are also admitted to have been of much more extent than 40 acres; and it is pleaded by Scarlett, that, at the date of

According to that view, the argument is at all times, as the value of the whole lands, and something of the value was attached to every part, even supposing that the decree had contained such a notandum. For, I should still feel much difficulty in sanctioning the doctrine of the lands was to be valued, and the rest exempted, from the power of the commissioners to pin down the whole valuation to the land. But it is unnecessary to go into that; I am satisfied to be put on the lands of Birks, but it may be difficult, at present amount.

LORD COREHOUSE.—There are but three alternatives under which this case must be considered. The lands of Birks may be valued along with Scotlandwell, or along with the rest of the barony, or valued at all. On considering the report of Oliver, who is an experienced valuer, I am convinced that they made no part of the 40 acres of Scotlandwell been admitted, on both sides, that they formed part of the lands of Scotlandwell. But as this is admitted, I take the view which has been expressed by Lord Kenzie, and hold that these lands were taken into view by the commissioners when they valued the lands of Scotlandwell. They were in truth valued as 40 acres. I cannot hold that 110 acres, out of 150, were wholly valueless. I never knew an instance of such a valuation as this is of no consequence that the lands of Birks may not have been included in the valuation; they were susceptible of being made arable, and made arable. I think, therefore, that part of the teind imposed on the lands of Birks. As to their being wholly teind-free in the circumstances, altogether impossible. And as Scarlett does not say they are unvalued, I think that a portion of the valuation of the lands of Birks is only alternative left to him. We should pronounce a finding

RS BUTLER JOHNSTON and HUSBAND, Objectors.—*D. F. Hope* No. 279.

—*G. G. Bell.*

ALD CONNELL (Common Agent in locality of Moffat), Respondent.—*H. J. Robertson.*

June 13, 1831  
Johnstone v.  
Connell.

—*Valuation—Locality—Confusio.*—The ten-pound land of C. was com-  
the 10 merk land of C., and the 5 merk land of C., of old extent; the  
contiguous, and had been possessed as one undistinguished property for  
centuries: in 1637 a decree of valuation of the 10 merk land of C.  
obtained before the High Court; in a question in 1837 how far that decree  
ble in a process of locality, where the 10 merk land could not be sepa-  
ratified,—Held, that, as the blending of the lands had taken place without  
ing imputable to any party, the benefit of the decree was not lost; and  
nothing appeared to take off the presumption, arising from the old extent,  
0 merk land was two-thirds of the ten pound land, the proprietor of the  
l land of C. could only be localled on, to the amount of one-third of his  
valued, the remaining two-thirds being covered by the decree of valuation.

creet of valuation before the High Court of Teinds, in 1637, the June 13, 1831  
“the 10 merk land of Corehead” of old extent, lying in the 1st Division  
Moffat, were valued. These lands then belonged in property Ld. Cockburn  
riority to James Johnstone of Corehead. In a locality of the  
Moffat, in 1837, it appeared that the Hon. Mrs Butler John-  
representative of James Johnstone, was proprietor of “the 10  
nd of Corehead of old extent,” and the common agent localled  
nd as unvalued, in respect that the valuation of “the 10 merk  
Corehead” could not apply to it. Mrs Butler Johnstone gave in  
s, and a question arose, of a special nature, whether “the 10  
nd” was identical with the “10 merk land,” which had been  
1637, or whether it consisted of that 10 merk land, and another  
us 5 merk land of Corehead, the dominium utile of which, in  
years after the valuation, was acquired by James Johnstone of  
d, and which, when added to the 10 merk land, made a 15 merk,  
und land of Corehead. The superiority of the whole 10 pound  
Corehead appeared to have belonged to James Johnstone at the  
he valuation. The first process of locality of Moffat had been  
1762, and the whole lands of Corehead were then localled on as  
l. In 1783 that decree of locality was reduced at the instance of  
Johnstone of Corehead, on the ground that the valuation of 1637  
received effect.

nsidering the conflicting evidence as to the question of fact, whe-  
10 pound land of Corehead was the identical subject valued by  
e 1637, the Lord Ordinary found “that the valuation 1637 of  
erk lands of Corehead cannot be held to apply to the 10 pound  
Corehead, now belonging to the objectors; therefore, repelled  
objections, and decerned: and found the objectors liable to the  
agent in the expense of this discussion.”

rated, and the respective lands could not now be identified, thus arose whether any, and what effect was due to the decree of the 10 merk land. The objector pleaded that, as the lands became blended without any fault of her, or her predecessors, the lands were originally two-thirds of the whole 10 pound land, and should be available to the extent of two-thirds of the whole, leaving only one-third unvalued.

The common agent answered that, in order to obtain a decree of valuation, it was necessary for the objector to show specific lands it applied. Although the relative proportions of the 5 merks, might mark the relative worth of the valued, and unvalued portions of Corehead, at the date when the old extent was made, there was no proof of their relative worth now. And as the 5 merk land now be producing as large a rental as the 10 merk land, she could not restrict the localling upon any part of her lands, alleging that such part was an actual portion of the 10 merk land, the 5 merk land.

Upon this question the following opinions were delivered.

**LORD MACKENZIE.**—I can see no ground in law or justice for the objections of the benefit of the decree of valuation. Though it is not possible now to draw the boundary line between the 10 merk land and the 5 merk land, that does not appear to me to have arisen from the fault of the objector, but from the fact that the lands have got blended into one, without blame being on the part of the objector, and if there was negligence any where, it was not on the part of the objector.

here is another view in which it may be considered. A valuation is just tantamount to a perpetual lease of the teinds at a fixed rent. But suppose that an actual lease of the teinds of the 10 merk lands of Corehead had existed, would a confusio like this have the effect of defeating the lease altogether? I do not think No. 279  
June 31, 18  
Johnstone v.  
Connell.

I think this would not have been the result any more than if the same tenant had, for a term of years, occupied two contiguous farms, the succession to which, after a lapse of time, split, and went to separate owners. There might be great practical difficulty in dividing one of the blended farms, from the other; but that could not cause the extinction of the right of either owner. The separation would require to be made according to the best proof which could be adduced, of the extent of each farm. And so in this instance, I do not think the benefit of the decree of valuation is lost to the objectors; and if there be no more direct evidence of the portion of the lands of Corehead to which it applies, there is the relative proportion which was formerly fixed when the valuation of the old extent was made, and which will afford a rule, in the absence of any fact or presumption to take off the effect of the decree of valuation, according to this rule, will extend to two-thirds of the lands of Corehead, leaving one-third unvalued.

**LORD COREHOUSE.**—I incline to take the same view of this point, though it is not unattended with difficulty. It appears that no evidence now remains to show what portion of the lands of Corehead was the 10 merk land, and what portion was the 5 merk land. Confusio has taken place, and that without any thing fraudulent or blameable on either part. In these circumstances I apprehend that common sense will not allow us to hold that the decree of valuation has become obliterated. There may be some difficulty in extricating the rights of the parties. But these rights are not lost, and must be extricated according to the best means now remaining for doing so. If there be no better method, then a proportion of the whole lands, amounting to two-thirds, being the proportion of the 10 merk lands to the whole 15 merk lands of Corehead, must be taken to be valued by the decree; and the remaining third part, or 5 merk land, must be dealt with as unvalued.

**LORD GILLIES.**—I entirely concur. I hold that the decree valuing the 10 merk land of Corehead applies, pro tanto, to the 10 pound land of Corehead. Two-thirds of the 10 pound, or 15 merk, land are valued, and one-third is not. If each of the 10 merk, and 5 merk, properties could be identified, the decree of valuation would apply to the whole of the first, and to none of the last of the two properties.

These two properties cannot now be separated. In the absence of direct evidence on the subject, I think it must be assumed that the relative value of the one, to the other, as 10 to 5, that having been the proportion formerly fixed, and there being no circumstance stated which should alter that proportion. I hold, therefore,

that these are now the relative proportions between that part of Corehead which is valued, being the 10 merk land, and that which is unvalued, being the 5 merk land. On these data, as the best which now remain, I apprehend that the decree of valuation covers two-thirds of the 10 pound land of Corehead, and leaves one-third unvalued.

**LORD PRESIDENT** declined judging, on account of relationship to one of the parties.

**THE COURT** pronounced this interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against: Find that the decret of valuation, 1687, is an effectual valuation of the lands of Corehead, but to the extent only of



*H. J. Robertson.*  
GLASGOW COMMISSIONERS OF POLICE, Respondents.—*S*  
*furd—A. McNeill.*

*Title to Pursue—Statute.*—1. Held under a local statute, Ewing, Jan. 19, 1837, that residenters in a city liable in police no sufficient title to complain of resolutions of the Commissioners rizing a certain appropriation of the funds alleged to be illegal who, besides being rate-payers, were the minority of the Board on occasion of passing these resolutions, but whose character expressly set forth, were in no better situation as to title. 2. Question minority of the Board, if their character as such were properly seen a good title to complain of the resolutions of the majority in respect in dispute?

June 13, 1837. THIS was a suspension and interdict applied for under similar to those in the case of Ewing v. Glasgow City Police, reported ante, p. 389, which see.

2d Division.

Ld. Cockburn.

The suspender, Morrison, and five others, formed the Board of Police Commissioners on the occasion of the resolution passed by the Board agreeing to pay a proportion of the expenses incurred in opposing the Water Company's Bill. These being themselves "General Commissioners of Police for Glasgow, and rated in the police-books as liable in payment of rates, and who have been assessed therefor and paid together with certain other parties "residenters in Glasgow of property there, and also rated in the police-books presented a bill of suspension, complaining of the resolutions of the majority of the Board.

e respondents, the Board of Commissioners, objected to the suspension title to complain, on the ground of their having no direct or immediate personal interest.<sup>1</sup>

ie Lord Ordinary, proceeding on the decision in the case of Ewing, found the objection to the title to suspend, and dismissed the action, with expenses.

No. 2  
June 13,  
Morrison  
Glasgow  
Missions  
Police.

he suspenders reclaimed, and contended that the present was different from Ewing's case, in so far as here the minority of the Board of Commissioners were complaining of the act of the majority, which was per se void title,<sup>2</sup> and had been set forth in the bill of suspension, independent of the title as residents in Glasgow liable to the police assessment, which was found to be insufficient; and this the more especially as the suspension related not to any malversation of the Board in affairs of the city, but to a proceeding totally out of the line of their duty, involving legal appropriation of the funds, which the minority of the Commissioners, as statutory guardians and administrators of the funds, had an interest to prevent.

On this it was answered, that the suspenders had not set forth in the bill the title they now wished to proceed upon, and could not be allowed to change their position and come forward with another title in addition to what they had formerly set forth; besides, that a different remedy was provided in such a case as the present by the 133d section of the Police Act.

**JUDICIAL CLERK.**—It is not necessary to give an opinion on the question whether it be competent or not for the minority of the Commissioners to complain, as this is not before us for judgment. There is no difference between the present and that of Ewing. The description in the bill of Morrison and the other suspenders as Commissioners, is a mere general designation they assume to themselves. We ought to see something *ex facie* of the bill showing that it was in the mind of the minority to make such a complaint. But neither there nor in the reasons and pleas in the record is this title set forth. In these circumstances there is no ground for altering the interlocutor.

**JUDICIAL CLERK** and **MEDWYN** concurred.

**JUDICIAL CLERK** was absent.

**THE COURT** accordingly adhered, finding additional expenses due.

**MOWBRAY** and **HOWDEN**, W.S.—**CAMPBELL** and **M'DOWALL**, S.S.C.—Agents.

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See this ground more fully argued in Ewing, ante, p. 395.

*Aitchison v. Magistrates of Dunbar*, Feb. 4, 1836, ante, XIV. 421.

general obligation to repay. As the above acknowledged along with other circumstances held to establish resting owi

**June 13, 1837.** THE late Joseph and David Murray were debtors Herriot in a sum of £400, and also in a sum of £100. Murray granted the following holograph acknowledged 1815—Received from Mr David Herriot one hundred pounds sterling," (Signed) "DAVID MURRAY, Bro. ruary, 1817, they executed a trust-deed for behoof o favour of David Herriot, and of the respondents C John Murray, proceeding on the narrative that they creditors, thereafter named, the respective debts a under-written, viz. David Herriot, the sum of £59 afterwards declared "that the mention of the sum persons before-named shall not import that such s unless they shall be otherwise sufficiently instructe lawful for us or the said trustees, or the other credi quarrel the same hinc inde." The trustees accepted and continued in the management of the trust. In division of the trust-funds was prepared, in which the Herriot was recognised as amounting to £591. In the management and for payment of expenses connecte Herriot advanced a sum of £174. He subsequently of the debt of £400 above-mentioned.

Thereafter, David Murray and David Herriot hav cators, Allan and others, trustees of David Herriot, i

Joseph and David Murray's trust-deed as due to Herriot, No. 281. 400 already paid,) and £174, being the sum advanced by behoof of the trust.

June 13, 183  
Allan v.  
Murray.

of £174 was admitted by the defenders to be due, and the n was as to the debt of £191, which was composed of the mentioned, with interest thereon down to the date of the id which the pursuers contended they had established by the knowledge above-mentioned, by the terms of Joseph Murray's trust-deed, and also by certain correspondence of

ff found that the sum of £174, with interest, was a subsisting the trust-estate of Joseph and David Murray, but that Her- had failed to establish the debt of £191 by legal evidence. a Herriot's trustees brought an advocacy, and pleaded, as below, that the balance of £191 was established to be due, debt as stated in the narrative of the trust-deed, under £400 thereof admitted to be paid, had been recognised by ncerned and acquiesced in as correct.

ndents, on the other hand, pleaded that there was no legal t evidence, which was expressly declared by the trust-deed te, to prove the constitution and still less the subsistence of question.

, Charles Herriot and John Murray, alleging that the trust they had acted had been some time since abandoned, pleaded r respondent Thomas Murray being in possession, as execu- state of their deceased constituents, and being able and ready ver sum might be found due to Herriot's trustees, there was no r in fact or law, on which any decerniture could pass against stees of Joseph and David Murray.

l Ordinary pronounced this interlocutor:—"Advocates the the interlocutors of the Sheriff complained of, and finds that 191, being the balance of £591, set forth in the trust-deed d David Murray, as then due by them to the author of the s sufficiently instructed to have been truly due at that period, ll resting owing; and, therefore, decerns against the defen- s Murray, as executor of and representing the deceased ray and David Murray, the original trusters, for the said sum h the lawful interest thereof, from the date of the said trust- yment: Finds the said defenders liable for the advocates' th in this Court, and before the Sheriff; allows an account e given in, and remits the same, when lodged, to the auditor ion and report: But in respect that the trustees of the said David Murray were liable only each for his own intromis- ad, to the knowledge of the advocates, and with the assent

\* "NOTE.—The Lord Ordinary thinks the debt of £191 sufficient by the minutes of the meeting of 27th February, 1817, by the deed executed the day following, and by the holograph acknowledgment granted by David Murray (whose representative is now the least) 29th May, 1815. He takes it to be settled by the cases of Ogi 1703 (Mor. 11510); Donaldson, 12th June, 1711 (Mor. 1151); Fiddler, 24th November, 1809 (F.C.); that such a naked acknowledgment of receipt of money, as appears in the document last mentioned, do the constitution of a debt and a general obligation to repay; while that all the circumstances of this case tend most strongly to conclusion; but, if this be the true character of the document, it is that it does not require a stamp, either as a receipt or a promissory receipt stamp, as witnessing not the *discharge* but the *constitution* and not a bill stamp, as not expressing any liquid or specific engagement on a certain day, but only a general acknowledgment of debt;—see 28th February, 1833 (11 Shaw, 478), and Martin, 25th June, 1782).

"The judgment might be rested, perhaps, on this ground as to the debt in this acknowledgment, with a small addition for unpaid interest to £191, at the date of the trust-deed in February, 1817. But it may be laid out of view the precise recital, in that deed, of a debt of £500 (£400 of which has always been admitted), in spite of the proof which occurs in a subsequent part of it, or the absolute and unqualified statement of the same facts in the minutes of the preliminary meeting. A clause in the trust-deed appears to the Lord Ordinary to be intended to ratify or retract the deliberate admission of the debts previously admitted, than to provide, in a *competition of creditors*, for the chance of some defect in the formal evidence of some of them, of which they might take advantage; but, *as against the debtors themselves*, the admission is nearly conclusive, and sufficient at least to lay upon them the burden of proving that it was erroneous.

"In any view, it seems altogether impossible to hold the ca

parties reclaimed, either as to the merits or expenses.

No. 281.

THE COURT, holding the balance of £191 to be instructed, not merely by the holograph acknowledgment above-mentioned, but by the whole circumstances of the case, pronounced as follows:—  
 “Adhere to the interlocutor in so far as complained of by the note for Thomas Murray, and allow the decree against him to go out and be extracted ad interim: Find additional expenses due; remit the two other notes to the Lord Ordinary, to hear parties farther on the points therein brought under the review of the Court, with power to do thereanent as to his Lordship shall seem just.”

June 14, 1837.

Thomson v.  
Campbell.

BENTON, W.S.—A'INSLIE, MACALLAN, and GRAHAM, W.S.—W. POLLOCK, S.S.C.—  
 J. MORRISON, S.S.C.—Agents.

WILLIAM and ALEXANDER THOMSON, W.S., Claimants and Pursuers.— No. 282.

*Sol.-Gen. Rutherford—Marshall.*

JOHN FREDERICK CAMPBELL, Raiser and Defender.—*D. F. Hope—Walker.*

*Process—Reduction—Multiplepoinding.*—The purchaser of a parcel of lands had a personal bond for part of the price, and at a subsequent period his heir had a bond of corroboration to the heir of the seller:—Held competent for the creditors of the seller to insist in a reduction of the bond of corroboration in so far as it was erroneously granted to the heir. 2. Circumstances in which held to be a sufficient objection on the part of the purchaser's representative that in the action and a relative multiplepoinding, representatives of the seller who were not cited were only cited edictally.

That the present claim was not brought forward when an action (afterwards reduced) was instituted in 1827, for the separate sum of £174, 17s. 6d., seems explained by the fact, that that action was for money *actually* advanced during the currency of the trust, and for which the trustees were personally and properly debtors, whereas the £591 was due by the trustees, and out of the trust funds and accordingly no claim was made at that time for *any part* of this £591 *other than* for the £400 all along confessedly due, and afterwards paid—or for the balance now in dispute of £191.

The trustees should not have been made parties in the advocacy, especially as no other defender is confessedly solvent, and has been in the management of his affairs ever since 1828. The trustees have therefore been found entitled to their defence in this Court. But as the Sheriff's decree against them, for the £174, 17s. 6d., has not been complained of, but, on the contrary, has been obtempered by payment (though it is not said by whom), they can have no relief from those who appear in an inferior court, where they appear indeed to have maintained many groundless and unnecessary propositions.”

Cullen, his heirs, and assignees, for the remaining sum was granted on the condition, "that at or before the simul et semel that the above capital sum is paid, the Cullen, as purchaser of the above lands, or his foresaid creditors of his father ranked on the foresaid price of the said lands, and shall obtain conveyances of the same in his favours as purchaser foresaid, conform to the deed of bond of caution granted for the said price, and shall deliver to me (the said Daniel Campbell), as purchaser of Saughs, for a further security of my said purchase, the deed of ranking, with a proportion of the grounds of debt answering to the said lands of Saughs, compared with the said decret of sale, so far as they affect my said part of the above decret of sale, and deliver the decret of the just proportion of the grounds of debt and diligences thereof, to me or my foresaid, on my obligation for ordinary form, under which condition and provision the same is granted, and no otherwise; but under this declaration the rest of the said capital sum shall be paid in the meantime due."

Dr Cullen died in 1790, no part of either principal or interest above sum having been paid. The contents of the inventory of the deceased, as part of the executry-funds, are included in a partial confirmation of the executry which was granted to his younger sons.

Daniel Campbell having also died, his successor,



I since the foresaid term of Martinmas, 1765, are still resting- No. 282.  
 nd unpaid, and that the same when accumulated extends at the  
 reof to the sum of £759, 4s. 5d. sterling, and that the foresaid  
 of the creditors of the said William Cullen of Saughs is still in  
 nce, and not completed; and that it has been required that I, in  
 ation of the foresaid bond granted by the said deceased Daniel  
 ll, should become bound in manner underwritten:—Therefore I  
 und and obliged myself, as I hereby in corroboration of the  
 bond above narrated, and without prejudice thereto, or any dili-  
 hat has followed or may follow thereon, sed accumulando jura  
 bind and oblige myself, my heirs, executors, and successors, to  
 he said Robert Cullen, his heirs or assignees, all and whole the  
 sum of £759, 4s. 5d. sterling, being the accumulated balance of  
 e of the above lands at the date hereof, with a fifth part more of  
 in case of failure, together with the lawful interest of the above  
 ated sum from the date hereof, and thereafter during the not-pay-  
 nder the following conditions always, that the said Robert Cul-  
 epresenting the said Dr William Cullen, as above, shall as soon  
 ble have the said ranking of the creditors of the said William  
 terminated and completed,” &c. The condition which followed  
 same in import as that inserted in the original bond.

ough this bond was taken in name of Lord Cullen as heir cum be-  
 it was not included in the inventory lodged by him of the estate,  
 e took up as heir to his father, and no part of the principal or inte-  
 he contents thereof was ever claimed or disposed of by his Lord-  
 any one in right of him, either during his life or after his death.

Walter Campbell died in 1816, and was succeeded by the  
 r, Walter Frederick Campbell.

ranking of the creditors of Dr Cullen, which had been in the  
 me proceeded with, terminated in 1831, when a final decret of  
 ice was pronounced in favour of the trustee for the creditors  
 milton Dundas), who subsequently granted to Campbell a dispo-  
 id assignation to this decret, and to the debts for which he (the  
 had been ranked and preferred.

32, Miss Margaret Cullen and Mrs Robina Cullen or Millar,  
 len's only surviving daughters, who were creditors of their father  
 of £3000 of principal, besides interest, expedite a confirmation,  
 utors-creditors ad omnia, to the debt in the above-mentioned  
 of which they granted a trust-assignation to the pursuers, Messrs  
 nd Alexander Thomson, W.S.

claim under the bonds had been made against Campbell till 1821,  
 application for a new bond of corroboration was made to him on  
 t of these ladies, and was subsequently granted. After the pro-  
 s in the ranking had been brought to a close, and Campbell's title  
 ands of Saughs secured, as above-mentioned, steps were taken to

June 14, 1887  
 Thomson v.  
 Campbell.

heirs or assignees, and in so far as such part of it might deprive the confirmation expedite by the pursuers' authors or otherwise, in case the bond should not be reduced to have it found and declared that the bond, in so far as granted of Lord Cullen, was truly a trust for behoof of the party in right to that part of Dr Cullen's executry-funds, consisting of the question; and that, in either alternative, it should be found that the pursuers were the true creditors therein. Some called as defenders in these actions were in the East and were cited edictally.

The two processes were subsequently conjoined.

In the multiplepoinding, Messrs Thomson claimed the medio, as in right of their constituents, in whom the debt their recent confirmation ad omnia.

In defence, it was pleaded for Campbell—

1. The present conjoined actions cannot proceed, inasmuch as parties in right of Lord Cullen are not called, and, in the case of this case, mere edictal citations are not sufficient.

2. The reductive conclusion is incompetent, as the bond cannot be held null, so far as granted to Lord Cullen, as ultra.

3. The declaratory conclusion, that the bond was a mere person of Lord Cullen for behoof of the claimants, is untenable capable of being competently proved.

4. There is no room for maintaining that the bond of 1776 is in a wrong party.

1. As to the amount of the fund, the claimants are entitled to the principal sum in the bond of corroboration, with the legal interest thereof from its date till payment; but, looking to the demand for a new bond in 1821, they are entitled, moreover, to insist upon an accumulation of interest as at that time.<sup>1</sup>

2. Decree ought to be pronounced in terms of one or other of the alternative conclusions of the summons of reduction and declarator, in respect that the debt in question was part of the executry-funds of the Dr Cullen, and that the bond of corroboration was granted in the name of his heir cum beneficio inventarii, either erroneously, or only for the benefit of those who had acquired, or might acquire the right to these executry-funds.

3. It is *jus tertii* to the respondent to oppose a decree of reduction and declarator, as concluded for in that action, or to oppose the demand of the present claimants in the multiplepoinding.

4. All parties interested have been called, and, if not, the remedy is in the power of the nominal raiser, who might have called any individuals he considered to have been omitted, and is barred from stating objection to making the fund in medio furthcoming.<sup>2</sup>

5. The condition set forth in the bonds has been purified not only by the proceedings and documents which the claimants offered, and are bound to deliver to Mr Campbell, but likewise by the operation of the *positive* and of the negative prescription.

The Lord Ordinary, after considering the question on cases, pronounced the following interlocutor, adding the note subjoined: \*—“ Finds, 1mo,

Scott's Creditors, Feb. 2, 1773 (M. 14189); Campbell v. Earl of Galloway, Feb. 3, 1802, M. App. to Annualrent, No. 4. The amount as adjusted by the Court before raising the action was £1890, or the sum in the bond of corroboration, with 4 per cent interest from its date.

M'Braire v. Hamiltons (2 W. and S. 66).

“ It is very much to be regretted that the parties did not settle this case judicially, when every thing was so near being adjusted in August and September, 1834. The Lord Ordinary has not thought himself at liberty to consider whether there was not at that time a truly *completed* agreement, because there is no statement or plea on the record under which that question can properly be decided. It is obvious, however, that after the letter of the defender's agent of 16th August, 1834, and the answer to that letter of the 18th (See Appendix, p. 36), every thing was substantially settled, and that it was captious at least, if not impotent, afterwards to break off, on the pursuers' very innocent demand of making a joint obligant with Mr Campbell, if the payment was to be postponed till Sunday; yet *this* was, at that period, the only remaining point of difference; the Lord Ordinary would rather infer, from Mr M'Innes's subsequent letter of

October, 1834 (p. 38, G.), that even this had not been objected to. Without expressing any opinion, however, as to the obligatory nature of these arrangements, the Lord Ordinary cannot help saying, that when he considers the admissions made in them, after the whole case was fully before the legal advisers of the Court (for the period referred to is more than a year after the execution of the last bond by Mr Hamilton Dundas in July, 1833), he cannot but be surprised at the

such payment.

"The Lord Ordinary has abstained from disposing of the of the action as to the bond of corroboration, chiefly because ratory conclusions sufficient and clearly well-founded. T opinion, however, is in favour of the competency of such reduction, though he sees difficulties in the way of it, in a ca the present, with which he was unwilling without necessity defender, however, shall take the case to review, and the c sufficiency of the decree of declarator, it may be right for the of the Court on the reduction also. The Lord Ordinary ( edictal citation of Lord Cullen's heir-at-law, and other i sufficient, in a case like this, to warrant decrees on the meri been dead for twenty-seven years. The defender has stat could be suggested in behalf of such heirs or executors; and in the whole case, it is that those persons could have even than the creditors of Lord Cullen, the heir served cum ben to these creditors, again, it is enough that, after twenty-seven on their part, the defender himself cannot indicate the name them. That the decret against the parties cited will be a de and may by possibility be opened up any time within fort irrelevant as an objection to decree in a multiplepoinding; si tion could be sustained, it would be enough to prevent such pronounced in any case where the raiser could prevail on one personally cited and having palpably no interest, to withhold record. If a preferable claimant is really absent without repetition from one who has been unduly preferred, but *the* under the decret will always be safe. See Bain, 29th No 9131).

"As to the proceedings in the ranking and sale, and the compliance with the condition of assigning the debts there estate in security of the purchase, the Lord Ordinary has li set forth in the interlocutor. He is rather inclined to thin secure at all events by the positive prescription under b superiority and the terms of the decret of sale. But he d

original creditor, and, not being included in the partial confirmations No. 28  
 made in 1790 immediately after his death, was duly vested in the June 14, 18  
 constituents of the present pursuers and claimants, by their confirmation Thomson v  
 executors-creditors ad omnia in 1832: Finds, 2do, That any right to Campbell.  
 said sum which was vested in Lord Cullen by the said bond of  
 corroboration in 1798, was so vested in trust only for the creditors of Dr  
 Cullen the original creditor, and not for the use or behoof of the said  
 Lord Cullen himself, or that of his creditors or representatives; and being  
 distinct and distinguishable, does now belong to the said pursuers and  
 claimants, to the exclusion of any claim on the part of the creditors or  
 representatives of the said Lord Cullen; and therefore, and in respect  
 of the citations and comparances in the conjoined action of reduction  
 and declarator are, in the circumstances of this case, sufficient to give the  
 defender, Walter Frederick Campbell, the representative of the original  
 creditor, and the only party who opposes the conclusions of that action, all  
 the protection against future competing claims to which he is legally  
 entitled, decerns in the declaratory conclusions of the said action, but  
 does not it unnecessary to decide on the separate conclusions for reduction:  
 Finds, 3tio, That the original proceedings in the ranking and sale, the  
 said decret of preference pronounced therein on the 8th July, 1831, in  
 favour of Gabriel Hamilton Dundas as trustee for the creditors of Dr  
 Cullen, and the disposition and assignation by the said Gabriel Hamilton  
 Dundas (with the consent of the present claimants) of the said decret  
 of preference, and of the debts for which the said trustee had been ranked and  
 preferred, and the whole grounds thereof, executed in favour of the said  
 Walter Frederick Campbell in March and July, 1835, and now ready to  
 be delivered on the debt being settled, constitute sufficient implement of  
 the conditions in the original bond and corroboration thereof relative to  
 securing the debtor's purchase of the lands of Saughs, by such a convey-  
 ance of a decret of ranking and the relative grounds of debt; and there-  
 fore, in the conjoined processes of multiplepoinding, ranks and prefers the  
 said pursuers and claimants to the whole balance of the price of the said  
 lands as the fund in medio: Finds, 4to, That the said fund in medio

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in medio, or of the debt truly owing. He has taken it at the sum finally adjusted  
 and agreed upon by the parties themselves, when the matter was (apparently)  
 not being accommodated in August, 1834, viz. the sum in the bond of corro-  
 boration, with four per cent interest from its date. It is very true that the pur-  
 suers then agreed to restrict their claim to this amount, only on the understanding  
 that they were to get immediate payment, and that they had always maintained  
 that they were entitled to legal interest, and to periodical rests and accumulations.  
 If the matter were entirely open, the Lord Ordinary would not be disinclined to  
 make some allowance of this sort; and if the case is brought before the Court by  
 the defender, he should be well pleased that their opinion should be taken upon  
 this point also. On the whole, however, he thought that the adjustment actually  
 made was equitable, and that there was a better chance of the matter being settled  
 without further litigation if it was left undisturbed."

unnecessary to decide on the conclusions for reduction, and as it found that the fund in medio is no more than £1890.

**LORD JUSTICE-CLERK.**—There is no doubt, looking to this case, is due. The only question is as to the matters contained in the persons' note. I think we are entitled to reduce the bond of corroboration so as to open up the way for the declaratory conclusions; and as to the fund, we shall do justice between the parties if we take the present bond of corroboration in 1798 and allow legal interest upon it downwards.

**LORD MEDWYN.**—After so long a period elapsing without any made for the debt, I am not surprised that Mr Campbell and his agents wished it to be investigated. But I have no difficulty either as to interest. It clearly was a moveable right, and Lord Cullen could find this was a debt due to himself. Mr Campbell is quite safe in present claimants.

**LORDS GLENLEE and MEADOWBANK** concurred.

**THE COURT** pronounced the following interlocutor:—"Find of corroboration granted in 1798 ought to be reduced with effect of opening the way to the declaratory conclusions in favour of the pursuers and claimants, and decern accordingly find the said pursuers and claimants entitled to legal interest on the above-mentioned bond of corroboration from its date in these variations adhere to the Lord Ordinary's interlocutor find expenses due."

JAMES MURRAY and JOHN MURRAY, Pursuers.—*J. Anderson.*  
 WILLIAM ELLIOT, Defender.—*G. G. Bell.*

No. 283

June 14, 18  
 Murray v.  
 Elliot.

*of—Payment—Bill of Exchange—Qualified Admission.*—In an action for payment of the balance of a debt originally constituted by bill which had been delivered up, the debtor having judicially admitted circumstances sufficient to show that the balance had not been paid—Held that such admission could not be actually qualified by the statement of counter-claims of which no other evidence was produced.

November, 1820, the late Thomas Murray, father of the pursuers, delivered a sum of £300 to the defender Elliot upon a promissory-note signed by him and his father. In November, 1826, Elliot paid a year's interest on account of the debt. On 8th January, 1828, he paid £50 and on 8th July thereafter the farther sum of £50 to account, the balance now remaining due being £175. Thereafter Elliot subscribed and delivered to Murray his acceptance for this sum payable three days after date, Murray about the same time delivering up to Elliot the original bill of £300. Ex facie of the new bill, the date had been altered by erasure from 25th November, 1828, to 25th November, 1827.

June 14, 18  
 2d Division  
 Lord Jeffrey  
 T.

Murray, founding on the circumstances now mentioned, raised action against Elliot, concluding for payment of the sum of £300, with interest, and deduction of the payments to account. Murray having subsequently died, the action was insisted in by his sons and executors James and John Murray.

Elliot admitted on the record the original constitution of the debt and its continuance up to November, 1826;—he admitted the subsequent payments to account, and also that some time after November, 1826, he had subscribed and delivered to Murray his acceptance for a sum of £175, but he alleged that the balance in question was liquidated by a debt nearly of the same amount due to him by Murray arising out of a transaction in 1800 in regard to the marches of their respective farms.

In defence against the action he pleaded—

1. The sexennial prescription.

2. That the bill having been delivered up to himself, the debtor, the contents contained in it must be presumed to have been paid, and that the payment could not be proved except by his writ or oath.

3. That the debt pursued for had not been established, and was at all events extinguished by the defender's counter-claims.

Lord Ordinary pronounced the following interlocutor, with the following finding of fact:—“ Finds, 1mo, That it is admitted by the defender,

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The defence, that the original bill of November 1820 was *prescribed*, and that it is no longer capable of being proved but by writ or oath, is absurd, after the



" in the circumstances of the case, and after the defender's history of the alteration of the date, the Lord Ordinary is inclined to think that, between these original parties, the bill for £175 would have been valid for action, or even for diligence. But as it could not be known whether or not such admissions would be made, it was proper to leave the summons as it stands. The Lord Ordinary thinks that it is not clear how this alteration was occasioned. The bill (he has no doubt) was made soon after the last payment to account (which was made in July 1828, and, of course, the date of that year was very near the end of the year, as no interest had been paid since 25th November, 1826, and ready with no more money, it was thought easier to change the date to 1827 (adding the interest up to that date) than to calculate the interest to the very day of the transaction.

" But the judgment is *rested* on the principle stated in the *viz.*, that facts proved by a defender's judicial admissions are facts proved extrajudicially by his *writ*, and are to be dealt with on the footing of prescription, exactly as any other facts so proved, or admitted by him; that is to say, to be taken as conclusive *against him*, but not as to any qualifications or counter averments, of which they are not proof. Proof by the writ of a party, though equiparate in many cases with proof by the writ of a party, stands in this respect on quite a different footing. The oath sworn by a party, and the force entirely from the judicial contract of parties implied on it, terminates all future discussion, and excludes all other proof. It not only admits of the adjunction of *intrinsic* qualities, which a party would otherwise have no means of proving. But the writ of a party (referred to after prescription has been sustained) has evidence of its own. It is but an ordinary article of evidence, and leaves all concerning it to be proved as other evidence. It brings any farther proof they can command, either to refute or to confirm it. The great general rule or canon of evidence, therefore, is, that no man can prove any thing in his own favour by his own writing, though the best evidence *against him* is what he has deliberately said or written. Judicial admissions, however, are more in contrast with oaths of party than mere private writs, and bear date long before any adverse interest had arisen, it is

amount till November, 1826, inclusive; the defender him- No. 285  
aid to the pursuer a year's interest upon the bill for this sum,

June 14, 18  
Murray v.  
Elliot.

the original debt by setting off against it a counter claim of a totally  
different nature, would rather appear to be *extrinsic*, and not available even in an  
action.

This counter claim, therefore, was in itself of a plausible description, it  
could not be inadmissible against the demand for this liquid and admitted  
original debt. But it is, in the highest possible degree, of the very  
dubious nature. The alleged debt, on account of the marches, is said to have  
been paid to the defender's father in 1800, when the defender himself was  
too young to have been put in the way of immediate settlement in 1810, when  
he was more than a child, and no way consulted about his father's affairs. It  
is said that he had been settled about that time, therefore (as the pursuer alleges),  
knowing about it, and the whole subsequent conduct, both of father and  
son, to demonstrate that it was either so settled or abandoned as groundless.  
It is fully admitted that they borrowed £300 from the pursuer, and  
were bound to repay that sum in full. But, if the pursuer had actually owed  
him only £100 at this time, it is altogether inconceivable that the obliga-  
tion should have been granted for more than the balance. But the full interest is  
allowed; and in 1824, the father, who alone knew every thing about  
the matter, dies without ever having hinted at the existence of this counter claim,  
or his son's standing. His son (the defender) then pays the interest of two  
years, and in the eighth year of the first bill's currency, makes two partial  
payments, one of the principal of £90 and of £50. The bill being thus saved  
from forfeiture, and the debt reduced in July 1828 to £160 of principal, with  
interest to November, 1826, he grants a new bill (now bearing date in Novem-  
ber 1825, *being the precise amount of principal and interest* then resting  
due on the old bill) into the hands of the pursuer; who, at or about this time, gives  
up the original bill for £300. These are the facts *admitted* on the record;  
and the only facts which the defender would now *assume*, without proof of  
relevant offer of proof, are 1<sup>st</sup>, That the pursuer, at the time, agreed  
that the balance of £175 to be extinguished by the counter claim for marches,  
which had been heard of for near 30 years; and in consequence of this agree-  
ment, he gave up the original bill as a paid and extinguished document; and 2<sup>d</sup>, That  
the £175 bill, at or about the same time, had no sort of connexion with  
the old bill or its settlement; that the coincidence of the sum with  
the balance was a matter of *mere accident*; and that it was granted altogether  
and merely for the accommodation of the pursuer, though it bears  
the words 'value received, is drawn *at only three days' date*,—and could not  
be accounted,—and, in point of fact, never was out of the hands of the  
defender. It may be added then, so soon after this as December, 1828, and but a  
few days before raising this action, it is proved by the defender's own letters, that  
he had been paid by the pursuer for payment of some debt, which he admitted to  
be the same; and that he never insinuates that they had finally closed accounts in the course  
of the action, or that *he* was really *creditor* to the pursuer, for relief of this alle-  
gation.

The summary of the facts disposes not only of the defence founded on  
the bill, but of the whole argument rested on the fact of the original bill  
being given up to the defender, and the maxim 'chirographum apud debito-  
rem' &c. That fact, looked at by itself, no doubt raises a *presumption*  
constituted by that document had been paid, but a presumption liable  
to be rebutted by opposite evidence, and in this case entirely overruled by the  
evidence of the cause. The mere granting of a new bill for the *exact balance*  
due on the old, would be sufficient to overrule it, but the whole  
case demonstrates that what might perhaps have been presumed, if no  
other evidence had been given, *cannot possibly* be true. To the Lord Ordinary this

three days after date : Finds, 4to, That though the date appears to have been altered from 25th November, 1826, to 27th November, 1827, and though the defender has denied that it was made by him, it is not denied that it was made with him before it was delivered to the pursuer ; but, on the contrary, by him (in the 9th article of his Statement of Facts), bill now founded on by the pursuer, was subscribed by modulation of the said pursuer, &c. : Finds, 5to, That though he has evaded any specification of the precise time when the £300 was given up to him by the pursuer, he has admitted some time posterior to the last payment to account of the said bill some considerable time prior to the raising of this action. Finds, 6to, That it is not pretended that the defender came to account of this original debt of £300, except the £50 and £50 respectively, for which he has been all along answerable to the pursuer ; and that the only account he gives of the way in which the £160 (or, with a year's interest, £175) was liquidated, is by averring that a debt nearly to the same amount had been paid by the pursuer to his (the defender's) father, upon some transaction.

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appears as certain as if it had been judicially admitted that the £300 was secretly purloined from the pursuer, or got up on a distinct pretence at the hour with the balance in cash. Indeed, the simultaneous grant of the bill for that very balance comes in substance to the same thing.

" Towards the close of the debate, the defender made no attempt to show his readiness still to prove some of the more insignificant averments.

as of their respective farms, so long ago as the year 1800, and alleged No. 283.  
 e been finally adjusted, and brought to a sum in 1810; and that this June 15, 188  
 bt was brought forward and agreed to be applied in extinction of Rendall v.  
 lance of the £300, when the original bill for that sum was delivered Robertson.  
 on after the payment of the last £50 in July 1828: Finds, 7mo,  
 here is no evidence whatever, nor any relevant offer of evidence  
 ould affect the pursuer in support of this allegation, which is entirely  
 l by the pursuer, and appears irreconcilable with the fact of the ad-  
 borrowing of £300 by the defender and his father in 1820, twenty  
 after this counter-claim is said to have emerged, and ten years after  
 been brought to a specific account, by what is called the award of  
 ee: Finds, 8vo, That in these circumstances, and with reference  
 way in which this action is libelled, it is not necessary to deter-  
 whether the bill for £175 could be the ground of diligence or direct  
 , in respect of its alleged vitiation; or even whether it can be looked  
 in adminicle of evidence in the present cause, inasmuch as the facts  
 ily admitted by the defender, which are at least equivalent to facts  
 cted by his writ, sufficiently establish that the balance of £175 has  
 ed unsatisfied of the original debt since 25th November, 1827, and  
 ie original document of debt was soon after given up by the pursuer,  
 n exchange for a new document, which, whether actionable or not,  
 hen subscribed and delivered by the defender in security of that  
 e; and therefore, and on the whole matter, repels the defences, and  
 is against the defender, in terms of the conclusions of the libel, reser-  
 always to the said defender his right to claim, in any competent  
 , any sum he can prove to have been owing by the pursuer to the  
 of the said defender, and to the pursuer his defences against such  
 : Finds the pursuer entitled to expenses.”  
 iot reclaimed.

THE COURT unanimously adhered, finding additional expenses due.

D. GRAY, S.S.C.—W. MARTIN, S.S.C.—Agents.

MARY RENDALL, Pursuer.—*Pyper*.  
 JOHN ROBERTSON, Defender.—*G. G. Bell*.

No. 284

*Property—Udal Lands.*—Circumstances in which held that a party who had  
 for several years, in possession of udal lands, had no title to them, and con-  
 ntly that the right of a disponee to whom he sold them must be set aside at  
 uance of the heir of the last proprietor.

June 15, 18

QUEL of the case reported ante, p. 265, which see. It was then  
 ed that the lands were udal, and the next question to be disposed of 1st Division  
 Ld. Cockburn  
 B.

that the title of John Rendall was so made up as reference to the right of Samuel Rendall, the pursuer way to certiorate a purchaser of the existence of the circumstances, the late John Rendall had then the real subjects in him by possession, and, even though he personal obligation to the heir of Samuel to make it him, that would merely create a claim of damages an instance of the heir, and could not affect the onerous Robertson which had been followed by possession answered that her late father, Samuel, had been act under the conveyance in his favour, so that he had the in him at his death. John Rendall, therefore, was not any sense, when he subsequently obtained possession intruder, and the right of a purchaser from him more competition with the right of the true proprietor.

In regard to the decree in absence, obtained by John against the pursuer's brother George, now deceased, pupil, no sufficient plea was stated against its being rec

The Lord Ordinary reduced the rights made up by his conveyance to Mrs Robertson, and farther "reduced the decreets in absence called for to be reduced in the mons, to the effect of parties being heard as in the found that the pursuer, Mary Rendall, as heir of her father of her brother, George Rendall, has the only good an to the lands of Ingsay, Nistabean, Brittavil, and others, libel. and is entitled to enter into possession. and to lev

**THE PRESIDENT.**—I think the interlocutor right. The possession of these lands was in Samuel, at his death, and in no one else. He died in the full real of the subjects, and it was not his brother John, but his son George, who was entitled to take them up after his death. Neither John Rendall nor his son can compete with the issue of Samuel. No. 284.  
June 15, 183  
Rendall v.  
Robertson.

**THE MACKENZIE.**—I think the interlocutor is well-founded. John Rendall cannot have had some possession on the mere pretence of a right as heir; but it is possible to hold that that circumstance can be founded on by his disponee as ground for cutting off the right of the true heir. It is of no moment, in this case, whether he granted a conveyance to Mrs Robertson or not. He had no power to grant it, and both his right, and that of his disponee, must be cut off.

**THE COREHOUSE.**—I think the interlocutor ought to be adhered to. I have considered the report of the previous judgment in this cause, where it was decided that the lands were not feudal, but udal, and, had I been then in the Inner-House, I should have concurred in that decision. It is indeed considered by Bankton that lands may be feudalized by any charter containing a precept for infefting the grantee, although the granter of the charter was himself a subject, and had no overture but was an allodial proprietor. But it appears to me to be more consistent principle to hold, that lands are not duly feudalized, unless the vassal can trace his title back to the Crown as the ultimate superior. The accounts which we have as to udal lands are of a very meagre character. But they are held by the courts to be allodial lands. Possession of them, however, is not enough if it be not on a title. And therefore I lay aside the possession which John Rendall is said to have enjoyed, as it was obtained by tortious proceedings adopted by a pupil. But Samuel Rendall's possession was on a good title. The disposition in his favour by his eldest brother Robert, who was the proprietor, appears unquestionable. Whether the use of dispositive words *de presenti* be essential to the conveyance of udal lands, it is unnecessary to decide, as there was such a disposition in Samuel's favour, followed by actual possession. The pursuer is the son and heir of Samuel, and is not affected by any possession which John may have had after Samuel's death, as such possession was on a bad title.

**THE GILLIES** concurred.

**THE COURT** adhered, and allowed additional expenses to the pursuer as to this point; and remitted to the Lord Ordinary to proceed with the ulterior conclusions of accounting.

R. URQUHART, S.S.C.—P. CROOKS, W.S.—Agents.

June 15, 1837. ALEXANDER HAMILTON, writer in Mauchline, was  
1st Division. Presbytery of Ayr, to be collector of the assessment of  
Ld. Corshouse. church for the parish of Mauchline. That parish contains  
D. town of Mauchline, consisting of from 300 to 400

These houses, for the most part, were built on small fee  
inferior description. They had never been erected in  
denomination. Their inhabitants exceeded one-half of  
the whole parish.

The heritors were assessed in proportion to their  
portion of the assessment was laid upon the feuars of  
James Boswell, Bart. of Auchinleck, who was the founder  
of valuation, resisted the assessment as irregular, and on  
terms of the case of Peterhead,<sup>1</sup> it must be imposed upon  
of land and houses in the parish, including the feuars  
proportion to their real rent. Hamilton raised an action  
Sir James's proportion of the assessment, before the Sheriff  
decerned for payment. Sir James brought an appeal  
record was made up in the Court of Session, but a  
pleas was lodged. The Lord Ordinary "appointed  
pare cases." \*

In Hamilton's case he averred that the real rental of  
of the parish was about £5500; and that the real rental  
Mauchline did not exceed £400 sterling. Sir James  
that these averments could not be regarded, as the  
record, and were not admitted.



uniformly been paid by the heritors according to their valuation, and the owners of houses had never contributed thereto. He now stated, in his case, that, in 1794, an assessment of £580 sterling, was made, for building the manse; in 1797, £355 sterling, for building school-house; in 1805, £620 sterling, for purchasing the school-master's garden, and for repairs on the church; in 1807, £137 sterling, for repairs on the church and manse; in 1820, £78 sterling, for repairing the manse; in 1821, £266, for purchasing land to add to the glebe; and, every year from 1809 downwards, an assessment for supporting the manse and other parochial purposes.

No. 285.  
June 15, 1837.  
Boswell v.  
Hamilton.

These averments were only met by a general statement that the advocate did not admit them, and that the details had not been given on the part of the respondent. Before disposing of the cause, the feuars of Mauchline were added as parties by a supplementary action.

The advocate pleaded that the judgment in the case of Peterhead did not rest on specialties, but settled a general principle, applicable to all cases where a parish, though partly landward, or agricultural, contained a town or village population. Every feuar, however small his feu, was, in legal sense, a heritor; the circumstance of an aggregation of feuars erected into a burgh, or left unerected, was immaterial; and therefore there was no ground for drawing any distinction between Peterhead and Mauchline. He also alleged that there were no sufficient averments of any custom of assessment, in the parish of Mauchline; but, even if he had, the case of Peterhead was decided on the footing that no such custom existed in Scotland, sufficient to exclude the principle there, wherever a parish contained a town or village population.

The respondent answered, that the case of Peterhead was rested on specialties, which did not occur here, as Peterhead was a considerable burgh and Mauchline only a minor village. And in particular, the judgment went on there being no custom of assessment in the parish of Peterhead, and such custom of assessing by the valuation alone was not averred in this parish. He pleaded separately that small feuars, such as those in the village of Mauchline, could not be viewed as heritors, in questions of assessment, or it would follow, that, wherever a parish was feued out in any parish, it would be optional to any feuar to insist that the assessment of the whole parish be according to real rent.

The Lord Ordinary reported the cause to the Court.

D GILLIES.—Two questions have been raised here, first, whether a "feuar" is a "heritor;" and, second, supposing all feuars to be "heritors," must assessment be imposed according to the real rent? In regard to the first question, no doubt that the feuars are heritors. But it does not follow as a necessary consequence that the assessment must be on the real rent. Every land estate out of which these feus have been made, stands valued in the cess books, and as the

feu was granted. If this Court can sanction the objections an alteration in the mode of assessment must take place Scotland. The assessment was originally directed by the imposed on the parishioners, in a ratio "effeiring to their come to be considered in practice as equivalent to effe though I scarcely think that is the same thing. For a man stance, and little income, or he may have a great income, an at all. But so it has been interpreted by practice. And I wherever there has been an established custom, that custom ought to be adhered to. If we once consider that we established custom, I do not know where we are to stop. follow? Wherever any one feu, great or small, is made in then the assessment must be laid on, according to the real the old custom to assess on the valuation only, I think the rule will give rise to much trouble and confusion, and the quences will flow from it which are probably not at present insist on the adoption of this new rule.

**LORD PRESIDENT.**—There are several hundred feuair ground occupied by the whole of these feus must be of consequence does not appear at all impossible, from any thing before us, per amount of valuation to each of these feus. But it is feuair is liable to assessment in one shape or another. It is ground, but the nature of the right, which constitutes a her is worth £500 per annum to the feuair, or only £5 per annum a heritor. And every heritor must be assessed.

**LORD CORNHUSE.**—I am sensible that there are very inconveniences which may result from applying the rule of the ci

portioned to that real rent. I think great inconvenience will result from adopting this rule of assessment, as a general rule, but I do not see any ground on which the Court can refrain from adopting it here.

It was understood that LORDS PRESIDENT and GILLIES concurred in thinking the rule of Peterhead must govern this case.

No. 285.

June 15, 1837.

James v.

Downie.

THE COURT pronounced this interlocutor :—" Conjoin the action directed to be raised for calling the feuars of Mauchline, to the advocacy at the instance of Sir James Boswell ; advocate the cause, and find that the expenses of rebuilding the parish church of Mauchline fall to be defrayed, agreeably to the principle of assessment laid down by the House of Lords in the case of Peterhead by all the owners of land and houses in the parish according to their real rents. Find no expenses due to either party, and remit to Lord Cockburn to proceed farther in the cause ; and decern."

HORNE and ROSE, W.S.—J. M'KENZIE, W.S.—Agents.

AMES, WOOD, and JAMES and MANDATARY, Pursuers.—*D. F. Hope*— No. 286.  
*M'Neill.*

ALEXANDER and JOHN DOWNIE, Defenders.—*A. Wood.*

*Husband and Wife—Retention.*—Held that goods furnished to the wife of a man who was absent from the country, the wife being in charge of her husband's business during his absence, were to be considered as furnished to the party himself.

SEQUEL of the case reported ante, p. 12.

The Court having adhered to the Lord Ordinary's finding that the defenders were entitled to retain the subject of the arrestment in their hands in liquidation of advances made by them " to John Gilchrist, the common debtor, or on his account," and the cause having returned to the Inner House, a question arose, inter alia, whether certain goods furnished to the defenders to the wife of John Gilchrist, who was a dyer, while in charge of his business during his absence from the country, were to be considered as having been furnished to Gilchrist himself.

The Lord Ordinary pronounced as follows, adding the subjoined note : \*

" It being quite clear as matter of fact, that the wife of Gilchrist continued in possession of the work, and carried on the business during his absence, the Lord Ordinary cannot see how that charge or possession could be held by her otherwise than in right of and for her husband.

When the defenders got back a part of their goods, which had been furnished to Gilchrist recently before he left the country, they must, of course, have struck the price of those goods out of the account. Then it appears, that after that time the defenders made further advances to the wife, which the Lord Ordinary holds to have been made for the husband, and this before the date of the arrestment, whereby the account was at last brought out. It is evident, therefore, that nothing was made of the point about goods taken back, unless the pursuers could succeed

June 15, 1837

2d Division.

Ld. Moncreiff  
F.

The pursuers reclaimed, but

THE COURT unanimously adhered, finding add.

T. LEIBURN, S.S.C.—W. B. CAMPBELL, W.S.—

No. 287.

WILLIAM KEITH (Anderson's Trustee),  
GILBERT L. FINLAY.—*Sol.-Gen. Rutherford*  
RHIND'S TRUSTEES.—*M'Neill*.  
DEWAR'S TRUSTEES and OTHERS.—*D. F. Hope*—*A*  
Competing.

June 16, 1837. SPECIAL case in which the Court refused reclaim  
2<sup>d</sup> DIVISION. by Finlay and by Rhind's trustees against th  
Lord Jeffrey. interlocutor.

R. MESSER and J. S. DARLING, W.S.—SCOTT and BALDERSTON, W  
W.S.—JAMES BALFOUR, W.S.—MOWBRAY and HOWDEN,

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in showing that the advances to the wife ought not to be  
There is probably little doubt that they got back the goods  
Gilchrist; but the matter of fact seems to be of no importan  
of the case otherwise."

JAMES STEWART, Pursuer.—*Thomson*.  
 GEORGE TRAILL and THOMAS POLLEXFEN (Stewart's Trustees),  
 Defenders.—*M'Neill—G. Bell*.

No. 288.

June 16, 183  
 Stewart v.  
 Traill.

—*Entail—Vesting*.—A party executed an entail of heritable property, the same time conveyed to trustees certain other heritable and moveable; the trust-deed provided that, after fulfilling the primary purposes of the trustees should invest the funds in the purchase of lands, which they dispose to and in favour of the heir of entail in possession at the time, should have attained majority, and to the other heirs in their order, the burden of subsisting annuities and provisions; the heir succeeding the primary purposes of the trust being accomplished, died two months before attaining majority, leaving an infant child—Held that on the majority of the heir succeeding, a right vested in him and the other heirs to obtain from the trustees an effectual denuding and conveyance of all lands which might have been purchased with the trust funds, and that they were entitled to the whole of the principal and proceeds until the principal should be invested, and that no farther delay for investment could take place.

late James Stewart of Burgh in Orkney executed, in the year 1828, an entail of his landed property, and of even date therewith, a conveyance conveying to certain trustees his whole other heritable and moveable property, 1st, For payment of debts and provisions; 2d, For making provision for his widow the liferent of certain stocking and moveables; 3dly, after fulfilling the above-mentioned purposes of this trust, my trustee or trustees shall lay out, and bestow the free residue of the trust-funds, including the intermediate or accruing rents, and the proceeds of lands belonging to, or acquired by them, as trustees foresaid, in the purchase of lands, in their own names, as trustees or trustee foresaid, that either in Orkney, or in any other place they shall judge proper, and shall be bound and obliged, as by acceptance hereof they shall be obliged themselves to dispose and denude themselves of the lands to be purchased by them, and also the lands herein above conveyed to them, to and in favour of the heir of entail in possession at the time, of my lands and estate, in virtue of the disposition made of entail above-mentioned, and who shall have attained the age of twenty-one years complete, and to the other heirs of entail, in their order according to the course of succession therein specified, but without the burden of such annuities granted by me, as shall be existing at the time." The trustees were likewise nominated executors, administrators and curators to the heirs of entail succeeding the testator in case of their being minors.

Shortly after the execution of this deed the granter died, and was succeeded in his entailed estates by his nephew, James Stewart, then a minor. In the course of a few years the purposes of the trust, with the exception of the payment of certain annuities and provisions,

2D DIVISION  
 Ld. Moncreiff  
 F.

Stewart v. Traill. 234. Pursuer, James Stewart, who reached majority on 23d. Feb.

During this time the accumulation of the trust-funds went on of lands being made therewith by the trustees. A sum of capital fund was beneficially laid out by them in the purchase of lands, and the discharge of the feudal burdens affecting the entailed estate. A provision was made for the payment of the annuity still payable out of the funds.

Thereafter James Stewart raised action against the trustees and Pollexfen, the trustees, setting forth the provisions of the deed and the dates of his father's majority and his own, and concluding that it found and declared that the trustees' power to accumulate the funds terminated on the 8th February, 1811, when his father reached majority, and that the trustees were bound to account for and pay over to him the whole of the fund at present in their hands, under deduction of the amount of the fund at the said date, and to purchase lands with the amount of the fund accumulated at such date, under deduction of the £1000 payment mentioned, and to convey the lands so purchased, and the interest on the lands, to the pursuer and the other heirs of entail; or otherwise it found and declared that the trustees' power to accumulate the funds terminated on the period of the pursuer attaining majority, since which period the trustees were bound to account for and pay over the funds, &c.

In defence against the action the trustees maintained that the provisions of the deed, and the circumstance of the purchase of lands against the trust-fund not being yet cleared away, the purchase of lands by their denuding and investing the funds in the purchase of lands, and the date of the majority of the existing heir of entail in 1832, and his father in 1811.

The Lord Ordinary pronounced the following interlocutor: That, by the terms of the trust-deed libelled on and produced, the fund of the trust consisted of all the property, heritable and moveable, which should belong to the truster at the time of his death, with the exception of the estate which he had previously entailed, and of the moveable subjects: Finds, that, after fulfilling all the purposes of the trust, by the payment of the debts and obligations of the truster and of all legacies and provisions appointed by him, it is the duty of the trustees 'shall lay out and bestow the foresaid trust-fund in the purchase of lands, or the intermediate or accruing rents and profits of the lands so purchased, or acquired by them as trustees foresaid, in the purchase of lands in their own names,' &c.; and that they shall be bound to dispose of the fund to be purchased, 'to and in favour of the heir of entail in the time' of the entailed estate, 'and who shall have attained the age of twenty-one years complete, and to the other heirs of entail in the order,' &c. 'but with and under the burden of such annuity as shall be subsisting at the time:' Finds that the said

specifically provided that the said trust-funds shall be laid out in the purchase of lands within any definite period after the other purposes of trust shall have been fulfilled; and that it is in some measure ambiguous, in regard to the power and duty of the trustees to accumulate the annual produce of the trust-fund, during any reasonable period which might elapse, before such investment or investments could be made, or to employ such accumulated profits in the same manner with the principal fund: But finds that it is a leading rule and principle of the law, specially laid down, that as soon as the immediate heir of entail shall have attained the age of twenty-one, the trustees shall denude of convey to him, and the other heirs, whether of age or not, whatever may have been so purchased in terms thereof; and finds that the existence of any annuity, provided by the truster, formed no obstacle, according to the declared meaning of the deed, to the execution of the stated purposes, either by the purchase of lands or by the conveyance of them to the heirs of entail, the security of such annuities being expressly provided for otherwise: Finds it admitted that all the debts and obligations of the truster were satisfied and paid, within a short time after his death, in June, 1802: Finds that no question is raised by the present pleadings affecting the produce or accumulations of the trust-funds during the period of the minority of James Stewart, the heir of entail, existing after the truster's death: Finds it admitted that the said James Stewart attained the age of twenty-one on the 8th February, 1811: Finds that at that event, whatever question might previously have existed, there was a clear vested right in him and the other heirs of entail, to obtain from the trustees an effectual denuding and conveyance of all lands which they might have purchased with the trust-funds, and individually and successively to enjoy all the rents, issues, and profits thereof, as their own: Finds it set forth in the record for both parties, that no lands had at that time been purchased, but finds it admitted by the defenders, that the whole sum of trust-funds had then been realized: Finds that the period which had elapsed between the time when the primary purposes of the trust, with the exception of annuities, had been fulfilled, and the majority of James Stewart, was more than sufficient, according to any reasonable construction of the trust-deed, to have enabled the trustees to lay out the trust-funds in terms thereof: Therefore finds, that, from and after that event, on the 8th February, 1811, the said James Stewart, after his death, the present pursuer, as the next heir of entail, was entitled to enjoy the whole interest and proceeds of the said trust-funds, until the principal thereof should be legally invested, in accordance with the purposes of the trust, and that no farther accumulation thereof for the benefit of the trust could take place: Finds, that the accounts between the pursuer and defenders as trustees, must now be made up on this principle. In respect that it is stated by the defenders, that they have laid out out of £3518 of the capital fund under high advice, and in the bona

No. 288.

June 16, 183  
Stewart v.  
Traill.



**LORD JUSTICE-CLERK.**—On reading the trust-deed, and circumstances of the case, I can find no grounds for passing first heir of entail; the date of which I think the time point investing the funds. I can see no specialty in the case to the principle on which the Lord Ordinary has decided it.

**LORD GLENLEE** concurred.

**LORD MEDWYN.**—I agree. The trustees may make a having earlier wound up the trust; but that is no reason why entail should not get the interest of the accumulated fund, and up on the principle laid down in the interlocutor.

**LORD MEADOWBANK** was absent.

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\* “**NOTE.**—The Lord Ordinary is of opinion, that, added down in the case of Stair, as finally decided in the House of S. and W. 2, 614, it is impossible to resist the plea of the conclusion of the summons. The clause of the deed does which was expressly mentioned in Lord Stair's case. *Brents of lands* which might have been *acquired* by the trust contemplate *successive* purchases, and an accumulation going on. If the pursuer's demand, by the summons therefore, requires you must go back to the time when the primary purposes *one year after* that date, it would be attended with great difficulty has done wisely in avoiding such a question. But the date first heir is a fixed point; and, as it cannot be thought that without any words used to that effect, to authorize an accumulation of funds, to the manifest prejudice of the first heirs, for *what* trustees might delay to purchase lands, it seems to be clear eight or nine years were enough for enabling the trustees to discretion being absolutely unlimited as to the time to be taken.

THE COURT accordingly adhered, finding additional expenses due, and to be paid from the trust-funds. No. 288.

J. M'COOK, W.S.—W. STEWART, W.S.—Agents.

June 17, 1837.  
Taylor v.  
His Creditors.

Craigie v.  
Gordon.

— TAYLOR, Pursuer.—*Whigham—Smythe.*  
HIS CREDITORS, Defenders.—*Deas.*

No. 289.

*Cessio—Expenses.*—IN a process of cessio, raised in the Court of Session under 6 and 7 Will. IV. c. 56, an examination of the pursuer took place under a remit to the Sheriff; when the cause was resumed by the Court House, a question arose between the parties, whether the pursuer, defenders should, in the first instance, discharge the expense of printing, The pursuer's state of affairs; and 2d, the pursuer's deposition before the Sheriff. The Court considered the state of affairs to be in the place of the old condescendence, and directed the pursuer to be at the expense of printing it, at least in the first instance. The defenders offered to bear half of the expense of printing the pursuer's examination; but the Court directed them to bear the whole expense, in the mean-time.

June 17, 1837.

1st DIVISION.

— Agents.

MRS ANNE BURNETT CRAIGIE and WILLIAM BURNETT CRAIGIE, No. 290.  
Pursuers.—*R. Bell—Thomson.*

THOMAS GORDON and OTHERS, Defenders.—*H. J. Robertson.*

*Trust—Husband and Wife.*—A trust was constituted in a post nuptial contract for the wife, who was deaf and dumb, but sui juris, and the heirs of the husband; the husband died, and the only heir of the marriage passed the years of minority; Held, although there was no provision in the deed for the trustees surviving in the event which occurred, yet as the widow and the heir had in themselves the entire right to the trust-property, they were entitled to discharge the trust and require the trustees to denude.

THE late Jonathan Craigie, and the pursuer Mrs Burnett Craigie, June 17, 1837.  
married in 1810, the latter being possessed of the estate of Linton, of about £10,000 in money. She was deaf and dumb, but was and continued to be sui juris, and able to manage her own affairs. In July, 1810, they entered into a post nuptial contract, whereby Mrs Craigie on her part, “for securing the support of the parties and issue of this marriage,” disposed to the defenders as trustees her whole lands and tenements. Various events were provided for by the purposes of the trust. The 6th and 7th purposes provided as follows:—“Sixth, If the present marriage shall be dissolved by the predecease of the said Jonathan Craigie,

2d DIVISION.  
Ld. Moncreiff.  
D.

vinmas after her decease, shall dispoſe the ſaid lands & assignees, and convey the fee of one-half of the ſoreſaid ſterling, to the aforeſaid children of the ſaid Charles Hay ſurvivors of them, their heirs and assignees, and the of £10,000 ſterling, to the heirs or assignees of the ſaid Jo But in caſe the ſaid Anne Burnett ſhall enter into a ſubſe it ſhall be in her power, by marriage-contract or other de the perſon whom ſhe may ſo marry, in the event of hi and of there being no children of her body, the free life lands, and of the ſaid ſum of money, and in that caſe thi terminate till the death of ſuch perſon, at which period a tion above directed ſhall be made. Seventh, In caſe marriage diſſolving by the predecease of the ſaid Jonn aforeſaid, there ſhall exiſt, at the death of the ſaid Ann child or children procreated of her body in the preſent or marriage, or the lawful iſſue of any ſuch child or childre the ſaid truſtees ſhall, on or before the firſt Whiſtſund after her deceaſe, make over to the heir-male of her body preſent or any ſubſequent marriage, the ſaid lands, a children of both marriages per capita, the fee of the ſaid ſterling : Declaring, that if only heirs-female then exiſt and the ſaid money ſhall belong to them all equally, and heir of the ſaid Anne Burnett's body ſhall exiſt, whether ſuch heir ſhall be entitled to the whole ; provided, howe be in the power of the ſaid Anne Burnett, by any mar other deed, to provide any future huſband, in the event her, and of there being children of her body at the d marriage with ſuch huſband, to a liferent of one-hal lands and ſums of money hereby conveyed ; and that i ſaid truſtees ſhall either make over ſaid lands and m directed, under the burden of ſuch liferent, or continu until the death of ſuch huſband of the ſaid Anne Burnett produce of that proportion of the rents and intereſt ſo p of the ſaid huſband, and applying the remainder of ſaid alimnt and ſupport of her ſaid children."

Jonathan Craigie died in 1812, leaving one child of t purſuer William Burnett Craigie. None of the event the marriage-contract, wherein the truſtees were to d

iam Craigie attained full age, and in a few years thereafter married, No. 290  
other continuing alive and sui juris.

these circumstances, Mrs Craigie and her son raised action against  
trustees reciting the provisions of the contract, alleging that the real  
t of the trust, which was a gratuitous act on the part of Mrs Craigie,  
o secure her property against the acts and deeds of her husband, and  
eserve the same for the benefit of herself, and of the children of the  
age, and that, looking to the present state of the family, the pur-  
thereof had been fully accomplished, and concluding, 1st, to have  
nd and declared that Mrs Craigie and her son have in them the only  
right to the trust-property, and to have the trustees ordained to  
le ; 2dly, to have them ordained to hold count and reckoning ; and  
to have it found and declared that the trustees were exonerated and  
arged of their office as such.

the trustees pleaded in defence, that they were not entitled to denude  
the trust in favour of the pursuers, at all events not without the sanc-  
tion of a court of law, in respect that by so doing they might injure or  
affect the interests of third parties.

The Lord Ordinary pronounced the following interlocutor, adding the  
subjoined : \*—“ Finds that the pursuers, Mrs Ann Burnett Craigie,

June 17, 18  
Craigie v.  
Gordon.

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The defenders are perfectly right in requiring a judgment of the Court ;  
as they will of course reclaim, in order to obtain it, some explanation of  
the facts of the case, and the grounds of the Lord Ordinary's judgment, may be

as was explained in the debate that the pursuer, Mr Burnett Craigie, being  
of age of twenty-six, was lately married, and that, in contemplation of that  
a marriage-contract was entered into, *to which the other pursuer, Mrs Bur-*  
*craigie, became a party*, and by which this estate of Linton, and the fund of  
£10,000, were, as the Lord Ordinary understood the statement, completely con-  
veyed and secured to Mr Burnett Craigie, and the heirs of the marriage, in con-  
sideration of an annuity of £400 a-year being secured to Mrs Burnett Craigie,  
ther, by *being declared a real burden on the estate*. It seems to be the  
object of the present action to have that reasonable arrangement carried into com-  
pletion.

The Lord Ordinary is perfectly satisfied, on a careful consideration of  
the marriage-contract libelled on, that no legal interest under it exists, or can  
exist, which can afford any good objection to the demand in the summons.  
Although Mrs Burnett Craigie is stated to be in the unfortunate situation of  
*deaf and dumb*, it is not denied that she is capable of acting for herself in  
her own affairs. Indeed, it is manifest that, if she could act for herself in enter-  
ing into this marriage-contract, she is equally qualified to act for herself in regard  
to her own interests under it.

The estate and funds settled by the contract were *exclusively the property of*  
her before the marriage, the husband having nothing to settle but conquest,  
in which there is none in question. The case, therefore, relates to the terms on  
which *the wife settled her own property* by the clauses of the deed ; and, in con-  
sidering such a settlement, the general rule applicable to all marriage-contracts  
has the effect, just in the same manner as if it were a settlement *by the husband*  
*on the wife*, *mutatis mutandis*, viz. that there is no *jus crediti* to any one, or to

As it proper to keep this principle in view, through every decision of the cause, as it seems to exclude, to a great extent, arguments employed by the defenders. But it is of no notice, that, in so far as the estate is provided to the *heir* (taking it to be as at Mrs Craigie's death) it is fully settled by case of Dormout, May 15, 1819, House of Lords, July (numerous precedents quoted in that case; and it is perfect pursuer to put forward the succession to her son, the existing or to transact with him, to the effect of extinguishing the jointure, even without such a settlement as that which is said to contract of marriage.

" But a very little attention to the terms of the marriage renders the present case very clear. The *fourth* first and the *be* laid aside as inapplicable. The *fifth* provides only for case in the event of the *wife predeceasing the husband*, an event place. The terms of it, therefore, are immaterial, except that any illustration of the intention in the other clauses can. It may be observed, however, that the family of *Hays*, for event, are stated to be *no relations* of the *husband*, but distant wife. The Lord Ordinary conceives that, even if the even would have let in their interest, the wife could have altered her own deed *mortis causa*. But this is not of much import.


" The *sixth* purpose of the trust requires particular consideration also relates solely to an event which has *not* taken place. It goes upon the event of Jonathan Craigie, the *husband*, *predeceasing* all and every one of the provisions which it contains, are for the condition added, 'in case there shall be *no children of the said Anne Burnett* attain the age of majority, or have lawful issue.' Upon that together, certain provisions are made for the farther execution there is a farther alternative in those provisions dependent on 'And in case the said Anne Burnett *does not* enter into any marriage, or, on the contrary, 'in case the said Anne Burnett *shall enter into* marriage.' But the Lord Ordinary apprehends, that all those provisions (whatever may be the effect of the clauses in the

of the marriage-contract and trust-deed libelled on, the entire and No. 290.  
 ght, title, and interest in the lands and estate of Linton, as spe-

June 17, 184  
 Craigie v.  
 Gordon.

and it could create no *jus crediti* to any one for continuing the trust : 2d, *e lands* being, in the event supposed, destined *exclusively to her own heirs assignees*, no *jus crediti* could be thereby created *against herself*, and she of course assign the property to whom she pleased : 3d, That the destination of one-half of the £10,000 to the children of Charles Hay, would have been a simple destination which she could have altered or revoked ; and 4th, That the provision which could have been at all maintained to give a *jus crediti*, that of one half of the £10,000 to the *heirs or assignees* of Jonathan Craigie. It is surely very unnecessary to consider the effect of such a clause when it is at the event on which it is made dependent has not taken place. There is no child of the marriage of full age, the case provided for does not exist, and signify nothing whether the pursuer or his issue may be the heirs of his mother's death or not.

Any difficulty which exists in the case arises from the terms of the *seventh* clause. That also goes on the *predecease* of the *husband*, but it supposes the existence of a child of the marriage, and without speaking of his attaining majority it runs thus, not quite grammatically :—‘ In case of the present marriage failing by the predecease of the said Jonathan Craigie, there shall exist *at the death of the said Anne Burnett*, any child or children procreated of her body in the event or any *subsequent* marriage, or the lawful issue of any such child or issue in that event,’ the trustees shall make over the estate to the heir-male of the said Anne Burnett, and the £10,000 to the younger children of both marriages, per capita. There is a substantive provision in this clause, of *power* to the wife to make a settlement on the second husband, though there should be children of the first marriage existing. It is scarcely necessary to observe, that the provision to heirs of the first marriage could create no *jus crediti*, and that the *reserved power* to settle could give no right to any one against her. But the puzzle, if any exists, arises from two circumstances ; 1st, That the event spoken of is that of their being no issue of the marriage existing *at the death of the lady* ; and 2d, That there is *no issue at all* in the event of there being no such issue existing at her death. It appears to the Lord Ordinary, that the form of the clause perhaps arose from the trustees thinking of the case of the wife dying before any issue she might have borne, and he thinks that, comparing all the clauses together, it ought to be that the fee *became vested in Mr Burnett Craigie* as soon as he came of age, but he is farther of opinion, that this point of the case, though it is the only point of any difficulty, would at any rate be solved by the principle of the case of *Macdonald v. Macdonald*, and other cases already referred to. But farther, as there is no destination beyond the heirs of the marriage, except to those of a subsequent marriage, it could create no *jus crediti*, he apprehends that the estate, and the money at stake must be taken in this question as being descendible, in the event of their being no issue of the marriage existing at Mrs Craigie's death, *to her own heirs and assignees*. The defenders argue, that you must supply words, and go back to the *seventh* clause. But the Lord Ordinary is clearly of opinion that this cannot be done, and that there is not the least necessity for it, as it is clear that the estate was to long to Mrs Craigie's own heirs and assignees, unless it is expressly provided otherwise by the contract ; and that the Court can never hold that the succession is to be regulated by a clause which is made for a *particular event*, where the *reverse of that event* has already taken place. It is really out of the question to put such a construction on this contract, as that in the event of her being no issue not surviving her, the pursuer loses all power over the estate, or at least over the £10,000. If he had never existed, the land estate would have gone to his *own heirs and assignees* ; and so it must now, if he and his issue fail. But the Lord Ordinary held that the same consequence must follow as to the £10,000.



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**LORD MEADOWBANK** was absent.

**J. SHIRHEAD, W.S.—GORDON and BARRON, W.S.—**

"In short, the only point of any difficulty is, that possibly



ALEXANDER SIMPSON, Pursuer.—*Sol.-Gen. Rutherford—Moir—* No. 291.  
*Spalding.*  
 DON CUMMING SKENE, and TUTORS, Defenders.—*D. F. Hope* June 20, 1837  
*—M'Neill.* Simpson v.  
 Skene.

*Valuation—Process.*—After a proof on both sides, a decree of valuation was pronounced by the High Commission, in 1697; the heritor was the titular and his tacksmen were defenders; the minister of the parish, a stipendiary, was not called:—Held, that, in respect of the minister not being called as a party, the decree was liable to reduction at the instance of the heritor, though no fraud or collusion was alleged to have taken place in the valuation.

v. Alexander Simpson, minister of the parish of New Machar, June 20, 1837  
 Process of augmentation, &c. One of the heritors, William Cumming Skene, of Pitlurg and Dyce, founded on an old decree of the lands of Goval. The pursuer then raised a reduction of the decree which was repeated in the locality. The ground of reduction was in these terms: “The only defenders called in the process of valuation as appears from the foresaid decree, were the principal and the Old College of Aberdeen, who were the titulars of the said parish of New Machar, and William Moir, who was heritor of their vicarage teinds; and the minister of the parish of Machar was not called as a defender in that process, as he ought to have been in order to have obtained a regular valuation of the teinds of the lands of Old Goval, so as to be binding and effectual against him and his successors.” During the discussion of this process the defender was represented by John Gordon Cumming Skene and his tutors in his room. The original record of the process of valuation and an extract was extant, which set forth that the action was brought at the instance of William Gordon, merchant burgess of Edinburgh, proprietor of the lands and others under-written, against James Middleton, present principal of the Old College of Aberdeen, James Urquhart, Doctor of Medicine, Mr John More, civilist, Mr James Fraser, sub-principal, and present procurator, Mr Patrick Gordon, solicitor, Mr William Black, Mr Alexander Fraser, and Mr George Mackenzie, agents of the said College, and William Moir, messenger, present heritor of their vicarage teinds.” The Old College of Aberdeen were the titulars of the teinds; the minister was a stipendiary, and so far as appears from the extract, he had not been called as a party. The extract of the proof had been led both by the pursuer, and by the defenders, and the High Commission had pronounced decree of valuation on 1697.

1st Division  
 Lds. Moncreiff  
 and Cockburn  
 (Teinds.)

The defender urged several special pleas of acquiescence and prescription, but the Court in the circumstances, disregarded them, and the only

necessity for calling the minister was admitted. It was necessary whether he was a mere stipendiary or whether the parsonage, and the authority of Erskine, Forbes, and Co on this point. At the date of this decree the correct practice was recognised and established; and as that practice had been the decree was of no avail against the pursuer whose name had never been made a party to it. It was not necessary to say that the decree had been fraudulently or collusively obtained: at a late date, it might be impossible to procure evidence of such allegations, however well founded. In regard to the case of Neill,<sup>5</sup> it referred to a sub-valuation in 1681, long anterior to the present valuation, and before the erroneous practice had been established by the decisions of the Court; it, therefore, could not now be a precedent.

The defender pleaded, (1.) That it must be presumed *tempus*, that every party was called who ought to have been. (2.) That as the minister was a mere stipendiary, his process of valuation was concurrent with that of the titular, and was covered by it, so that if the titular was made a party, it was unnecessary whether the minister was made a party or not. And it has been held in the modern case of M'Neill,<sup>6</sup> which applied a *fortiori*, that the valuation was there led before a sub-commission, and that the minister's non-citation was taken in a process of a valuation which was overruled. The rule in that case should be enforced here with less hesitation, considering the antiquity of the decree, and the absence of collusion was made.

The Lord Ordinary ordered Cases, and reported them.

<sup>1</sup> Feb. 1, 1708, 1 Connell, 279.

<sup>2</sup> Feb. 1, 1671, Forbes on Tithes, 329.

<sup>3</sup> 2 L.R.N. 10, 35; Forbes on Tithes, c. 30, s. 1, 1 Connell, 279, 1832 (ante, N. 359).

<sup>4</sup> Lord Saltonstall, May 22, 1827 (S. and D.'s Teind Cases, p. 15, March 7, 1798 (16772)).

<sup>5</sup> June 3, 1801, Dict. voce Teinds, Appx. No. 12.

<sup>6</sup> "NOTE.—This case turns on the same point as Mr Thom

t, on considering the Cases, directed a report from the Teind- No. 291:  
ding the state of the practice of calling the minister in pro-  
uation.

June 20, 1837  
Simpson v.  
Skene.

k stated that, after examining the record from 1660, the year  
oration, downwards, it appeared that there were 62 decreets  
recorded; that, in 13 of these, occurring at intervals between  
696, the minister had not been called; that he had been  
the others; and that in the case of Kirkbean, 1st February,  
valuation had been reduced in 1708, by an interlocutor bear-  
proceeded "in respect the minister was not called."

ing the cause along with the report, the following Opinions  
ed.

SIDENT.—I think the decree ought to be reduced. The defender  
e appearance of the titular is sufficient to cover the whole right and  
e minister, wherever the minister is a mere stipendiary. But as there  
ion between the titular and the heritor, through which the interests  
r might be sacrificed, I am of opinion that the minister ought always  
party. In this process of valuation he was never called, and, there-  
the pursuer may set it aside.

CKENZIE.—It appears to me that an action like this involves two  
very different questions. In the first place, can the minister, though  
diary, maintain that this decree is altogether null, without alleging  
g irregular, or collusive, was committed in carrying through the pro-  
ion? And, in the second place, if he shows that collusion, or some  
ous proceeding, took place, whereby he was injured, can he then  
ecree? In the last case, I can well understand his right of reduction;  
e first, which is the only question here. I do not see any statutory  
uiring that the minister shall be made a party, under the pain of total  
e no unalterable practice to establish such a rule; and it does not  
ble, after a total change of circumstances has occurred, to allow the  
ake advantage of this, and upset the decree, where no allegation is  
thing wrongous or collusive having occurred in leading the valuation.  
en any such understanding and practice as to the necessity of calling  
, the records would no more have exhibited 13 cases, where the  
not called, than they would have exhibited 13 cases where the titular

The state of the practice appears to me to make much against the  
that it is necessary always to call the minister. And then there is  
ase of M'Neill, decided in recent times. That was a sub-valuation,  
ound to be conclusive against the minister, though he had not been  
was only a stipendiary. But an actual decree of valuation before the  
should be equally good, or better, against the minister in the same  
s. The precedent of M'Neill applies a fortiori; and I am, on the  
inion, that the defender in the reduction should be assoilzied.

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Whether the circumstance of its not appearing from the record of the  
so far as preserved, that the minister of New Machar (being stipend-  
lled, creates a nullity in the valuation?"

of the parish, must be made parties to the suit, for both I  
And the minister's interest is stated to be, "because the m  
a parish, he is the better secured in his stipend, and in a fu  
tation." His interest may often be stronger even than that  
when I find that the rule of law so laid down by these auth  
ported by the decision in the case of Kirkbean, where the e  
was that the minister was not called, I think that rule ought  
In regard to the case of M'Neill, which was the approbation  
very ancient date, it may be observed that, at one time, the  
ject was erroneous, and the error had prevailed to a very  
That sub-valuation was led, before the more correct rule was  
supported by the Court; but this decree of valuation does not  
so. And I am satisfied that the more correct rule which has  
blished in the practice of this Court, and also upon the aut  
writers, and by a series rerum judicatarum, ought to be appli  
cording to that rule, the decree of valuation under reductio  
aside at the instance of the pursuer; and I think the rule ou  
Nothing would be more dangerous or injurious than to shake  
so established. The law would thereby be rendered fluctuat  
at present, and in future. There does not appear to me  
limiting the doctrine of Erskine to those cases only in whic  
parish was not a stipendiary but the titular. I think his do  
ed; and Connell has adopted the same view of that doct  
supports. I am of opinion, therefore, that the decree ought t

LORD GILLIES.—I concur with the Lord President and I

THE COURT pronounced this interlocutor :—"Sustain t

BENJAMIN ABERNETHIE and OTHERS, Pursuers.—*M<sup>c</sup>Neill—  
Macdowall.*

No. 292..

ENANT.-GENERAL BENJAMIN GORDON, Defender.—*D. F. Hope  
—A. Wood—Anderson.*

June 20, 1837.  
Abernethie v.  
Gordon.

—A substitute-heir, under a recorded entail, made up a title in fee  
heir of line to the entailer, and was infeft: during a period of 13 years  
tment remained on the record, after which it was reduced at the instance  
xt substitute-heir, who also insisted in a declarator of irritancy against the  
tioned heir: the first-mentioned heir then assumed the name and arms of  
ler, and made up a complete feudal title under the entail; he also lodged  
in process offering to find the most ample and sufficient caution and  
to the effect of protecting the estate against his debts or deeds, con-  
or executed prior to the period of completing his feudal title under the  
Held, that the irritancy which had been committed was purgeable; and  
tor pronounced assoilzieing the defender, in hoc statu, from the conclu-  
orfeiture, and quoad ultra dismissing the action, and finding that the de-  
or his cautioner, should have right at any time to show, by declarator,  
competent process, that the necessity for the continuance of caution no  
isted.

*rior and Vassal—Real Right—Legal Diligence.*—A substitute-heir  
entail which was recorded, but had never been feudalised, served him-  
of line to the entailer, and was infeft in fee-simple; the next substitute  
the infeftment as in contravention of the entail; the first heir then took  
nexecuted procuratory of resignation, in the deed of entail, by service as  
ntail and provision; he expedite a charter of resignation, and was infeft  
l the fetters of the entail:—Held that the entailed estate was liable for  
s and deeds of the first heir, contracted or done prior to his completing  
title under the entail; but was not liable for subsequent debts or deeds.

late General Gordon was proprietor of the estate of Balbithan, June 20, 1837.  
ft, in fee-simple. In 1803, he executed a strict entail of that  
oy which he disposed it to himself, and, after his decease, in life-  
his two sisters; whom failing, to William Forbes, of London,  
ew; and in fee to Major Benjamin Forbes, eldest son of Wil-  
rbes, and the heirs-male of his body. The next substitute was  
in Abernethie, merchant, London. The entail contained a pro-  
that “the said Benjamin Forbes, and the heirs-male of his body,  
ole other heirs, male and female, called to the succession, and  
bands of such heirs-female called to the succession of my said  
nd estate, shall be obliged, immediately upon their succession to  
ning possession of the lands and others above-mentioned, con-  
to use, bear, and retain the surname of Gordon allendarly, and  
nd designation of Gordon of Balbithan:” it also provided, that  
id Benjamin Forbes, and whole other heirs of tailzie, shall take  
ssess the lands and others before written upon this tailzie only,  
on no other right or title whatever; and that they shall use any  
ght which they may happen to have or acquire thereto as addi-

1st DIVISION.  
Lords Jeffrey  
and Cockburn.  
D.

contained the usual prohibitions against sales, debts, succession, and it contained the following clause:— under these irritancies following, as it is hereby expressed, declared, that if the said liferenters, or the said Benjamin or other heirs of entail, or any of them, shall contravene conditions, provisions, limitations, and restrictions herein contained, failing or neglecting to fulfil and perform the said conditions, and every one of them, or by acting contrary to the said conditions and restrictions, or any of them, excepting and reserving as aforesaid, then, and in any of these cases, all such acts shall be void and null in themselves, and the person so contravening, or omitting to implement the said conditions and provisions contrary to the said limitations and restrictions, or any of them, for him or herself alone, forfeit, amit, and lose all right, title, and interest in the foresaid lands, in the same manner as if the said person were naturally dead, and the rights thereof shall devolve upon the said person, or of tailzie, though descended of the contravener's body, shall be lawful, whether major or minor at the time, to put the said person in irritancy, and to make up titles to the said lands and tenements, and to the person last infeft therein before the contravener himself or herself, without being anywise bound by the debts and deeds of the said contravener, or to the declarator or adjudication, or by any other way by law, and all the debts and deeds of the said Benjamin Forbes, or of tailzie, or any of them, contracted, made, or granted,

eded, or who shall have contravened the conditions, provisions, limitations, or restrictions herein contained in any other way, shall ipso facto se and forfeit their right to the said lands and estate, and the same shall devolve to the next heir of entail, in like manner as if the contravener were naturally dead, and that freed and disburdened of all the debts and deeds of such contravener, and of all adjudications and other diligences deduced thereon.”

No. 292  
June 20, 1814  
Abernethie v. Gordon.

There was afterwards a clause inserted, providing “ that in case adjudications or other diligences shall pass against my said lands and others, any part thereof, for payment of debts which shall be owing by me my death, or for payment of any other real or legal burdens which y be incurred during the possession of the said Benjamin Forbes, the other heirs of tailzie, or for any other debts to which my said lands others may be subjected at any time hereafter, then and in that case, said Benjamin Forbes and the other heirs of tailzie respectively in possession of my said lands and others for the time, shall be bound obliged to redeem such adjudications, or other legal diligence, within years after the date of such adjudications, and to disburden my lands estate thereof in all time to come ; and in case of their failing to them as aforesaid, they shall respectively forfeit their right to my lands and others, in the same manner as if they were naturally dead, and the right thereof shall devolve upon the next heir of entail,”

General Gordon died in the same year in which the entail was executed, and without having feudalised it. The entail was put on record 1804. One sister of the entailer survived him, and on her death, William Forbes entered into possession. After enjoying possession for several years, a charter of resignation was expedite in 1814, in favour of him in liferent, and his son, Major Benjamin Forbes, in fee, under the executed procuratory in the deed of entail, but without any step having been used for taking up that procuratory. Infestment followed, and the conditions and fetters of the entail were duly engrossed in this instrument. William Forbes died in 1815. Major Forbes, who afterwards attained the rank of Lieutenant-General, then entered on possession. Until 1822 he continued to bear the name and arms of Gordon, being then advised that the entail was reducible, and that his own under it was irregularly made up, he served himself nearest heir of to General Gordon, and, laying aside the name of Gordon, and assuming that of Forbes, he raised a reduction of the entail, and of the made up in 1814, setting forth, inter alia, that, at the date when the deed of entail was signed and attested, it remained blank in an important part of the body of it, which was irregularly filled in, ex interdict ; that the charter of resignation had been expedite without authority from him (Lieutenant-General Forbes or Gordon) ; and, separately,



After obtaining this decree, Lieutenant-General  
procured a precept from Chancery, and was infeft  
estate of Balbithan, his sasine being recorded on No-

Benjamin Abernethie subsequently returned to 1  
1833, raised a reduction reductive of the decree of 1  
in 1822. As he was an English bankrupt, the act  
concurrence of the commissioners on his estate. T  
tion were, inter alia, that the decree had been obtain  
no sufficient evidence was adduced to substantiate  
which the action had been founded; and that th  
respects legal and valid, or at least, that it was onl  
that substitute-heir, who was called after Benjamin  
doubt as to its validity could be raised. The action  
reduction of the title made up in 1814, in respec  
tory of resignation in the entail was not effectuell  
the argument maintained by Lieutenant-General F  
this subject, in the process of reduction in 1822,  
action concluded for declarator that the entail was  
fender, Lieutenant-General Forbes or Gordon, 1  
contravention of the entail, and violation of the  
tions, and restrictions therein contained, whereby  
irritancy of, and amitted, lost, and forfeited his ri  
rest to the whole entailed lands and others specifi  
of entail; and that his right, title, and interest 1  
shall in all time coming be void and extinct; and th  
others, with the rents, mails, and duties of the sa

person to the foresaid entailed estate in terms of the foresaid No. 292  
ail; or at least, the said defender Ought and Should be De- June 20, 1831

Ordnained to make up titles in a proper, legal, and habile Abernethie v.  
e said entailed estate, and to possess the same under the Gordon.  
itions, provisions, and limitations, and clauses irritant and  
contained in the said deed of entail, and by no title whatever  
any respect disconform to, or inconsistent with the said deed

nder, styling himself Lieutenant-General Forbes or Gordon,  
nces, pleading, that the entail was null, on the grounds which  
t forth in the reduction of 1822; and that the titles made up  
re inept on the grounds stated in the said process; that the  
duction in 1822 was well founded, and, therefore, the defen-  
o be assoilzied from the present summons. No pleas were  
efence, relative to the alternative conclusion for forfeiture of  
or at least compelling the defender to make up titles under  
n the event of the decree of 1822 being reduced.

rd was closed on summons and defences. No averment was  
record that the defender had contracted any debt, or granted  
which could affect the estate.

d Ordinary (Jeffrey) decerned generally in terms of the  
nclusions of the libel, but superseded "the consideration of  
nclusions of the libel, as to the defender having incurred an  
d the pursuer being entitled to enter to possession of the  
is interlocutor, and the decree of reduction therein contain-  
final."

nder reclaimed on the merits, and the pursuer as to a techni-  
n.

nt refused the defender's reclaiming note, and, under the pur-  
pronounced this interlocutor:<sup>1</sup>—"Alter the interlocutor re-  
nst, and reduce the decree of reduction libelled on, so far as  
e disposition and deed of entail libelled; and also reduce the  
retour libelled, under which the defender made up a title to  
f Balbithan in fee-simple: Of new, reduce the charter of  
libelled, expedite in virtue of the procuratory of resignation in  
position and deed of entail, and the instrument of sasine  
he said charter, and decern and declare accordingly: And  
declare, and decern, that the said disposition and deed of  
ed, bearing date the 20th day of July, 1803, made and  
he deceased Lieutenant-General Benjamin Gordon of Bal-  
valid, effectual, and subsisting entail of the lands and others

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<sup>1</sup> See report, Jan. 17, 1835, ante, XIII.

No. 292. therein contained. Quoad ultra, adhere to the interdict against, reserving all questions of expenses."

JUNE 20, 1837.  
Abernethie v.  
Gordon.

Upon this decree being pronounced, the defender re and arms of Gordon, and, in 1835, he expedie a general process, judicially intimating, "first, that he has resurg hereafter constantly to use, bear, and retain the surname and the arms and designation of Gordon of Balbithan that, of this date (Feb. 2, 1835), and under the name of he was served heir of tailzie and provision to the de Gordon of Balbithan, under and in terms of the entail of, that an extract of the retour from Chancery has accor tained, and is herewith produced. This step is prep passing of a crown-charter on the procuratory of resign in the deed of entail, but which cannot be obtained until term in May next."

In June following, Lieutenant-General Gordon obta charter of resignation, proceeding on the procuratory is still unexecuted, under which he was infeft on June 9, 1 vestiture engrossed all the fetters and conditions of the en

The defender now contended, that as one of the alte sions of the summons was, to have him ordained to make the entail, and he had done so, the action was sufficient leave nothing behind but a question of expenses. But if it to go into the ulterior question, whether the estate could be forfeited, then the defender moved that the record sh up, unless the above minute, stating the purgation of the to entitle the defender to plead that the irritancy which l ted was purgeable, and was either purged already, or coul the course of this process by taking any farther steps w necessary for doing so before decree.

The pursuer objected to the admissibility of the min the opening up of the record.

The Lord Ordinary (Cockburn) "found that the def purge any irritancy that may have been incurred may be tained, though not stated in the original record; received an offer of purgation, and appointed parties to debate on claim to be allowed to purge, and on all the other points i interlocutor of Lord Jeffrey." \*

\* "NOTE.—If the offer to purge is to be received as a defen objection, to the minute would be well founded; but no such offe the record, and no motion has been made to have the record o not a defence; on the contrary, it is perfectly consistent with a

rties were at issue, in their averments, whether the defender had with mala fides in taking the decree of reduction in 1822 when pursuer and the other heir-substitute were abroad, or whether he had with bona fides, and had used every reasonable exertion to certify the substitute-heirs or their agents, of the existence of that ss.

No. 292  
June 20, 18  
Abernethie  
Gordon.

the question as to the forfeiture of the estate, the Lord Ordinary ed Cases.

*aded by the Pursuer—*

The act of contravention, consisting of making up an infeftment e-simple to an estate, in violation of the entail, was so eminently ous to the whole system of entails, that it was placed by the e 1685, c. 22, on a different footing from other contraventions, in- ch that it was specially declared by the statute, “that if the said sions and irritant clauses shall not be repeated in the rights and yances, whereby any of the heirs of tailzie shall bruik or enjoy the ed estate, the said omission shall import a contravention of the irri- and resolute clauses against the person and his heirs who shall omit ert the same, whereby the said estate shall, ipso facto, fall, accresce, e devolved to the next heir of tailzie, but shall not militate against ors and other singular successors, who shall happen to have con- d bona fide with the person who stood infeft in the said estate, ut the said irritant and resolute clauses in the body of his right.” gh this clause of the statute was not engrossed in the libel, it was etent to found upon it as one of the old public laws of the realm. And even if the deed of entail had not declared it to be an irritancy to up a fee-simple title, the statute itself would have supplied this: t was impossible that any entail could be made under that statute, did not give to the next substitute-heir the estate, as being ipso devolved to him, by the act of the heir in possession making up a mple title, as completely as if such heir in possession executed a directly purporting so to devolve it. And it was consistent with e, as well as policy, that this sanction should be applied, because

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itancy has been incurred, or probably with an unextracted decree declaring he offer to purge only arises on the assumption of the irritancy, and it is eant as a defence against that conclusion, but as an equitable mode of satis- ; and therefore it can never form a proper part of the record, unless the er were to bring it out by a conclusion against the competency of pur-

f the offer is to be received at all, it is not easy to prescribe its exact form ; se the Judicature Act does not apply to minutes. This one appears as re- as most others, and it has not been received as correct in its statements, but y as the defender's offer.

Certain things were pressed on the Lord Ordinary in consequence of the d&- 's announced intention to do something new with his titles. The Lord ary cannot interfere with this. The pursuer will receive from the maxim te lite, &c. all the protection he is entitled to.”

on which it was granted to him, and no longer ; and, as penal on the pursuer to be deprived of the devolution terms of the granter's entail, as it was penal on the that devolution. It was therefore impossible to sue for purgation, as an irritancy, amounting to the repudiation inferring ipso facto forfeiture, had been committed.<sup>1</sup>

3. There was a difference between an irritancy by omission and that which arose out of a commission. The former could be purged, before decreet, by performing what was required ; such performance placed all matters on the same footing as would have stood if no omission had been committed ; the latter was not purgeable, because, in the nature of things a position once committed at a given time, never could be undone, and could not be recalled during which the act was done, which was the maxim *brocard* applied, *quod semel factum est, infectum fieri non potest*. This rule applied to all gratuitous or unilateral rights, and not to a settlement, having no onerous cause, and flowing from the entail.

4. But if it was competent, in point of law, to sue for purgation wherever that was possible in point of fact, still it was necessary that the purgation should be adequate and complete. But the question could be, such purgation of this irritancy. Though a settlement was made under the entail on June 9, 1835, the defender had been in possession as a fee-simple proprietor from 25th November

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period. Every debt or liability then contracted by him might be made No. 25  
affect the estate. And such liabilities might arise not merely from June 20, 1  
debts, cautionary obligations, latent partnerships, representation of parties Abernethi  
ceased, &c. such as the pursuer could not trace and expose, but might Gordon.  
arise from various other causes to an extent perhaps unknown to the  
defender himself, and might be of such a nature as to continue current,  
and in force, for an indefinite future period. Besides this, the defender  
might have executed deeds of alienation of the estate, and these, espe-  
cially if onerous, would still affect the estate, notwithstanding the tailzied  
vestment in 1835. It was not in the power of the pursuer to condes-  
cend on the particulars of such debts or deeds, and he did not require  
even to aver their existence on the record. It was enough that the  
defender, by his deliberate act, had exposed the estate to a great danger,  
against which both the entailer and the legislature had made an anxious  
provision to protect it: and as the defender could not demonstrate to the  
court that this hazard was totally removed, he had not purged the  
intancy, and the forfeiture must take effect.

5. There was good ground for maintaining, that even the current and  
future debts and deeds of the defender would affect the estate. He had  
made up a title in fee-simple by an investiture as heir of line to the party  
infest. Being thus fully clothed with the real right of the estate,  
nothing could take it out of him but a resignation, or the less regular  
mode of a disposition followed by a charter of confirmation. Neither  
mode had been adopted, but, after the estate had been actually taken up,  
it was no longer in the hereditas jacens of General Gordon, the  
defender expedite a general service to him, in order to take up the  
executed procuratory in the deed of entail, and he thereon expedite a  
charter of resignation. But though that procuratory had been valid, when  
anted, it could no longer afford the means of effectually resigning the  
estate after the real right to the estate had, by an apt and valid inves-  
titure, been taken up by the defender himself. Unless he had also  
resigned, in his own proper right (which he had not attempted, and which  
could not have supported the entail), the resignation made was not  
actual. It was not an answer to this to say that the pursuer had reduced  
the defender's fee-simple title. That reduction would debar the defender  
himself, in any question with the pursuer, from ever pleading the fee-  
simple title against the title made up under the procuratory in the entail;  
but it would not affect third parties who were entitled to maintain that  
the fee-simple title was still extant on the record; that the defender was  
not duly divested of it; and that it was the dominant title to the estate,  
the force of which was not taken off (unless in a question between the  
pursuer and defender) by the reduction, and therefore, that the defender's  
present and future debts and deeds would affect the estate.

6. No authority or precedent could be found for allowing purgation of

No. 292. the irritancy committed by the defender. It had always been held by lawyers as an unpurgeable irritancy,<sup>1</sup> and was expressly so stated in *Bankton*. And there were various decisions, especially that of *Walsheils*, which implied the same thing.

June 20, 1837.  
*Abernethie v. Gordon.*

*Pleaded by the Defender—*

1. According to familiar principles and decisions in the law of Scotland, no penal irritancy could take effect until decree of declarator, and it was competent to the defender in the declarator, at any time before decree, to purge the irritancy, wherever he could restore things to the same state in which they would have been if no irritancy had been committed. This was still more readily allowed where the irritancy did arise in terms of the convention of parties, but under a statute. As regards the statute 1685, c. 22, the declaration of an *ipso facto* devolution, as it implied a penal forfeiture, must be construed and applied by the Court in the same manner as any other penal statutory irritancy, as to leave room to the party charged with committing it, to purge by decree.<sup>2</sup> And, in a recent case,<sup>3</sup> in regard to a similar declaration of *ipso facto* devolution, contained in another clause of the same statute, the Court had refused to apply the literal construction now contended for. In the present case the defender was entitled to the most favourable interposition of the power of equity in the Court, as he had proceeded under the warrant of a decree of the Court, reducing the estate when he made up a title in fee-simple. It was a separate answer to the plea founded on the clause quoted from the statute, that, as it was of a penal nature, it should have been engrossed *ad longam* in the libel, and was irregular to found on it at all.

2. Even in the case of a conventional irritancy, if of a penal nature, the Court allowed it to be purged at any time before decree, as in the case of a lease where a conventional irritancy had been incurred through arrears of rent, or a feu in which a declarator of irritancy was raised *non solutum cum nem.* But as the forfeiture of an entailed estate was truly as much a penalty as occurred in these, or any other case of conventional irritancy, purgation ought to be allowed, if it were possible in point of fact, to purge the irritancy.<sup>4</sup>

3. It was immaterial whether the irritancy arose out of a fact of commission or commission; wherever it could be purged by replacing matters *statu quo*, the Court equitably allowed such purgation. And, in so doing, they gave true effect to the intention of the parties who originally incurred the irritancies, because the Court only sustained purgation when

<sup>1</sup> *Bankt.* 3, 685; *Sewart*, Feb. 1, 1726 (7275).

<sup>2</sup> See authorities quoted under 3d plea.

<sup>3</sup> *Bentley v. Macleod*, 2, 1837 (ante, p. 711).

<sup>4</sup> See authorities quoted under 3d plea.



ravention was done away with, and the intention of the party who imposed the irritancy duly carried into effect.<sup>1</sup> No. 292.

The only question, therefore, was whether the irritancy of having made up a fee-simple title was purged. The defender had now made up a June 20, 1837.  
Abernethie v.  
Gordon.

under the entail which was actual purgation of that specific irritancy; as the resumption of the name and arms of the entailer, after having liberately repudiated them, had been sustained by the Court as a purgation of that specific irritancy. In regard to a totally distinct question, the risk of the estate being evicted for the defender's debts or deeds, that risk only applied to deeds done or debts contracted prior to 9th June, 1835, when his tailzied infestment entered the record. And as the pursuer had not even averred upon the record that the defender had done any deed to affect the estate, or contracted any debt during that period, it was enough for the defender to allege, as he expressly did, that he had done no such deed and had contracted no such debt. At all events, it would be time enough to declare the forfeiture of the estate on account of the contravention of contracting debts at any period hereafter when it should be made actually to appear that debt had been contracted which the defender could not discharge and which was made to affect the estate.

even if such a case could ever arise, the defender would be entitled to the benefit of that clause in the entail which allowed five years for bringing an adjudication for debt; which clause, in itself, materially aided the defender's plea, that any question of forfeiture, *hoc statu*, on account of the mere risk or possibility of an unknown debt, was out of the question.

The fee-simple title which had been made up by the defender was rescinded by the pursuer and declared void and null. The defender was afterwards entitled to make up his tailzied investiture, as fully and freely as if no fee-simple title had ever existed: and he had done so.

No precedent existed which showed the irritancy in question to be irredeemable. The case of *Westshiels* was complicated with various circumstances, and was reversed in the House of Lords, on one of these, so as to afford no authority. The whole tendency of the doctrines of institutional writers, and the practice of the law, was to sustain purgation wherever it was possible; and it should be now sustained in this case. The Lord Ordinary reported the cases; and, after the parties were heard, the defender, by permission of the Court, lodged in process a petition, offering to find sufficient caution against the hazard of the estate being evicted for his debts or deeds prior to June 9, 1835. The

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St. 13, 14; 2 Ersk. 5, 25, and 27; M'Kay, Nov. 23, 1798 (11171); St. 8, 32; 4 St. 18, 7; Sandford on Entails, 294; Innes, March 9, 1819; Gordon, July 23, 1748 (7281); Ross, Nov. 8, 1766 (7289); Macdonald, Jan. 27, 1768 (1542); Price, July 6, 1760 (not reported, but quoted in Sandford on Entails, p. 298); Stewart, July 12, 1738 (15557, and see Craigie's Appeals, p. 233).

No. 292.

June 20, 1837.  
*Abernethie v.  
Gordon.*

minute was in these terms :—" That with a view to the on which decree of forfeiture of the estate was sought by the defender, in respect of the risk to which the estate is exposed during the time the titles were made up in favour of the defender had then contracted debts, that is, prior to June, 1835, being the date of recording the sasine pro Curia, the Crown charter expedite on the procuratory contained in the deed of entail of the said estate of Balbithan, he, the defender, distinctly averring that there were no debts in existence during the period above-mentioned, and that he had executed no deeds, and no obligations or securities of any sort or kind, of whatever description, which could affect, or purported to affect, or related to the said estate, and that he could ever be made to affect or relate to the said estate indirectly, is ready and willing to find the most ample and effectual caution and security, to the effect that he had contracted no debts whatever, incurred before the said 9th day of June, 1835, and that no debts contracted by him prior to the period before mentioned should ever be made available against the said estate of Balbithan, or of course, that all such debts, and all adjudications or decrees in respect thereof, might be led therefor, should be redeemed within five years after the date of such adjudications, and the said estate of Balbithan disburdened of the same, in terms of the condition to that effect contained in the deed of entail, or within such other time as the Court may hereafter appoint; and further, that he has executed no deeds, and no obligations or securities of any sort or kind, of whatever description, which could affect, or purported to affect, or related to the said estate, or which could ever be made to affect or relate to the said estate directly or indirectly."

The pursuer objected to this offer of caution as altogether inadequate. There were no sufficient means of determining to what party, the caution was to be found, or in what extent. The value of the estate, at the end of forty years, might be increased by the discovery of mines within it, or by the fencing of a part of the estate, which would be incalculably greater than at present. And even after the estate had run, there might be obligations unexpired which had been contracted by the defender prior to 9th June, 1835. But besides this, caution might appear to offer some protection against the claims of the defender, it could not avail against any deeds of alienation which the defender might have executed.

The Court resumed consideration of the cause along with the offer of caution, and the following Opinions were delivered.

LORD GILLIES.—An undoubted irritancy has been committed in the deed of entail, and it is whether it can be purged. It is the general rule and practice to allow a debtor to purge a debt, and prevent forfeiture whenever it is possible to do this. The difficulty is that absolute and complete purgation appears to be impossible.

ender has now made up a feudal title under the entail. But I apprehend **No. 292.**  
 rsuer is well-founded in maintaining that the debts and deeds of the  
 er, while he stood on the record of sasines as a fee-simple proprietor, may **June 20, 1837**  
 le to affect the estate notwithstanding the subsequent title made up under **Abernethie v.**  
**Gordon.**  
 ail. I should, however, incline to adopt the rule of allowing the defender  
 ge the irritancy, if he can take such steps as will satisfy any reasonable  
 that adequate precaution is used to protect the interests of the substitute-  
 gainst any hazard resulting to them from the act of irritancy. Now an offer  
 e of caution, such as should satisfy any impartial person and should satisfy  
 art, that the risk to which the estate has been exposed shall be duly guarded  
 . I do not think that the irritancy is sufficiently purged without this; but  
 cient security be found, then I consider that the defender should be  
 ed from the conclusions of forfeiture. Perhaps real security, and not mere  
 l security, may be requisite on the part of the defender; but, in the mean  
 would pronounce a judgment finding him entitled to be assoilzied upon  
 te security being found. I may farther observe that I consider the pursuer  
 ntitled in point of form to found on that clause in the statute 1685, c. 22,  
 ng ipso facto forfeiture as the consequence of making up a fee-simple title,  
 he omitted to engross that clause in his libel. The enactment of 1685,  
 may be referred to as part of the old public laws of Scotland. But I have  
 explained the grounds on which I apprehend that statute does not entitle  
 decree.

**D PRESIDENT.**—I arrive at the same result with Lord Gillies. And I am  
 ed in my opinion by perceiving that the maker of the entail had foreseen  
 ssibility of such a risk as the estate has incurred, and he has made a provi-  
 that subject which is the law of this case. The risk now remaining to the  
 is that it may be carried off for the debts of the defender. The entailer  
 d a prohibition on the heirs against contracting debt, but as he foresaw  
 his might be contravened and that adjudications might be led against the  
 upon such debts, and made real against the estate, he declared by the entail  
 period of five years should be allowed by the heir to redeem these adjudi-  
 , failing which, a forfeiture should be incurred. The statute 1685, c. 22,  
 sly allows the lieges to tailzie their estates with such conditions as they  
 fit, and to fence these conditions. The entailer has accordingly provided  
 an heir, failing to make up a title under the entail, should contract debt,  
 he should not de plano forfeit the estate, but should be allowed a period of  
 ars to purge the contravention. And I think it must have been to this very  
 hat such a provision referred, for there is no other way in which the debt  
 cted by an heir in possession could permanently affect the fee of the estate.  
 efender therefore appears to be entitled to maintain that he satisfies all the  
 ements of the entail if he purges adjudications within five years after they  
 d for debts of his against the estate. The pursuer, on the other hand, is  
 d to require that he shall be duly secured that such purgation shall be made;  
 he defender meets this with an offer of ample caution. The defender is  
 to find such security, if the Court are of opinion that, on doing so, he has  
 l the irritancy, and will be enabled to retain the estate. I think him  
 d to our judgment to that effect: and after pronouncing it, the cause should  
 titted to the Lord Ordinary to hear parties as to the details of the kind of  
 y which must be found.

June 20, 1887.  
Abernethie v.  
Gordon.

favourable of all cases for allowing purgation, as the irritancy is after obtaining a decree of this Court, which would have effected the defender, if it had not afterwards been reduced. And by a more certain mode is adopted of protecting this entail than a decree of the estate would be. After such declaration, the estate, though next substitute, would remain liable to be attached for the debt contracted while he stood on the record as a proprietor in fee-simple. Purgation can only be allowed upon ample security being found against such hazard. By allowing purgation the estate will continue in the hands of the heirs of entail; by declaring a forfeiture, it would still run in fee-simple, and the estate would be totally carried off. In regard to those words of c. 22, which declare the irritancy to be incurred, ipso facto, by the fetters in the investiture of each heir, they do not appear more stringent than are found in the ordinary provisions of each entail on this subject. I do not think they operate as a bar against purgation. I think the only question is, whether purgation is made, and is it sufficiently made here? The first point in this case is the injunction of the entail has now been complied with and the estate is under the entail. I am of opinion that it has. There is no doubt that a fee-simple investiture can have the effect of rendering the estate liable for the future debts of the defender after he has made up a complete fee-simple entail, the entail having been long ago recorded. I at one time doubted whether the effect of the fee-simple investiture was the dominant title done away with, but I am now satisfied that it is. The next question is whether the defender must prove the non-existence of debt, or must he relieve the estate from all hazard on account of debt. Upon this I am of opinion that if the defender find substantial caution to that effect he requires to do. But I do not think that the action should be unqualifiedly dismissed. It should only be dismissed hoc statu, and ought to be not only to purge, but it should be that no debts have been incurred and remain extant. If we dismiss the action on these terms, and it appears that debts come up, we can still forfeit the estate, and the estate will be liable for any loss which may accrue through the delay. Under the equitable jurisdiction of this Court I apprehend we are not bound to follow this course, and as it appears to me that all possible mischief to the estate will thereby be done away, I think we are not bound to be so strict, and entitled, to forfeit the estate on account of the contravention committed.

LORD CORNHOLST.—I never approached the consideration of this case, and it appeared to me to be attended with more doubt and difficulty than one important question in law besides the question whether a court of equity, interpose in such a case, though no precedent in which it ever did so or was asked to do so. My doubts are now removed, and the opinion I am to deliver is not given without some hesitation, and I am concurring, in the result, with those which have been now given.

It is unquestionable that a double irritancy has been incurred first, under the terms of the statute 1685, c. 22, and next under

of entail. The statute expressly directs all the irritancies to be repeated in rights and conveyances of the estate; and the deed of entail as expressly binds every heir to possess the estate under no title but the tailzied title engrossed by the fetters. The defender, in violation of both the statute and the entail, made title in fee-simple, and was so infest. He did this deliberately and advisedly, violating the entail, and possessing with a fee-simple infestment on the record, for a period of about thirteen years. The question is, what is to be the effect of this? In dealing with that question, I proceed on the footing that the entailed estate may be made liable for the deeds and debts of the defender done or contracted during that period. The defender indeed intimated at the bar that he was prepared to dispute that position if it was necessary for his safety to do so: but it was not necessary, according to the view which I take, and if it had been so, I do not think it could have been successfully disputed. I assume, therefore, that for the defender's debts, and also for his deeds of alienation during the above period, the estate may yet be affected unless the double irritancy be sufficiently purged. The pursuer has maintained that these irritancies are altogether un purgeable in nature, and that the authority of Bankton and of the case of Westshiels establishes this. The pursuer insists that there is a distinction between an irritancy like that which is specially declared by the statute, and an irritancy created solely by deed of entail. In meeting this plea the defender has contended that it was regularly brought forward, as the pursuer was bound to have libelled, *ad longam*, clause in the statute on which he founded to a penal effect. I rather think it ought to have been done; but, independently of this, I consider the argument of the pursuer to be ill-founded. I think no such distinction exists as is contended out that all irritancies, whether statutory or inserted in the entail, are intended solely for the purpose of preserving the estate in the tailzied line of succession, wherever this object is fully accomplished, the effect is to purge any contravention on which may have been incurred. The opinions both of the late Lord Lowbank and Lord Armadale, in the Bargany cause, are expressed in the most decided terms to this effect. The general rule is that all irritancies may completely be purged if in point of fact they are purgeable, as the infliction of penalties is odious in the view of the law. This was so held by Craig as well as by Lord Stirling, and, according to the constant practice of this Court, the statute 1685, has always received an equitable interpretation. One recent illustration of this occurred in the case of Bontine,<sup>1</sup> decided on 2d March last. It was objected by the pursuer that he had no title to pursue a reduction and declarator which was directed against his father, that he had libelled on an irritancy which, if proved, was declared by the statute to forfeit not only the right of the contravener, but also of "his heirs." Although these were the words of the statute, the Court held it clear that they did not render such forfeiture necessary in every case as to the heirs; that the statute was to receive an equitable interpretation; and that, on due consideration of the terms of the entail in that case, the forfeiture, even if incurred by the pursuer's father, did not extend to cut off the right of his heir the pursuer himself. Upon the same ground which influenced the Court in that case, I hold it clear that the statute is to be equitably interpreted, and that a statutory irritancy is just as purgeable as an irritancy created solely by the deed of entail.

June 20, 1883  
Abernethie v  
Gordon.

<sup>1</sup> Ante, p. 711.

been committed. The estate remained liable for all the deeds of the defender during those thirteen years prior to 1835, while his simple stood upon the record. The estate, therefore, was in a position from that on which it would have been, if no contravention had been committed. It has indeed been suggested by your Lordship, that a special clause in the entail which regulates this, by allowing to the creditor a term of five years to redeem an adjudication which may have been made on the estate. But I conceive with deference, that that clause does not regulate this. This is not a declarator of irritancy on account of the neglect of debt by an heir in possession. If it were so, I think the clause would be allowed the requisite period to purge, and if I were to grant it, then, not only might the estate be declared forfeited, but the adjudication might be annulled. But in this case, where the irritancy arises from possession on a fee-simple title, that last consequence could not follow. The adjudication on it, could not be annulled, but would effectually stand, and I apprehend that the clause of the entail allowing five years to purge, has no bearing whatever upon the question of purgation in this case.

In regard to the case of Westshiells, I lay it altogether aside, and do not refer to this. The Court of Session had held that as Sir Robert Denham the settler of the tailzie in his general retour, and had enjoyed the benefit of that general retour, and had contracted debts after the general retour, incurred irritancies which he could not purge. But the House of Lords, on sounder principles of conveyancing, held that no irritancy could be sustained, failing to engross the settler in a general retour, and they reversed the decision of the Court of Session. Sir Robert Denham of Westshiells never made up a fee-simple title, but on a mere personal right, and all objections which would have been good against him, would have been equally good against those who had lent money to him, who could plead upon no right higher than his. And it may be said that an offer of caution was made in that case, such as has been made here. I consider the decision in that case to affect the determination of the present case.

I come then to the question as it presents itself in this case. Whether a security has the effect of producing purgation, and, by the equity of redemption, may be sustained as sufficient, provided that ample real security is given. It is my opinion that such security will amount to purgation as to all debts which exist, they will be entirely extinguished by payment, and it is sufficient to provide for such extinction, by finding ample security. But that is not the whole difficulty of the case. There is a hazard remaining, which I apprehend, with me, and it is this. Though security may be found for the debt, that is not enough to take off the effect of deeds of alienation, if they have been executed by the defender while his interest in fee-simple stood upon the record. Suppose that he sold and alienated the whole, or any part

The purchaser may perhaps refuse, on any terms, to give up his bargain, No. 292.  
 as the entailed estate may be affected in a way which cannot be cured by  
 tion, or even by placing other lands of equal value under the fetters of the June 20, 1837.  
 There was one individual estate entailed, and the irritancy incurred by the Abernethie v.  
 Gordon.

on of a portion of it, is not purged by entailing another piece of land, how-  
 luable, under the same fetters and destined to the same heirs. This is the  
 as to which I have experienced chief difficulty in holding that there can be  
 al purgation, by any security however ample. The grounds on which I at  
 sidered the difficulty to be overcome were these. The defender acted with

bona fides in raising the reduction of the entail in which he obtained a  
 of reduction in 1832. He then possessed the estate, believing himself to be  
 olute proprietor; and if he, proceeding on that belief, entered into a sale of  
 ate, and executed a disposition of it, he made a contract in which it has  
 ely proved that there was an error in substantialibus. He entered into the  
 t of sale, believing on justifiable grounds that the lands were his absolute  
 ty, and that the estate which he sold was altogether his own. The purchaser  
 ver acquired a real right in the lands, as appears from the records. And as  
 was an error in substantialibus on the part of the seller, I conceive him to be  
 d to resile. If a party sell a vessel, as brass, which proves to be actually  
 he would be entitled, on making the discovery, to resile; and still more  
 that privilege to exist here, where the party was in the bona fide belief  
 e estate was absolutely his own, whereas his right to it was so strictly  
 d that the alienation of the smallest part, inferred a forfeiture of the whole.  
 s, therefore, that, under the circumstances, the defender would be entitled to  
 from any contract of sale into which he may have entered, and which now  
 is in nudis finibus contractus. The worst consequence which I apprehend  
 in any view, fall on the defender, would be a liability to damages, for resiling.  
 ot at present see any good ground even for subjecting him in damages; but,  
 e were, that is a species of hazard to the entailed estate which may be effec-  
 guarded against by the caution which is to be found by the defender.

Considering the exorbitant penalty which is here demanded by the pursuer, I  
 end that we are warranted, in equity, to receive the purgation which has  
 ffered, as being sufficient hoc statu. But I think the decree must be qualified  
 o bear that it takes effect only hoc statu. Circumstances may yet emerge,  
 as we cannot at present foresee, and as to which we ought not to foreclose  
 res, by pronouncing any final and absolute judgment between these parties.  
 state over which the security is to be given may prove of less value than the  
 d estate; or other circumstances may arise of a nature which cannot at pre-  
 e anticipated. But, as the case now stands, I have come to the opinion,  
 t not without difficulty, that the offer of purgation which has been made, is  
 ble to the effect which I have just stated.

*Opinion of Faculty for Defender.*—Will the Court allow personal caution as suf-  
 purgation, if the pursuer does not object?

**THE PRESIDENT.**—Undoubtedly the Court will consider it enough, if the pur-  
 is satisfied with it.

**THE COURT** pronounced this interlocutor:—"Find that, in respect the  
 defender has made up, and possesses under, a feudal title to the estate of  
 Balbithan, completed in terms of the deed of entail, and has offered, as the  
 foresaid minute bears, to find the most ample and sufficient caution and



No. 293. JOHN ARCHIBALD MURRAY, His Majesty's Advocate  
Gen. Rutherford—Ivory.

THOMAS BRUCE, Respondent.—D. F. HOPKINS

*Public Officer—Process—Title to Pursue.*—1. Question of Session, whose assistant clerk has died without being performed the duties of the assistant clerk, is entitled, without the authority of the Court, and notwithstanding the provisions of § 16, to levy and appropriate those fees, which his assistant, if levied.—2. Circumstances in which the Court found, that a Advocate (stating that a depute-clerk had collected fees, contrary to express statute, and praying the Court to find that to appropriate the fees, and to ordain him to account for, and to the directions of the Court; and also praying the Court to of the office in which this levying of fees had occurred, so as to ment of 1 Will. IV. c. 69, § 13, and place the business of it footing), was informal and incompetent, in so far as it was of tion and complaint; and was unnecessary, in so far as it was the Court, in respect that a memorial had been previously laid the Lord Advocate, on which the Court were to proceed for the enactments of the statute.

June 22, 1837. It was enacted by 1 Will. IV. c. 69, § 13, "That which shall next occur in the office of principal clerk  
1st Division. in the office of depute-clerk of Session, shall not be  
Whole Court. in like manner, the vacancies in the office of the other  
R.

clerk, or closet-keeper. Prior to the act, the depute-clerk possessed No. 26  
 right of appointment of his assistant clerk; but by the act, the right June 22, 1  
 appointment was vested in the crown. Thomas Bruce, W.S., was one Murray v.  
 the depute-clerks, and his assistant clerk was George Lang; their Bruce.  
 being attached to the First Division of the Court.

In February 25, 1833, Lang died. There was no power in the crown  
 to appoint a new assistant clerk, as the requisite reduction in the total  
 number of the clerks, including those connected with proceedings in trial  
 court, had not yet taken place. There was no longer any power in  
 the crown to appoint an assistant clerk, as it had been taken away by the  
 act. But the work, belonging to the assistant clerk, still required to be  
 performed. Bruce made a communication on the subject to the Lord Pre-  
 sident, who approved of the suggestion, then made by him, that he should  
 himself discharge the duties of the office of assistant clerk, in the mean-  
 time, with the aid of a clerk, already experienced in the assistant's office,  
 acting under him, until a more permanent arrangement should be  
 made. Bruce also intimated by letter to the Lord Advocate (Jeffrey)  
 in London, attending Parliament, his willingness to undertake this  
 work, and suggested that it was inexpedient, at present, to fill up the  
 vacant office.

By 50 Geo. III. c. 112, § 16, it was enacted that each depute-clerk of  
 session should have a salary of £400, per annum, but should not be en-  
 titled to draw any fees. The assistant clerk of each depute-clerk was,  
 however, paid by fees, which were levied from litigants on the occasion  
 of any piece of work was performed, such as giving out a process when  
 demanded, &c. For these fees, the assistant clerks were not liable to  
 account to any party; and they formed the sole remuneration to the  
 clerks for the performance of their office. When Bruce entered on  
 discharge of the duties of the office of assistant clerk, he levied the  
 fees incidental to the performance of these duties. The annual amount  
 of these fees, as drawn by Lang had been returned to the law commis-  
 sioners at an average of £800 per annum, but, according to the statement  
 of Bruce, they did not, in his hands, exceed the net sum of £260, per  
 annum, after paying clerks and expenses.

In May 1835, a memorial was presented by the Lord Advocate (Mur-  
 ray) calling the attention of the Court to the position in which the busi-  
 ness of the office of Bruce was placed, and also the business of three other  
 offices in which two principal clerks had retired, and one depute-clerk had  
 died, since the passing of the act 1 Will. IV. c. 69. His Lordship sub-  
 mitted to the Court the necessity of their interposing, under the powers  
 of 13 of that act, by "making such regulations as may be necessary for  
 re-apportioning the duty among the remaining clerks." The memorial  
 further suggested that Bruce should be required to account for the fees  
 which he had uplifted since the death of the assistant clerk, Lang, and to  
 sign them, after deducting such amount for remuneration on account

Murray v.  
Bruce.

out of these fees as the Court should direct.

The Court did not make any regulations or adopt any the presentation of this memorial; and Bruce continued his duties, and levy the corresponding fees of assistant clerk.

In 1836, an application was made to Bruce on the part of the Treasury, requiring an account of the amount of the fees which he had received, and of the authority under which he acted. Bruce claimed right to these as his private property, the fees for work done; and he denied the title of the Lords of the Treasury to inquire into the matter. Soon after this, in July 1836, a petition was presented by the Lord Advocate (Murray) which was brought before the Division of the Court, stating, that, notwithstanding the Statute Geo. III. c. 111, § 16, prohibiting a depute-clerk to levy fees, the abolition of the office of assistant clerk consequent on the death of Lang, the fees, which would have been leviable by Lang, were levied, without any authority, and in the face of the Statute; and that Bruce, who was all the while drawing the salary of a depute-clerk, who refused to account for the fees so uplifted, and insisted that they were duly earned by him, and became his private property. The petition described this as a "usurped appropriation" of the fees, and prayed that an undoubted abuse of Bruce's official character and functions might be redressed. The petition was not entitled a petition and complaint, and had no conclusive effect against Bruce; but, after simply stating the facts and the provisions of the Statute, it prayed the Court to consider the petition and to do therein as in the premises shall seem meet: and, more especially, to appear to your Lordships to be the proper course, to grant a decree, directing a copy of this petition upon the said Thomas Bruce to be given to him to give in answers thereto, if he shall be so advised by the Court, to find that the said Thomas Bruce is not entitled to appropriate to his own use the fees in dispute; and to order the said Bruce to hold count and reckoning for the same: and to pay the amount thereof, as the same may be ascertained, in manner and to the persons to whom the same may be disposed of and applied to the public service, or otherwise as your Lordships may hereafter direct; and in the meanwhile to prohibit the said Bruce from making any order, and to make such regulations as to the business of levying and applying the fees in future, as your Lordships shall think proper and necessary in the circumstances."

Bruce stated in his answers, that the provision of 50 Geo. III. c. 111, § 16, prohibiting a depute-clerk to accept fees, had reference to duties which properly devolved on him as depute-clerk; that

which he was placed by the death of his assistant Lang, subsequently No. 293  
 the enactment 1 Will. IV. c. 69, § 13, was altogether anomalous, so June 22, 1851  
 as the Court did not exert the powers thereby conferred on them, Murray v.  
 and apportion the duty among the remaining clerks; that as he could Bruce.

competently discharge the duties of assistant, but was not bound to do so,  
 was entitled to charge for performing these duties, the same fees,  
 which Lang, had he survived, would have charged, as he had equally  
 borne them; that this was the course most conducive to the public inter-  
 est, until the Court made some new regulation; and that he had commit-  
 ted no unwarrantable irregularity, but acted with strict propriety, in fol-  
 lowing this course, especially as he had not adopted any steps before com-  
 municating with the head of the Court, and with the then Lord Advocate,  
 and receiving the express sanction of the former, and no intimation of  
 dissent from the latter, of these high officers.

After replies and duplies, a hearing in presence of the whole Court  
 was ordered. The Court threw out a doubt as to the competency of the  
 application, in respect that it rather appeared substantially to charge mal-  
 versation in office, and yet was not drawn in the form of a petition and  
 complaint. The hearing in presence turned chiefly on this question, in  
 regard to which the Lord Advocate maintained, that, considering the  
 party whose conduct was the subject of animadversion, and who was a  
 clerk of Court; and considering the subject of the application, which was  
 a call on the Court to exercise the powers vested in them by 1 Will. IV.  
 c. 69, § 13, for apportioning the duties of the clerks, he had sufficiently  
 discharged his duty in bringing the facts distinctly before the Court, and  
 now remained for the Court to do their duty by acting on the informa-  
 tion which was thus communicated to them. If the due performance of

public business, in a regular and authorized manner, was thus suffi-  
 ciently provided for, by the Court, the principal object of the application  
 was satisfied; and, in regard to any conclusions in the petition, which were  
 directed against the respondent personally, it was competent for the Court  
 to enter on them, if necessary, and many instances were on record in  
 which their Lordships had done so, when acting upon memorials, or infor-  
 mations, which were still farther removed from the form of a regular peti-  
 tion and complaint, than the present application was. It was therefore  
 wholly discretionary with the Court to proceed against the respondent if  
 they saw cause; and the petitioner by bringing the case into this position,  
 had attained every object which he had in view in presenting the petition.  
 The respondent answered, that, where the substance of the petition  
 involved a charge of malversation by a public officer, it ought to have  
 been in the form of a petition and complaint; that the adoption of this  
 form was essential for the safety and protection of such officer; and, there-  
 fore, that the petition, in so far as it was of the nature of a petition and  
 complaint, was informal and incompetent; and that, in so far as the con-  
 clusions of the petition were of a purely civil and patrimonial nature,  
 such as those for accounting, the Lord Advocate had no interest to pursue

June 22, 1837. paying to another officer, on whom extra duty had devolved out of these fees as the Court should direct.  
Murray v.  
Bruce.

The Court did not make any regulations or adopt any in the presentation of this memorial; and Bruce continued to duties, and levy the corresponding fees of assistant clerk.

In 1836, an application was made to Bruce on the part of the Treasury, requiring an account of the amount of the him, and of the authority under which he acted. Bruce circumstances under which he had been led to perform the duties, the fees which Lang, his assistant, if surviving, would have claimed right to these as his private property, the fees being for work done; and he denied the title of the Lords of the Court to inquire into the matter. Soon after this, in July 1836, a petition presented by the Lord Advocate (Murray) which was before the Division of the Court, stating, that, notwithstanding the provisions of Geo. III. c. 111, § 16, prohibiting a depute-clerk to levy fees, the abolition of the office of assistant clerk consequent on the death of Lang, the fees, which would have been leviable by Lang, were levied, without any authority, and in the face of the provisions of the Act of 1836, which gave to Bruce, who was all the while drawing the salary of a depute-clerk, who refused to account for the fees so uplifted, and insisted that they were duly earned by him, and became his private property. The petition described this as a "usurped appropriation" of the fees, "an undoubted abuse of Bruce's official character and functions," and was not entitled a petition and complaint, and had no conclusive nature against Bruce; but, after simply stating the facts and the statutes and acts of sederunt founded on, it prayed the Court to take the premises into consideration, and to do therein as in their discretion to your Lordships shall seem meet; and, more especially, if it should appear to your Lordships to be the proper course, to grant an order, directing a copy of this petition upon the said Thomas Bruce, and to require him to give in answers thereto, if he shall be so advised by counsel, and to find that the said Thomas Bruce is not entitled to appropriate to his own use the fees in dispute; and to order the said Bruce to hold count and reckoning for the same; and to pay the amount thereof, as the same may be ascertained, in manifold copies to be disposed of and applied to the public service, or otherwise as your Lordships may hereafter direct; and in the meanwhile to make such order, and to make such regulations as to the business of the Court, as to levying and applying the fees in future, as your Lordships may think proper, authorized by the statute, and to be proper and necessary in the circumstances."

Bruce stated in his answers, that the provision of 50 G in prohibiting a depute-clerk to accept fees, had reference to the duties which properly devolved on him as depute-clerk; and that

which he was placed by the death of his assistant Lang, subsequently No. 29:  
 the enactment 1 Will. IV. c. 69, § 13, was altogether anomalous, so June 22, 18  
 as the Court did not exert the powers thereby conferred on them, Murray v.  
Bruce.

apportion the duty among the remaining clerks; that as he could  
 competently discharge the duties of assistant, but was not bound to do so,  
 was entitled to charge for performing these duties, the same fees,  
 which Lang, had he survived, would have charged, as he had equally  
 paid them; that this was the course most conducive to the public inter-  
 est until the Court made some new regulation; and that he had committed  
 no unwarrantable irregularity, but acted with strict propriety, in fol-  
 lowing this course, especially as he had not adopted any steps before com-  
 municating with the head of the Court, and with the then Lord Advocate,  
 receiving the express sanction of the former, and no intimation of  
 dissent from the latter, of these high officers.

After replies and duplies, a hearing in presence of the whole Court  
 was ordered. The Court threw out a doubt as to the competency of the  
 application, in respect that it rather appeared substantially to charge mal-  
 versation in office, and yet was not drawn in the form of a petition and  
 complaint. The hearing in presence turned chiefly on this question, in  
 regard to which the Lord Advocate maintained, that, considering the  
 conduct of the respondent whose conduct was the subject of animadversion, and who was a  
 member of Court; and considering the subject of the application, which was  
 laid on the Court to exercise the powers vested in them by 1 Will. IV.  
 c. 69, § 13, for apportioning the duties of the clerks, he had sufficiently  
 discharged his duty in bringing the facts distinctly before the Court, and  
 now remained for the Court to do their duty by acting on the informa-  
 tion which was thus communicated to them. If the due performance of  
 public business, in a regular and authorized manner, was thus suffi-  
 ciently provided for, by the Court, the principal object of the application  
 was satisfied; and, in regard to any conclusions in the petition, which were  
 directed against the respondent personally, it was competent for the Court  
 to enter on them, if necessary, and many instances were on record in  
 which their Lordships had done so, when acting upon memorials, or infor-  
 mations, which were still farther removed from the form of a regular peti-  
 tion and complaint, than the present application was. It was therefore  
 wholly discretionary with the Court to proceed against the respondent if  
 they saw cause; and the petitioner by bringing the case into this position,  
 had attained every object which he had in view in presenting the petition.  
 The respondent answered, that, where the substance of the petition  
 involved a charge of malversation by a public officer, it ought to have  
 been in the form of a petition and complaint; that the adoption of this  
 form was essential for the safety and protection of such officer; and, there-  
 fore, that the petition, in so far as it was of the nature of a petition and  
 complaint, was informal and incompetent; and that, in so far as the con-  
 tent of the petition were of a purely civil and patrimonial nature,  
 those for accounting, the Lord Advocate had no interest to pursue

claimed right to these as his private property, the for work done ; and he denied the title of the Lord inquire into the matter. Soon after this, in July presented by the Lord Advocate (Murray) which was a Division of the Court, stating, that, notwithstanding Geo. III. c. 111, § 16, prohibiting a depute-clerk from receiving the abolition of the office of assistant clerk consequent on the abolition of the office of assistant clerk, the fees, which would have been leviable by the said Thomas Bruce, were levied, without any authority, and in the full knowledge of the said Thomas Bruce, who was all the while drawing the salary of the said office, and who refused to account for the fees so uplifted, and in the full knowledge of the said Thomas Bruce, and duly earned by him, and became his private property, the said Thomas Bruce, in his narrative, described this as a “ usurped appropriation of the public money,” and as “ an undoubted abuse of Bruce’s official character ;” and he prayed that the petition was not entitled to be considered a petition and complaint, and had no legal force or effect, and no nature against Bruce ; but, after simply stating the facts, he prayed that the statutes and acts of sederunt founded on, it prayed that the same be taken into consideration, and to do therein as to your Lordships shall seem meet ; and, more especially, he prayed that it should appear to your Lordships to be the proper course to be taken, in serving a copy of this petition upon the said Thomas Bruce, and to require him to give in answers thereto, if he shall be so required, and in the event, to find that the said Thomas Bruce is not entitled to appropriate to his own use the fees in dispute ; and that the said Thomas Bruce be accordingly held to account and reckoning for the same amount thereof, as the same may be ascertained by the Court.



[illegible]

following unanimous judgment:—"Find, that, in a petition is of the nature of a petition and complaint, it not being in the correct form of an application or that, in so far as it is a mere information to the Court, necessary to act upon it, there being a separate memorial Advocate before the Court, on which their Lordships proceed without delay, and, under which, all the oral Lord Advocate has brought under the attention of this information, can competently and expediently in so far as this has not been already done by the Court of 11th March last; and decern."

D. CLEGGHORN, W.S.—DICKSON and STEWART, W.S.—Adv.

No. 294. ARCHIBALD FYFE (Trustee of Steele and of Baxter), Plaintiff—*J. Anderson*.

THOMAS HAMILTON MILLER, Defender.—*Sol.-Gen. Ruthven*.

*Prescription, Triennial—Oath on Reference.*—Circumstances sustained the plea of triennial prescription, and found an oath of state of debt, negative of the reference.

June 27, 1837.\* ARCHIBALD FYFE, accountant in Edinburgh, trustee of John Baxter, confectioner in Edinburgh, and  
1st Division. Steele, confectioner there, raised an action in 1834 for payment  
Ld. Cockburn. R. for £15 10s. 6d., accepted by Thomas Hamilton Miller.

January, 1829, and 1st March, 1830; and for an account of £9, 9s. 6d., in account due for confectionary articles, furnished by Baxter, between August 1811, and July 1813.

No. 294.

June 27, 1830  
Fyfe v. Miller

The bill for £15, 10s. 6d. fell due in April 1830, and the defender signed the amount of it and subsequent interest. He stated that he knew nothing of any farther debt being due to Steele; and that he knew nothing of Baxter's account. He pleaded prescription, and the pursuer asked a reference to the defender's oath.

Under his deposition the defender stated that Baxter had been employed by his family to furnish confectionary articles; that he did not know whether the articles in Baxter's account were ever furnished or not, they fell entirely under the charge of his wife now deceased; that in 1818 he executed a trust-disposition for behoof of his creditors, but had never since seen the deed, and had no recollection whether the debt to Baxter was stated in it, or in any relative list of debts, or not at all; and that he had occasion to believe that some of the creditors were paid in whole, or in part, by the trustee, and some were not paid at all. He deposed to the account of £5, 4s. 8d. to Steele, that Steele was one of the tradesmen with whom the deponent's family dealt; but that he had no knowledge whether the articles in that account were ever furnished or not, as he never took any charge of such matters. He also deposed that he had not paid the account to Steele, and knew nothing about the account to Baxter.

The deponent was, of consent, re-examined, and deposed that, he had made every inquiry at his trustee for the missing trust-deed, and for all the necessary information; that he had "obtained from the trustee an excerpt of a paper in the trustee's possession entitled state of debts due by T. Hamilton Miller as at Martinmas 1820, which the deponent now produced and described as relative hereto; that a copy of the state from which the excerpt appears to have been taken, was, as the deponent understands, sent to him in 1820 by the trustee; and sometime thereafter returned by him to the trustee, with observations on some of the articles therein contained." The state thus referred to, was in these terms:

State of debts due by Thomas Hamilton Miller, as at Martinmas

Due to John Baxter, Edinburgh,			
Account ending 27th Oct. 1812,	.	.	£9 8 8
Interest from 27th Oct. 1813,	.	.	3 6 5
			<hr/>
Sum,			£12 15 1

(Entitled on the back thus.)

State of debts due by T. H. Miller, as at Martinmas 1820."

" Copy of this sent to Mr H. Miller."

The defender answered, that independently of the state of debts, there was nothing to found on, and the referred to in the oath, that did not import any admission contained in it. The excerpt produced was a mere copy appear that the statement of the debt in question was a writing of the defender's trustee. But, even if it had have been made up from the alleged creditor's own statement out the privity or sanction of the defender. The state the defender, had been returned to the trustee with objections of the articles. These had not been recovered, and, in proof on the subject, the presumption was that this debt in these observations. And even if the defender had owned in the state shown to him, that would not have amounted of it; and every presumption in regard to so old a debt should be in favour of the defender.

The Lord Ordinary found the deposition negative and assoilzied the defender with expenses.

The pursuer reclaimed.

LORD PRESIDENT.—I think the defender ought to be asked does not instruct the debt; and, in regard to the writ while being equivalent to the writ of the defender, it is not proved mentioned the entry of the debt which is there made. It may be made by the defender's trustee, merely on the information of him in making up the state which was submitted to the defender. the defender had made observations upon some of the items have not been recovered, so as to be laid before the Court. I vations may have consisted of objections to this very debt. run, and the onus lies on the pursuer to take off the effect of what he has failed to do this, and that the Court should assoilzie the

LORD GILLIES.—As the case at present stands, I am of the only doubt is whether there ought not to be farther inquiry be it. The fact whether the state, containing the entry of that debt writing of the defender's trustee, seems still open to be expiscated

It was understood that, after some discussion at the bar

of making farther inquiry, both parties intimated, that they were No. 294  
 fied to take a judgment on the case as it stood.

June 27, 18  
 Dundas v.  
 Robertson.

LORD COREHOUSE.—I think the defender should be assoilzied. Among other  
 ands I may notice the disappearance of the trust-deed, which may have con-  
 d most important conditions in reference to a question like this. The mere  
 action of that excerpt from the state of debts will not, in the circumstances,  
 off the effect of prescription. The production of the trust-deed would, I  
 hend, have been desirable and necessary in order to show how it bears on the

The oath and the state, taken by themselves, do not afford sufficient evi-  
 , to overcome the plea of prescription.

LORD MACKENZIE.—I think the defender must be assoilzied. The oath just  
 nts to this, that the defender knows nothing about the debt. That will not  
 out the pursuer's case, and he accordingly fails in his action.

THE COURT adhered, and awarded additional expenses against the pursuer.

P. CAMPBELL, S.S.C.—J. RONALD, S.S.C.—Agents.

LORD DUNDAS, Advocate.—*Sol.-Gen. Rutherford—Speirs.*

No. 295

JOHN ROBERTSON, Respondent.—*G. G. Bell.*

*Teinds—Titular—Superior and Vassal.*—The titular of the parsonage teinds  
 parish was also superior of certain lands within the parish: he feued out the  
 and teinds together, for payment of a cumulo feu-duty; the minister of the  
 b, titular of the vicarage teinds, had always levied them himself: in a subsequent  
 entation the minister gave up a proven rental, including both parsonage and  
 age teinds, and the Court modified a stipend without drawing any distinction  
 een these two classes of teinds, which apparently exhausted the whole of both  
 em: in the locality, the above-mentioned vassal was localled on for 15s. 5d.  
 ipend, exhausting the whole parsonage and vicarage teinds of his lands; by a  
 ss of valuation the respective proportions of parsonage and vicarage teind  
 fixed at 11s. 10 $\frac{1}{2}$ d. for parsonage, and 3s. 6 $\frac{1}{2}$ d. for vicarage; the vassal  
 nto arrears of the cumulo feu-duty, and the superior raised an action for the  
 nt, deducting the annual sum of 11s. 10 $\frac{1}{2}$ d., being the whole parsonage  
 s; the vassal claimed deduction of the entire annual sum of 15s. 5d. localled  
 m for stipend: Held that as the superior and titular had never feued out the  
 age teind, but only the parsonage, and had no concern with the vicarage teind,  
 as not bound to make any farther deduction from the cumulo feu-duty than  
 um of 11s. 10 $\frac{1}{2}$ d., being the parsonage teinds, and decree pronounced accord-  
 for the full balance claimed.

LORD DUNDAS was patron and titular of the parsonage teinds of the June 27, 18  
 ed parishes of Birsay and Harray, in Orkney. He was also superior  
 rious lands in these parishes, including the lands of Corrigall, which  
 feued out to Mrs Christian Robertson or Johnstone. Both the  
 and the parsonage teinds were feued out together for a cumulo feu-  
 . From time immemorial the ipsa corpora of the vicarage teinds of  
 nited parishes were levied by the minister from the respective occu-  
 of the lands.

1st Division  
 L.

rior to 1805, the stipend of these parishes consisted of £22, 4s. 5 $\frac{1}{2}$ d.

ments, the whole out of the teinds generally, and without between the parsonage and vicarage teinds, both of which by the minister in the proven rental. Subsequently to doubted whether the whole teind, parsonage or vicarage the stipend, a valuation of the parsonage, and of the respectively, was led by Lord Dundas. The minister after the valuation, but it was not challenged by any other party upon by the heritors amongst themselves. The property under the augmentation 1822, which was localised by an act of locality on the lands of Corrigall, was 15s. 5d., which, that process, "exhausted the whole parsonage and vicarage rigall." Under the process of valuation, it appeared that the teind, payable out of the lands of Corrigall, on an average was 8s. 6½d., leaving 11s. 10½d. for parsonage teind.

In 1832, Lord Dundas brought an action before the Sheriff against Mrs Robertson for payment of £32, 12s. 1½d. arrears of the feu-duties payable out of the said lands of other lands belonging to her. Mrs Robertson had paid 15s. 5d. localised on Corrigall, and Lord Dundas, in making account of arrears, allowed a deduction of the annual sum out of the cumulo feu-duty, payable to him, in respect of for parsonage teind, and, if paid to him, would have been in his hands, liable to be localised on primarily for payment to which purpose Mrs Robertson had already applied it. In payment of the stipend, his Lordship admitted that she acquired relief against him to which he gave effect by deducting it

hing to take off the effect of the valuation of the vicarage teind at  $2\frac{1}{2}$ d., which, in the process of valuation, had been deponed to by the minister, who levied it from her; or to take off the effect of the express agreement in the locality that the sum of 15s. 5d. exhausted the whole of the parsonage and the vicarage teind of Corrigall. Lord Dundas fore pleaded that as he had never possessed any right to the vicarage, and had never feued it out, or received any part of the cumulo feu-duty on account of it, there was nothing beyond the sum of 11s.  $5\frac{1}{2}$ d., the duty for parsonage teind, which could be deducted and set off at the arrears of cumulo feu-duty, due to him: that the balance of stipend, consisted of the vicarage teind, of which the minister himself was the titular, and which Mrs Robertson had always paid, and must pay, but any right of relief against any party.

No. 295.

June 27, 1837.

Dundas v.  
Robertson.

The Sheriff, considering that there was not sufficient evidence that any of the stipend of 15s. 5d. was imposed on account of vicarage teind, that the whole of that sum appeared to be imposed on account of parsonage teind, gave effect to the pleas of Mrs Robertson, and decerned for such balance as remained after making the deduction of the whole of the sum of 15s. 5d. during the years for which the arrears were due.

Lord Dundas brought an advocacy, in which a new record was made and the process of augmentation in 1822, and the process of valuation were specially examined and referred to.

The Lord Ordinary then “sustained the reasons of advocacy, advocated the cause, and in the original action repelled the defences, and decreed in terms of the libel.”

A reclaiming note was presented by John Robertson, the representative of Mrs Robertson, who had died during the dependence of the case.

THE PRESIDENT.—I think the interlocutor of the Lord Ordinary is well founded. Lord Dundas, neither de jure had a right to draw the vicarage teinds, in fact, drew them. The vicarage teind of the lands of Corrigall has been valued at 3s.  $6\frac{1}{2}$ d. The whole teind, including parsonage and vicarage, is valued at 15s. 5d. From that amount the vicarage teind should be deducted, and the balance, being parsonage teind, forms a good set-off against the claim of Lord Dundas, as is admitted by his Lordship. But the amount paid for vicarage teind, for which his Lordship is not liable. He never feued out the vicarage teind to the respondent, or received any part of the cumulo feu-duty on account of it.

THE COREHOUSE.—I am also of opinion that the interlocutor of the Lord Ordinary should be adhered to. And this does not appear to me to be a case requiring much difficulty. There were two distinct benefices which must be valued separately—the parsonage and the vicarage teinds. Lord Dundas was not the titular of the parsonage teinds; and the minister was titular of the vicarage teinds. In reference to their liability for stipend, the vicarage teinds, in the hands of the



as titular, drew the ipsa corpora, conform to use and wont. augmentation was granted, apparently exhausting the whole which, the Court drew no distinction between the parsonage. It is true that, on this occasion, the interlocutor did not express, in 1805, that the minister should draw the ipsa corpora of the lands that did not by any means prevent the vicarage teind, which was in the hands of the titular, from being liable for stipend, just as before the free parsonage teinds. The proportion of stipend, being 11s. 10½d. at Corrigall, was due partly for parsonage and partly for vicarage. In the process of valuation it has been ascertained that 3s. 6½d. was due for vicarage, leaving 11s. 10½d. for parsonage teinds. And though the minister reduced the valuation, so far as affecting his interests, its effect was not among the heritors who were parties to it, including the advocator. But as the cumulo feu-duty, payable by the respondent to the superior, on account of teinds, as well as lands; and, in so far as it was due, in the situation of free teind in the hands of the titular liable for stipend, the respondent is confessedly entitled to the arrears of cumulo feu-duty, corresponding to 11s. 10½d. per annum. The whole sum payable by the respondent on account of parsonage and vicarage teinds is 11s. 10½d. The only question is, whether, in ascertaining the balance of arrears of cumulo feu-duty, due by the respondent, to his superior, the advocator, he is entitled to deduct not only the sum of 11s. 10½d., corresponding to the parsonage teinds, but also the sum of 3s. 6½d., corresponding to the vicarage teinds. The vicarage teinds were always levied by the minister himself from the respondents and decessors, and I can perceive no ground whatever for laying the burden upon the advocator directly or indirectly. I am, therefore, of opinion that the Court should adhere to the interlocutor of the Lord Ordinary.

LORDS GILLIES and MACKENZIE concurred.

THE COURT accordingly adhered.

KERR and DICKSON, W. S., Advocator's Agents — PETER CROOKS, W. S., 1

**BRODIE and OTHERS (Shirreff's Trustees), Raisers and Claimants.—Sol.-Gen. Rutherford—Walker.** No. 296.

**ADAM WILSON and OTHERS, Claimants.—Wilson.**

June 27, 1837  
Brodie v.  
Wilson.

**Retention—Expenses.**—1. Where the holder of a fund, due to a party, possesses a right of retention as against that party, such right is equally against the arresting creditor of that party. 2. Circumstances in which it was applied in favour of trustees, holders of a legacy due to a party who was put to them in improper litigation, and was subjected to expenses; the trustees were not entitled to retain these expenses out of the legacy, in a question with the party's arresting creditors, though part of the expenses was incurred, and the whole of the expenses was pronounced, only after the arrestments had been used.

late James Shirreff of Bastleridge executed a trust-disposition and settlement, conveying his whole heritable and moveable estate to George Cockburn, advocate, and others, as trustees and executors. By the settlement the trustees were directed, inter alia, to pay a legacy of £1000 to the testator's nephew and heir-at-law John Shirreff. James Shirreff died in 1834. In October following, the trustees raised a multiplepinding, calling all the legatees and beneficiaries under the trust, and declaring that John Shirreff was threatening an action of reduction of the settlement, and also that several creditors, or pretended creditors, of the testator, had used arrestments in their hands, so as to interpel them from paying the legacy. John Shirreff raised an action of reduction of the settlement, which he afterwards, in July, 1835, abandoned. After paying the expenses incurred by the trustees in that action, he brought a new action of reduction, which was tried before a jury on 19th July, 1836, and a verdict was found for the trustees. On November 24, 1836, the Court pronounced this interlocutor:—"Apply the verdict in this case, and, in consequence thereof, assoilzie the defenders from the whole conclusions of the pleadings; find the pursuer liable to the defenders in expenses; and order an account thereof to be given in, &c." On December 6, an order was pronounced, approving of the auditor's report, and decreeing for £164, 2s. 5d. as the taxed expenses.

June 27, 1837  
1st Division  
Ld. Cockburn  
R.

On 9th January, 1836, arrestments had been used in the hands of the trustees by Adam Wilson, S.S.C., as holder of a promissory note for £1000, subscribed to him by John Shirreff. And in March, 1836, he used arrestments, as the holder of two acceptances of John Shirreff for £1000 each. There were other creditors who had used similar diligence. In these circumstances a competition arose in the multiplepinding between the trustees, who claimed a right of retention of the sum of £164, 2s. 5d., being the taxed expenses, out of the legacy due to John Shirreff, and the arresting creditors, who contended that such right could not prevent their diligence from attaching the whole legacy. The Court decided, that, even if the whole expenses had been incurred prior

arresting creditor to transfer to himself a greater right than a common debtor. Such creditor might plead as high as he could do, but no higher.

The Lord Ordinary "having heard parties' procurators of the arresting creditors of John Shirreff, found, that these creditors for the legacy due to the said John Shirreff are not entitled to deduct the expenses for which they are liable against him."

The trustees reclaimed.

LORD PRESIDENT.—My only difficulty as to this case arises from the circumstance that the expenses incurred by the trustees, were incurred in the settlement of the deceased James Shirreff. The whole beneficiaries of the trust were benefited by that defence, and there might be some ground for holding that the expenses should come out of the legacy and should not form a preferable claim against the legacy of John Shirreff by effect of postponing his arresting creditors. But I have been of opinion that this plea is not sufficient; and, laying it aside, the question comes to this:—A party holding an intimated assignation, is preferable to any other party. But the party who is the actual holder of a fund, under a right of intimation, is preferable to any subsequent assignation, however duly intimated. Therefore, under their right of retention of the legacy, the arresting creditors of the legatee, and the interlocutor of the Lord Ordinary are accordingly.

LORD GILLIES.—I think the interlocutor should be altered so that there is any difficulty in the case. The arresting creditor is not to be, in a better condition than the common debtor. He may

**D MACKENZIE.**—I am of the same opinion. The trustees were holders of No. 296.  
and an unjust action was brought against them by the party in right of that  
That party was found liable in expenses, and I cannot doubt, for a moment, <sup>June 27, 1837.</sup>  
ight of retention as against him. But if it be good against him, it is equally <sup>Wight.</sup>  
ainst any arrestments used by his creditors.

**D COREHOUSE.**—I am of the same opinion. The arrester is not, and he  
be, possessed of a higher right than that of the common debtor.

**THE COURT** accordingly altered, and pronounced this interlocutor :—“ Recal  
the interlocutor complained against ; and find that, in settling with the  
arresting creditors of John Shirreff the pursuers are entitled to deduct the  
expenses for which they obtained decree against him, and decern : and find  
also that the creditors are liable in the expenses of the present action, and  
allow an account thereof, &c.”

**WALKER, RICHARDSON, and MELVILLE, W.S.—J. KNOX, S.S.C.—Agents.**

**JOHN WIGHT and OTHERS, Petitioners.—Fletcher.**

No. 297.

**For Loco Tutoris—Process.**—Where a pupil, resident in England, was pos-  
of a heritable estate in Scotland, and all the next of kin were resident  
; the Court, in the circumstances and on the application of his mother and  
stees and guardians under an English settlement of his deceased father,  
ed a factor loco tutoris, after the usual intimation on the walls and in the  
book.

**The late Sir William Grant of Beldorney, in Banffshire, settled that** <sup>June 27, 1837.</sup>  
**in liferent on his brother Major John Grant of Dawlish, Devon-**  
**and in fee on William James Grant, the eldest son of Major** <sup>1st Division.</sup>  
**. Sir William was survived by his brother, who was resident in**  
**nd. In April, 1836, he executed a last will and testament, in the**  
**th form, in which, after narrating his desire “ to appoint trustees to**  
**re, so far as by law they are empowered to do, and to receive the**  
**of the said estate in Scotland during the minority of my said son,**  
**he attains the age of 21 years, in case he should be under that age**  
**time of my decease,” the instrument proceeded, “ Now, I do by**  
**y last will and testament, nominate and appoint John Wight, Esq.**  
**r, of Teignmouth ; Mr Abraham Vicary, senior, draper, of Dawlish**  
**id ; and my dear wife, Sarah Grant, to be guardians and trustees**  
**said son during his minority, and until he shall attain his said age**  
**years,” &c.**

**Or Grant died in December following. His trustees presented a**  
**to the Court, stating that they were doubtful of their authority**  
**in Scotland as tutors and curators of the pupil William James**  
**. under the above testamentary nomination, especially as Major**  
**interest in Beldorney was only a liferent ; and that it was expe-**  
**to have a factor loco tutoris appointed. They suggested Peter**  
**on, solicitor in Banff, for this office. The petition also stated that**

Patton.

JOHN MENZIES, Defender.—*D. F. Hope-*

*Reparation—Seduction—Proof—Summons.*—1. In an marriage with an alternative conclusion for damages as for held insufficient to support such alternative conclusion.—2 port such conclusion, the summons ought to contain a ps seductive arts having been used.

June 27, 1837. SEQUEL of the case reported ante, XIV. 427. T  
2d Division. Stewart, having failed in her conclusion for declarat  
Lord Jeffrey. in her alternative claim for damages as for seduction  
T. tained no particular statement with reference to t  
founded principally upon two letters (in addition to  
adduced in the declarator of marriage) admitted to  
defender Menzies. In the first, which was address  
the parish on the occasion of the birth of Stewart's l  
ing expressions occurred; "I am so annoyed and  
altogether, that I can scarcely say or tell you any th  
to be baptised as soon as possible, and I have aske  
sponsor. I will pay all the fines and things that a  
letting me know as soon as possible all the different  
what would be the amount expected. I beg of you n  
any session or thing of that kind, as I was myself th  
again, "I feel for the poor woman more than it is  
tion, when I think of the mischief I have done in d  
ter for ever." In the other letter, which was addre

ing to take you to myself, but there are just two things to be con- No. 298  
 sidered, one is, that all my respectability and connexion with my equals June 27, 1837.  
 has come to an end, and another, that I will lose all the respectability which Stewart v.  
 which my friends at this time pay to me, but that won't be a sufficient excuse Menzies.  
 for destroying you." In this letter he also made offer to settle an  
 annuity on Stewart, and a sum of money on her children, provided she  
 removed to some distance from his property.

The Lord Ordinary found that there was no sufficient proof to support  
 a claim for damages, and accordingly assoilzied the defender there-  
 leaving no expenses due. His Lordship added to his interlocutor  
 the following note.\*

There is no direct evidence (for what Robert Stewart deposes at p. 24 and  
 the pursuer's proof, can scarcely be considered as an exception) as to the  
 nature of the intercourse between the parties, or their behaviour to each other, prior  
 to the time when an illicit connexion must (at the very latest) have begun, viz.,  
 six months previous to the birth of the first child in June 1827 ; and all the  
 evidence is to be found upon, in relation to this most important period, is, that as she  
 was by this time about eighteen months in the defender's family, it is to be  
 inferred that she had all that time resisted his solicitations. But as this assumes,  
 on any intelligible ground, that he had begun his solicitations as soon as she  
 came to his house, it is obvious that no regard whatever can be paid to such a vague  
 and groundless surmise.

The whole case, in short, depends on two admitted letters of the defender, one  
 addressed to the clergyman of the parish, on occasion of the birth of the first child,  
 15th June, 1827 ; the other, and by far the most important to the pur-  
 suer, without any date, but proved, by its contents, to have been written  
 during her second pregnancy, and sometime in spring 1829. Both these letters, the  
 pursuer contends, contain *admissions of seduction* on the part of the defender, and  
 impose a consequent obligation to make her reparation for the injury she had conse-  
 quently sustained ; and the last of them also contains clear traces of a purpose of  
 concealment, and indications that such a connexion had been long contemplated by  
 the defender, which, she says, she is entitled to draw back to the period of their  
 first intercourse, and to assume as the cause of her yielding.

It is impossible to deny that the tenor of these documents gives a certain  
 weight to those allegations, and gives the case somewhat of a painful character, in  
 favour of the defender. But the Lord Ordinary, though he cannot but regret that  
 the merits of the cause could not be sent to the appropriate tribunal of a jury, has  
 held that he should be justified in finding upon this evidence alone that a case  
 for damages had been made out.

The defender's general expressions of self-condemnation, and of his deep feel-  
 ings of ruin and misery he had brought upon the pursuer, though stronger than  
 would perhaps be natural, in a case of *mutual* transgression, do not necessarily  
 prove that he was conscious of any thing which our law would consider as seduc-  
 tion ; nor is, any artful practices, or false insinuations, held out to entrap a reso-  
 lute ;—any deliberate plan to corrupt the principles or inflame the passions of an  
 experienced female ; or even any long and persevering solicitations after  
 repulse and resistance. In almost every case where a young woman gives  
 herself up to temptation, the man is the aggressor, and in fact, as well as in  
 law, decidedly the most to blame ; while, in every case almost without excep-  
 tion, the woman is incomparably the greatest sufferer. Yet it would be of perilous  
 consequence to hold that every woman, upon her first lapse from virtue, should be  
 obliged to recover damages as for seduction, from her paramour. But if this could  
 be proved, it would scarcely be less perilous to hold the feeling expression of



which the defender chiefly insists, as excluding the presumptions of intended marriage which have formed the chief in most of the decided cases, would have become of no consequence had been such proof of actual *matrimonial communings*, which she thinks would certainly have been afforded by a letter of this kind, intimating, and connected, as it then would have been, with the consequences of the pursuer's too implicit reliance on the defender. The difficulty, however, is in the *dates*. In the long interval when their matrimonial contemplations may have originated, the pursuer yielded either to the mere request or to the importunities of the defender. In that interval she had become the mother of a child; she was about to give birth to another; she had entered into a cohabitation with him; and had become an object of more constant solicitude than there is any proof of her having been before she desires. It is believed to be far more common for men to take up purposes of marriage with the mothers of their illegitimate children, whom they had not previously entertained, or professed any intention of marrying, than for women of inferior rank, to seduce men of any description to reduce women of inferior rank, to marriage; and therefore, when the *only proofs* of such pursuit are the birth of children, the Lord Ordinary thinks he is bound to hold that they do not amount to *ex eo quod plerumque fit*, and to hold that they do not amount to a sufficient inducement held out to give effect to amorous solicitation.

“It is upon *this* ground that the Lord Ordinary rejects the plea. He is not at all moved by the reference in the second letter to MacDougall, to which she consented to be an accessory, but which is chiefly with the defender, or by his suggestion, that the letter in that letter may have been dictated, rather by gratitude for an unworthy transaction, than by any original attachment. The terms of the letter are exclusive of such a supposition. Neither does it give the pursuer of her right to reparation. If there was seduction, on account of her improper conduct in suppressing the truth, during the discussion of the declaratory conclusions, it was proved that she had acknowledged in the statements of that



to the conclusion for damages, I think there is as little ground for it as for the No. 298.  
er.

LORD JUSTICE-CLERK.—The question is, whether we are warranted in giving <sup>June 27, 1837</sup> <sup>Williamson's</sup> damages on the single ground of seduction. There must be a basis on which this <sup>Executors v.</sup> <sup>Fraser.</sup> action is to rest, as that seductive arts had been used. There is no element to this effect, but simply the alternative conclusion for damages as for action. As to the defender's letter to the clergyman, it is written with a feeling that he wished the blame to fall as lightly as possible on the girl. There is no defence in either of the letters that he acknowledges himself guilty of seductive

LORDS MEADOWBANK and MEDWYN having concurred,

THE COURT adhered.

GRIG and MORTON, W.S.—JAMES FERCUSSON, W.S.—Agents.

WILLIAMSON'S EXECUTORS, Pursuers.—*Monro.*

No. 299.

A. T. FRASER, Defender.—*Maitland.*

*Process—Jury Trial—Issue.*—No reclaiming note being presented within 10 days after an interlocutor of the Lord Ordinary settling an issue—an alteration of the issue to the effect of inserting a sum of interest in addition to a principal therein mentioned (the alleged error not being a clerical mistake), held to be incompetent without consent of parties, although the issue had not been signed by Judge.

In this case an issue had been prepared by the jury-clerks, and approved of by the Lord Ordinary, who pronounced the usual interlocutor settling the issue. No reclaiming note was presented within 10 days, <sup>June 27, 1837.</sup> <sup>2d Division.</sup> <sup>Ld. Moncreiff.</sup> the issue was engrossed, in order to be signed by his Lordship. <sup>Jury Cause.</sup> After, but before it was signed, one of the parties discovered that interest of the principal sum in question had been omitted to be mentioned in the issue, and applied to the Lord Ordinary to have this altered, which was not, however, alleged to have been a clerical mistake, stated. His Lordship having doubts as to his power under the Act 20. IV. c. 120, § 31, to allow the proposed alteration in the issue, referred the point to the Court, who were of opinion that he could not, without consent of parties, make any alteration on the issue after pronouncing the interlocutor settling it.

Consequence, however, of the Court having passed an Act of Seder-

in this young woman on the world without some provision. There may be a case of *turpis causa*, if the intercourse continued after the date of the last letter, but then terminated, he does not see why action should not lie for the provision stipulated; at all events, he has no idea of allowing any expenses in process.

No. 300.

WILLIAM YOUNG, Pursuer.—*Robertson*—  
ANDREW PATON BELL, Defender.—*McNeil*

June 27, 1837. *Bill of Exchange*.—This was an action by the acc  
relieved of his liability as such on the ground of v  
2<sup>D</sup> DIVISION. Court held by a majority that there were no circum  
Ld. Jeffrey. take it out of the rule of law that want of value cou  
F. the writ or oath of the holder, and this the pursuer h  
they accordingly adhered to an interlocutor of the I  
izing the defender.

JAMES FREDIE, W.S.—W. and J. B. DOUGLAS, W.S.

No. 301.

COMMERCIAL BANK, Pursuers.—*M*  
THOMAS PATON, Defender.—*Penn*

*Bill of Exchange—Vitiatio*.—A party, who was trust  
promissory-note, bearing to be "for value in trust-account  
ing the trust, and there having been ex post facto added  
stances in which held that such alteration did not import a

June 28, 1837. THE defender, Paton, was acting trustee on tl  
2<sup>D</sup> DIVISION. Pentland, under a voluntary trust-deed, one San  
Ld. Jeffrey. appointed trustee in succession. On 13th June, 18  
T.

th personally and as trustees of Pentland, for payment of the No. 301.

put in defences, and pleaded, that the bill, having been vitiated  
ue, by a material alteration made without the assent of the  
; was thereby rendered null and void, both at common law  
er the Stamp Acts; and that the action, being expressly laid on  
could not be maintained. He moreover alleged, that the bill in  
had no connexion with Pentland's affairs, and offered to prove,  
e jure, that it was not meant to be applied to Pentland's trust,  
; the proceeds had not been credited to that trust.

June 28, 183  
Commercial  
Bank v. Paton

meet this allegation, the Bank produced a state of outstanding  
hich was holograph of Paton, beginning with these words:—  
mercial Bank bills on account of Pentland's trust—T. Paton,  
16s.," and then enumerating various other bills.

, without attempting to deny this document, stated it to be "a  
tting of temporary accommodations."

Lord Ordinary decerned in terms of the libel, and found expenses  
ding the subjoined note.\*

The promissory-note having been originally granted, according to the  
s own admission, not simply for value received, but '*for value in  
ount,*' the Lord Ordinary is not of opinion that the mere specification  
by an ex post facto operation) of *what trust it was* that was intended,  
ounted to the fabrication of a new document, in the sense of the stamp  
to such a variance in the granter's obligation as to make him no longer  
y his signature, provided always that the specification so added can be  
have been according to the real truth of the transaction. To make a  
ument out of an old one, or to alter the nature and tenor of an original  
n, it would seem to be necessary that there should have been an original  
t and obligation of a definite and precise tenor, to which effect might have  
en according to that tenor, but for the variation. In this case, however,  
nal document was perfectly vague and indefinite; and all that was done  
ive it that necessary particularity, without which it could not have been  
. It was evidently intended to give those who discounted it the security  
trust-funds or estate; but, without specifying what that estate was, it is  
y could practically have no such benefit. If the name of the trust truly  
was added, therefore, this was not an *alteration*, but a mere *completion*  
riginal document; and brought in no new party, but only took away a  
ambiguity as to who the original party was. It has always been compe-  
ording to our law, to fill up the name of the payee of a bill, though left  
en subscribed by the acceptor, or even to fill up a whole bill above his  
bscription, and such appears also to be the law of England; and although  
cases there may be fuller evidence from the occurrence of a *blank* of the  
ring contemplated such filling up, yet the principle truly applies to such  
the present, for here also the instrument is signed in an *imperfect* state,  
ect cannot be given to it without some filling up, there is the same im-  
rant so to fill it up as in the other. It is in all respects parallel to the  
of a *Christian* name, or a designation in a bill or promissory-note, which,  
ecessary to give it effect as an actionable document, had been accident-  
ted, and to which, if done according to the truth of the transaction, and  
d meaning of the parties, it is thought no possible objection could be

own hand; and, 2d, That with reference either to his actual writing, or to the nature of the case, he had not averred or aversantly.

" 1st, The note in question, for the precise sum of £1675, 16s. issued with the Commercial Bank, who now pursue the grantor, Pentlands. The defence is, that it has been altered so as to bind individually, but as trustee for Pentland, with whose affairs it is in connexion. Now, to meet this allegation, the pursuers produce standing bills *holograph of Paton himself*, which begins with the words in his writing:—'Commercial Bank bills on account of Pentland's £1675, 16s.,' and then proceeds to enumerate several other bills. The defender makes no attempt to reduce or deny this document, and all that the defender says about it is, 'that it was a mere jotting of temporary account, and that the money really never was accounted for to the trust of Pentland.'

" 2d, In the face of this written evidence, and of the admission that the payee of the note, was connected with him in Pentland's office, named as the subsidiary trustee on that estate, the defender has produced *any written evidence* not required any diligence for the recovery of the note, but claimed absolver at the debate upon the naked ground of a general averment, with a general offer to prove, prout de jure, that it was not the trust that the note was meant to be applied, and that, in fact, it was not been credited to that trust. The latter allegation the Lord Ordinary receives to be plainly irrelevant in a question with the pursuers—*it cannot be proved scripto*, and in the face of his own holograph, he thinks the defender can never be allowed to prove the other by *parole*.

" But the whole of his allegation, when carefully looked into, is found to be irrelevant for want of necessary specification on points where the defender offers an apology for vagueness. He says confidently enough, that the note was issued on Pentland's trust was not 'the trust-account' against which the note was issued, but has nowhere ventured to state *what other trust-account it was*. He says that he and Mr Sandeman were jointly engaged in the business of the trust, and that in the course of their transactions much accommodation was done between them. But though repeatedly called upon to name any of the accounts of which they had a joint management except Pentland's, he was not willing to comply, and to this hour maintains a politic silence on the subject. The Lord Ordinary, therefore, humbly conceives that he has made no allusion to a vital part of the case, which is so qualified as to be remitted to proof.

" In thus deciding the case against the defender without a remission, the Lord Ordinary has not forgotten that he is bound to assume the truth of the facts offered to prove in a competent manner, and accordingly he has granted several allegations positively denied by the pursuers, and which, if true, they say they are ready to disprove. In particular, he has assumed that the words, 'for Mr Pentland,' were not in the note when it was issued, or that he ever knew of their being there till after the note was paid upon for payment, and that they were not there when it was first issued.

GLENLEE.—I think we may with great safety refuse the note.

No. 301.

Their Lordships adhered, finding additional expenses due.

June 28, 183  
Cameron v.  
Young.

J. A. CAMPBELL, W.S.—ROY and WOOD, W.S.—Agents.

R CAMERON, Claimant.—*Sol.-Gen. Rutherford—J. Anderson.*

No. 302.

ANE YOUNG and OTHERS, Claimants.—*D. F. Hope—Anderson.*

Competing.

*and and Wife—Marriage-Contract—Fee and Liferent.*—Terms of an al contract which held to import that the fee of a sum conveyed to the as tocher, but sub modo, was vested in the representatives of the prede- wife.

e year 1826, the claimant, Peter Cameron, who had been pre- June 28, 183  
married and had a family, entered into a second marriage with 2D DIVISION.  
at Donaldson, sister of the other claimant, Mrs Young. By the Lord Jeffrey.  
of marriage, which was antenuptial, Cameron, with consent  
children of his first marriage, in consideration of Margaret  
on's portion, and for making a suitable provision for her and  
dren of the present marriage, bound and obliged himself, his  
d executors, to settle and secure the sum of £2500, or such addi-  
m, in case of a depreciation of the rate of interest, as should  
a free yearly annuity of £120; and, for that purpose, he con-  
signed, and disposed the contents of a bill for £1000 grant-  
imself; "which principal sum of £1000 sterling, contained in  
bill, together with the said Margaret Donaldson's portion of  
sterling hereafter made over for the like purpose, amounting to-  
o the aforesaid principal sum of £2400 sterling, the said Peter  
a, with the consent, concurrence, and approbation of the said

but were added at the time with the knowledge and on the suggestion  
rsuers themselves. He has likewise assumed that, in point of fact, the  
were not accounted for to Pentland's trust, and that there is no mention  
te in the trust-accounts. Holding all these things to be true, he has yet  
esitation, on the grounds above stated, in decerning in terms of the libel,  
enses.

land has sisted himself by a minute, but has lodged no separate defences,  
is only to say that the proceeds of the note never were applied for the  
f his estate, and that, therefore, that estate should not be liable for their  
it. If the fact be so, he and his creditors have great cause to complain  
fenders; but the allegation is palpably irrelevant as against the pursuers,  
defences have been rightly overruled. Paton was avowedly his trustee,  
power to bind his estate to the last farthing of its value, and if he and  
r-trustees discounted a bill 'for value in *that* trust-account,' the onerous  
f that bill must have access to it for payment."

£1400 sterling should go to the heirs, executors, said Margaret Donaldson after her death." It was in case Cameron should predecease before these and secured, without there being a child procreated that the above sum of £2400 should not be equal to an annuity of £120, the obligations come under on the part of Cameron and his foresaids, should notwithstanding be binding and effectual, "to the effect of providing and effectually securing to Margaret Donaldson in a free yearly annuity of £120 for life, the interest of her own portion of £1400 sterling as part of her annuity; and in the said events also the foresaid principal sum of £1400 sterling, her own disposal, and to go to her heirs, executors, or assigns whatever sums or subjects she may succeed or acquire by matrimony, as after provided for." These provisions were made in full of her legal rights; and it should be in Cameron's power to divide and dispose of the said sum of £2400, among the children to be procreated of him and Margaret Donaldson, in such manner as he should think proper, among the children to be procreated of him and Margaret Donaldson; and in case of his having done so, Margaret Donaldson should possess the said sum of £2400, in writing under her hand, while she continued unmarried; and in case of her death, the said sum was, to be divided equally among the children of the marriage by either of the parents, the fee of this sum was, to be divided equally among the children of the marriage.

For these causes, Margaret Donaldson, on the 10th day of October 1840, did give and grant unto Cameron and his foresaids, "for the special purpose of the said principal sum of £1400," &c., in order that

ve him, and to the child or children to be procreated of the marriage in fee; whom failing, to the said Margaret Donaldson's tutors, and assignees." It was farther provided, "that although the marriage shall happen to dissolve within year and day, yet, if a living child being procreated, yet, that the whole provision contained, conceived in favour of either party, shall take effect, any law or practice to the contrary notwithstanding, excepting allennarly that, in the event of the said Margaret predeceasing the said Peter Cameron within the foresaid year, without leaving a child procreated of the marriage, that the £900 sterling of her said portion shall fall to, and belong to her nearest of kin, and for the said space, and to the amount foresaid, she renounces the power of testing, assigning, and conveying, to the use of her nearest of kin, though she reserves the power of doing otherwise, if she shall be so inclined; and she also reserves to herself the power of participating and dividing the said £900 sterling among her nearest of kin, in such shares as she may see proper by any order under her hand."

No. 30

June 28, 11

Cameron v

Young.

, Mrs Cameron's portion of £1400 was invested on bond to Hans Leslie of Denlugas, with consent of the parties named in the contract, to superintend the investment thereof. After narrating the facts of the contract, &c., the bond proceeded:—"Therefore the said Peter Cameron has instantly made payment to me of the foresaid principal £1400, whereof I hereby acknowledge the receipt, renouncing all claim to the contrary, which sum of £1400 sterling I, the said Hans Leslie, hereby bind and oblige myself, and my heirs, executors, and assigns, whomsoever, to content and pay to the said Peter Cameron, or to the said Margaret Donaldson alias Cameron, and the longest of them two, in conjunct fee and liferent, and for her liferent use, if she shall happen to survive him, and to the child or children to be procreated of the marriage between them in fee; whom failing, to the said Margaret Donaldson, or to her executors, or assignees of the said Margaret Donaldson alias Cameron, after her death."

, Mrs Cameron died, leaving no children of the marriage, and having executed any settlement. Thereafter doubts having arisen whether her next of kin or the surviving husband had right to the sum in Mr Leslie's bond, he brought a process of multiple-petition to try the question.

Report of his claim to the unlimited disposal of the fund in medio, pleaded—

that the fund in medio having been expressly declared by the contract to be her "portion" of the wife, and having been conveyed to the husband and wife in conjunct fee and liferent, and for her liferent use

contract, on the failure of the children of the marriage executors, and assignees, the right of Cameron was to be liferent, and the fee, in the event that has happened to her nearest of kin.

2. The bond by Mr Leslie having been expressly vestment of Mrs Cameron's own fortune, and under and provisions contained in the marriage-contract, in respective rights of the contracting parties as previously settled.

The Lord Ordinary pronounced the following interdict subjoined note:—" Finds, that, by the conception of

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<sup>1</sup> Angus v. Ninian, 1733, as reported by Elchies, v. Fiar, N. Henderson, Jan. 20, 1790 (F.C.)

\* "The £1400 in this case came from the wife, and it was by the marriage-contract that it should be vested, at the sight of her fortune, payable to the spouses, in conjunct fee and liferent, and the marriage in fee; whom failing, to the heirs or assignees of the wife. It is thought to be clear, that if it was not given as *tocher* or nomination, it would carry the fee to the wife. But the specialty here is *tocher*, though *sub modo*, and that there are provisions in the contract to import that it was *truly the intention and understanding of the parties* that the fee should be in the wife. There is no question here with third parties, but only as to the rights of the contracting parties, the representatives of the deceased wife being the only competitors of the husband. There can be no difficulty, therefore, from mere legal machinery, in giving effect to what may appear to have been the intention.

"The Lord Ordinary assumes that looking merely to the terms



between the claimant, Peter Cameron and Margaret Donald- No. 302  
ceased, and according to the true construction thereof, the fee of

June 28, 181  
Cameron v.  
Young.

the contract begins, as is usual, with the obligations undertaken by the husband, the first and principal of which is that he shall secure the wife in an annuity of £120 in the event of her survivance, and for this purpose shall vest of his own, 'together with her portion of £1400,' and add as much more as may be necessary to yield that income; and then, and on the other part, the husband gives the said portion of £1400 to the husband, not, however, absolutely, but only under the destination mentioned, but 'for the special purpose above mentioned,' that is, to form part of the fund to be secured for her own jointure. It may be said, therefore, that this sum was ever given to the husband, and that it was *bona onera matrimonii*, or was placed *sub jure mariti*, or became part of the fund in communion, as in the case of an ordinary tocher. It is not, however, to be considered that the Lord Ordinary *rests* his judgment, though it is to be altogether overlooked in expiscating the true meaning of the whole instrument.

There are three provisions upon which he principally relies as fixing that destination:—1st, That for the case of the husband dying before the £1400 was paid, or when it (and the £1000) was not yielding the full annuity of £120; 2nd, That fixing the destination of any acquisitions or succession by the wife *stante matrimonio*; and, 3d, That regulating the effect of the dissolution of the marriage year and day, and without a living child. It is his impression that it is impossible to account for the terms of *any* of those provisions on any other supposition than that the parties clearly understood and intended that the fee of this fund should be in the wife.

It is provided that if the husband shall predecease (for it is thus both agreed that a clerical omission must be supplied) before the said sum of £1400 is invested and secured, or when it shall not yield a full income of £120, his heirs shall notwithstanding be bound to secure the widow in such an annuity; 'and in the said events she shall *still* have the said principal sum of £1400 of her own portion at *her own disposal, and to go to her heirs, executors, administrators, assigns, as well as whatever sums or subjects she may succeed to or acquire by her matrimonial rights, as after provided.*' Now, it seems impossible to reconcile either the usage or the existence of this provision, with any thing but a clear understanding on all hands, that the fee of £1400 had been in every other case previously secured to the wife, and at her disposal for her assigns. The phrase is, that, even in the special cases mentioned, she had not the security of the investment stipulated, or though the husband's estate was to be burdened beyond the £1000 for her annuity, she was to have the absolute disposal of that sum for the benefit of her own heirs and assigns. It can scarcely be disputed, that *in those cases* she was to have this fund, and that the fund was to go to her heirs. But it is altogether inconceivable that the parties should have intended this, if, in the other case of the fund being secured and yielding the full annuity, it was all to belong to the husband, and be entirely beyond his control. The cases specified are indeed those in which there was *most reason* for holding that this right and control of her's might be lost or impaired, and it is plainly on this account that they are specified. If she had no deed formally securing the fee to her, it seems to have been ought that her right might have been disputed; and if her husband's heirs had been made to pay more than the £1000 expressly stipulated towards her annuity, they might have objected to her *still* drawing her whole £1400. But it is incomprehensible that she should have a right to draw it only in these special cases.

The inference from the provision as to the wife's acquisitions or successions during the marriage, will have been already anticipated from the concluding words of the last citation from the contract. Her right to the £1400 and to such

as to the marriage dissolving within year and day, and the declaration, that the whole rights and obligations of the parties subsist and be effectual, it adds this remarkable exception, that in the event of the said M. Donaldson predeceasing said space, the sum of £900 of her said portion shall fall to the nearest of kin; and for the said space, and to the amount, restricts her power of testing or assigning to the prejudice of but reserves the power of doing so quoad ultra.' Now, if, up to the end of thirteen months, it had really been understood that she was to go to her husband, is it conceivable that it should have been the event of her dying two months earlier, he should not only not lose his legal right but should actually lose his legal right *even to the liferent* of her portion? If the contract is to be construed with any view to enable him to hold that this was intended when the premature dissolution was to take nothing whatever from the wife's rights under it. It is not a little striking, when it is confined to thus narrowing the *liferent*. But to suppose that it also extended to the total *fi* which, but for this exception, would have remained with him, to be seriously contemplated. As the Lord Ordinary reads the passage, however, the matter is not left to implication, the sum on the whole £1400 after year and day being expressly set for this joint deed of herself and her husband. She restricts her power (thus openly asserted and admitted by both spouses to exist) 'to the amount 'foresaid,' but expressly reserves the said portion, that is, after year and day should be elapsed, and to the whole extent. By putting his name to a deed containing these words, the Lord Ordinary holds the husband signed an express admission that the predeceasing wife disposed of the whole sum now in question.

"The Lord Ordinary rests his judgment on these grounds. His degree strengthened by the fact of there being an express stipulation should have power to fix the shares in which the property should be divided of the marriage, which, if he had been understood to be his, is obviously unnecessary. Considerable weight seems to have been placed on the stipulation in the late case of Miller of Dalswinton, 14th No

on, and therefore ranks and prefers the claimants, Mrs Jane No. 302.  
and others, the representatives of the said Margaret Donaldson, June 29, 183  
fee, and the other claimant, the said Peter Cameron, to the life- Wilson v.  
of the said sum of £1400, and decerns in the ranking and prefer- Lumsdaine.  
accordingly; finds the wife's representatives entitled to expenses."  
Cameron reclaimed.

THE JUSTICE-CLERK.—I am for adhering, and I have no difficulty in arriving  
I consider to be the true construction of this contract. Although both  
put together particular sums to make up a sors, yet it is demonstrated by  
of the whole deed, beginning with the very first clause, that the enixa  
was that the fee of the sum in question should be in Mrs Cameron and  
s.  
other Judges having concurred,

THE COURT adhered, finding additional expenses due.

GORDON AND MACKAY, W.S.—JAMES BENNET, W.S.—Agents.

BERT WILSON, Objector.—*Sol.-Gen. Rutherford—Thomson—* No. 303.  
*Stark.*

JANET LUMSDAINE and JOHN LUMSDAINE (Lumsdaine's Re-  
presentatives), Respondents.—*D. F. Hope—Milne.*

*in Security—Hypothec of Law-Agent—Personal Exception—Competi-*  
in a ranking and sale a competition arose between the third and last heri-  
editor, and a party who both claimed a hypothec over the titles, as law-  
of the debtor, and had also paid certain interests on the two prior heri-  
bts, and been assigned by the prior creditors to their rights; that party  
ed as law-agent of the postponed heritable creditor, in making his loan,  
as agent of the debtor, borrowing the loan:—Held that, in the special  
stances, the law-agent was barred from competing with the heritable cre-  
respect, inter alia, that the law-agent had been aware, at the time when  
was made, that no mere stranger would have lent money on the lands  
former two securities; that it was by means of the agent's personal ac-  
ce with the creditor that the creditor was induced to enter into the loan;  
most the whole loan was applied in retiring obligations in which the agent  
and jointly with the debtor who borrowed the money, or in paying debt  
the borrower to the agent; and that, at the date of the loan, the agent  
n paying, for several years, the annual interests on prior heritable debt,  
also a considerable business-account due to himself by the borrower,  
title-deeds were in his hands, neither of which facts was communicated  
to the lender.

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penses have been given against the husband, partly because the judgment  
upon the ground that the true meaning and intention of his *own deed* was  
ich he has now been disputing, and chiefly because it appears from his  
recently before the action, that he (being a professional person) was indi-  
of opinion that this was its meaning."

thereof, and that the same shall be available to principal sum and interest that may become due thereon bond."

Keltie became involved in pecuniary difficulties, connected with him in extensive bill transactions. Lumsdaine was holder of some of these bills, both Keltie and Wilson were parties to them, and their amount being £736, 17s. 6d. It was suggested that these bills were granted solely for Keltie's behoof, and to the best of Keltie's knowledge, as to the best means of relieving Keltie from his embarrassments, a farther loan on this subject was suggested by Wilson, and Lumsdaine was mentioned as the person to whom it might be obtained. Keltie, in a letter of the 1st of March 1819, referring to this, observed, that Lumsdaine might be able to raise up his money, so that the relief would be but temporary. Wilson, "Would it not be better to try to get it from some other person who has no design of calling it home?" Lumsdaine answered, on March 2, 1819, that Keltie could not get it without obtaining some relief; and he added:—"The only resource was suggested as the only visible resource of relief, and as my previous acquaintance with the gentleman, no such relief could have accrued from that quarter, or any other quarter. No stranger would lend one shilling on the lands after the charges and duties upon them, and as to the time of repayment, no time could be got from any one (even if the security could be got from him, and, indeed, no probability of

whole of the transaction as to the loan of £900, Wilson acted as confidential agent both of the borrower, Keltie, and of the lender, Lumsdaine. No. 303.  
 June 29, 1837.  
 Wilson v. Lumsdaine.

Wilson had part of the title-deeds of Gelvan in his possession prior to the loan by Lumsdaine, and he continued to hold them afterwards. He died in 1823, at which time a considerable business-account was due to Keltie, besides a large account for cash advances, &c. His son and executor, Robert Wilson, writer in Edinburgh, succeeded him as confidential agent both of Keltie and of Lumsdaine, and continued to transact business for them. He also, as representative of George Wilson, was in right of the debt due by Keltie to George Wilson.

For a period of several years \* anterior to the date of Lumsdaine's loan, George Wilson had been paying the interest on the heritable debts affecting the estate of Gelvan. That estate was ultimately cleared by a process of ranking and sale, and after paying the heritable debts prior to that of Lumsdaine, there remained only a fund, stated as amounting to £200, for which a competition arose between him and George Wilson.

Wilson's claim of Robert Wilson was rested, 1st, on his right of hypothec on the title-deeds. This could not be brought into competition with the claim of Mrs Kerr, the creditor next in order before Lumsdaine, as George Wilson had bound himself to warrant her security, as available both for the principal and interest of her loan. But in support of Lumsdaine's right, it was maintained by Robert Wilson, that it should prevail as in the ordinary case of a competition between a law-agent's hypothec and the infestment of a heritable creditor. The business-account to which this ground of preference applied amounted to £500, of which the greater part was incurred to the late George Wilson. Robert Wilson's claim of preference was made, 2dly, on a sum of above £900, being annual interests on the two prior heritable debts for £800 and £600, paid by George Wilson and himself to the prior creditors, and as to which he alleged he was now assigned to the benefit of the reference which would have belonged to these prior creditors if the interests had been unpaid. This sum included a charge of interest on the principal. But as the sum so paid to Berry was stated at £395, and as George Wilson had assigned his bond of £800 to Craigs in 1818, it appeared that the annual interests on Berry's bond must have been paid by George Wilson for a considerable number of years prior to Lumsdaine's loan of £900 in 1819.

Lumsdaine died during the process, and his representatives pleaded, even supposing Wilson to have obtained a good assignation to the benefit of the prior creditors for their interest (which was denied), still the

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There was no closed record in this case, and several facts were, on that account, specifically stated than usual.

by his uncle, Wilson, that did not diminish Wilson's amount. Besides this, almost the entire sum of cash paid to Keltie, as making up the sum of £900, was paid to Wilson, in extinction, pro tanto, of the debt due to Wilson. Wilson thus reaped eminently the benefit of the loan, the confidential agent of Lumsdaine throughout the transaction, debarred from pleading as against Lumsdaine, either an additional burden on the price of the lands, in the shape of the titles, or of an accumulation of the interests on the property, unless he could prove that Lumsdaine was expressly aware of the existence of these burdens. And, separately, in so far as his claim, founded on the hypothec, that was excluded by the fact that the disposition to Lumsdaine assigned the whole of the property to him, for his farther security; and that the possession of the property by Lumsdaine, subsequently to that deed, must be imputed to Lumsdaine, and for behoof of Lumsdaine, to the same effect as if the deeds had been deposited, of even date with the disposition, in the hands of the agent of Lumsdaine, the right of hypothec either for prior or subsequent accretion to Keltie. And, separately, and in general, as George Wilson, acting as Lumsdaine's agent, had drawn him into a local influence, which he knew that no stranger would have done, Robert Wilson must be postponed in this competition to Keltie, that he had fully certiorated Lumsdaine, his client, of the loan, and had to run.

Robert Wilson alleged that Lumsdaine had been

; that the clause of assignation of writs, in the disposition to No. 303. ne, was not meant to affect, and did not affect, the security then June 29, 1881 George Wilson under his hypothec for the account already in- Wilson v. y. Keltie; but farther, as he was the agent of Keltie, as well as Lumsdaine. Lumsdaine, his continuing the possession of the titles, in the same as before Lumsdaine's security, ought not to be allowed to affect of hypothec for the subsequent account. And, generally, re no circumstances in the case which should have the penal depriving him either of his right of hypothec, or his right as of prior heritable creditors for their interests, so far as paid by

paring the state of interests in the ranking, the common-agent l Lumsdaine's representatives to Robert Wilson, who lodged is, which were followed by answers on the part of Lumsdaine's tatives.

Lord Ordinary found, "first, that in the special circumstances of , the possession of the title-deeds of Keltie, the common debtor, te George Wilson, and the objector, does not found a right of those title-deeds in competition with Mr Lumsdaine, the post- eritable creditor; secondly, that the objector has a right of pre- for the amount of the interest paid by him, and out of his own n prior heritable debts, in so far as he has produced assigna- the said interests or obligations to assign, granted by the credi- eceiving such payments, and while vested in the said heritable

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OTE.—As the fund in medio is confessedly insufficient for the payment eritable debts, the only matter of any importance here, is the objector's preference in competition with Mr Lumsdaine, the last heritable creditor. this limited view of the subject of dispute, it would have been desirable ome more precise statement of the facts on both sides, than is to be found argumentative and perplexed pleadings. But, as the Lord Ordinary thinks do afford the means of forming a judgment, he has not thought it expe- the circumstances of the case, to put the parties to the expense of making ord.

objector's claim of preference involves two points,—first, the business- alleged to be due by the common debtor to the objector's uncle, the late Wilson, and to the objector himself, for which, it is said, he holds a lien on mon debtor's title-deeds; and, secondly, the interests paid by George and the objector on certain heritable debts, in regard to which interests, it e has the benefit of these heritable securities.

the first point, the Lord Ordinary has no doubt that the title-deeds are of ter which in themselves might have afforded a valid right of lien; and the fficulty in his opinion arises from the relative situation of the parties in vour the lien is urged, and the postponed heritable creditor, Mr Lums- ainst whom it operates. Those parties were the agents not only of the debtor, Keltie, but of that heritable creditor. It was George Wilson, t of Keltie, who, as agent for Mr Lumsdaine, obtained for the latter the security for £800; and he and his nephew, the objector, continued to

when the security was granted, George Wilson had a lien as agent for Keltie; and the business-account then due formed regard to which the lien is pleaded on the title-deeds, was only in the hands of Wilson, or were placed in his hands completing the security. Fourthly, it is not shown that any communication was made by George Wilson to Lumsdaine of the existence of the security, or of the effect of them on the heritable security.

"Now, in these circumstances, the Lord Ordinary's decision must be sustained. Wilson being the agent of both parties, Lumsdaine, having a right to the title-deeds by the force of the table bond, the agent must be understood to have held them for the creditor, at least to the extent of excluding all encroachment or interference. In fact, since those decisions by which an agent's lien has been established in reference to heritable securities, the only mode of preventing such a claim is to stipulate for the delivery of the title-deeds; and here, as the title-deeds were in the hands of the agent for the creditor, the very situation vantage, the Lord Ordinary cannot hold that the party, in being the agent for the common debtor, was entitled to found on his claim of preference cutting down the security of his other creditor. A preference in such a claim is still stronger, when it is considered that George Wilson was aware of the narrowness of the heritable security; there is no evidence that he ever communicated to the lender his own client, the existence of his own business-account, amounting to hundreds of pounds, and forming, as is now contended, a debt table security which he was taking for his client.

"The greater part of this reasoning also applies to the facts of the case after the loan by the common debtor to the late George Wilson, the present objector. Those parties still continued the agents of both parties, the heritable creditor, as well as of the common debtor. It is never given notice to the heritable creditor of the encroachment by their own business accounts which their other client, the common debtor, is incurring to them. But if a professional person chooses to act for both parties, he must do justice between both,—still more clearly is he bound to do so.



as Wilson's claim, for the interest paid by him or George Wilson, on No. 303 the prior heritable debts, had been preferred.

June 29, 184  
Wilson v.  
Lumsdaine.

LORD GILLIES.—I think that the pleas maintained by Wilson, though perfectly good if there had been no special circumstances in the case, are not available to him in consequence of the personal exception to which he is liable. But I consider him barred, in a question with his client Lumsdaine, or Lumsdaine's representatives, from maintaining that he has a right of preference either on account of the writer's hypothec, or on account of the interest of prior creditors, which he alleges he paid, on condition of obtaining from them an assignation, or an obligation to assign their security. I would, therefore, refuse the reclaiming note of Wilson; and, in the counter reclaiming note by Lumsdaine's representatives, I would alter and postpone Wilson in the competition, even as to his claim, founded on payment of such interest.

LORD MACKENZIE concurred as to refusing the note for Wilson; but, in regard to the counter note, his Lordship was inclined also to refuse it, and was understood to be of opinion that, although a claim of damages might lie against Wilson, when an action of damages should be brought, and a record made up containing a more distinct statement of facts and details, it was premature, in this competition, to postpone Wilson, in regard to the interest paid by him on preferable debts. His Lordship considered that, though a law-agent failed to give notice to his client that years of interest were accumulating on a prior heritable debt, that would not, per se, necessarily subject the agent in liability to his client to keep him scatheless, to the extent of the whole of that interest; and that being the case, the injury resulting to a client from an agent's omission to make this communication, was a question of circumstances requiring minute and distinct details; that, in the present case, some of these annual interests, and perhaps the greater part or the whole of them, might have been paid under circumstances which did not in the least degree prejudice the postponed creditor, Lumsdaine; and there was nothing before the court to justify the postponement of the whole claim, which was, in truth, to render it altogether nugatory, as the bond of Lumsdaine would absorb the whole fund in medio.

LORD COREHOUSE.—I rather incline to concur in the view taken by Lord Gil-

The late George Wilson was the agent of Keltie, the borrower, and he was the agent of Lumsdaine, the lender. He thus held an equivocal and ambiguous character, the conflicting duties of which it may often be difficult, or impossible to reconcile. I do not say that it is unlawful for one man to act in this double capacity, but it borders very closely on being contra bonos mores. And at all events, if a man will take on himself the very delicate responsibilities which are involved in such a character, he must take care that he makes the most complete disclosure to each of his clients of every thing which it is for their interest respectively to know, before entering into the transaction. And where a question afterwards arises whether such disclosure was made, I should certainly throw the onus

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not extend to the interest on those advances, which seems to be charged in accounts in process. There is no authority for holding that the heritable security covers interest upon interest on behalf of the original creditor, and the assignee of it be in a better situation."

that, in regard to such interests, paid by Wilson, and concerning Wilson or his representative cannot found a claim which a claim of Lumsdaine's representatives, arising under that loss how much had been lost to Lumsdaine by the misfeasance quite inextricable. But it is saved, and I think justice is done. The claim of Wilson, in competition with that of his client Lumsdaine, should very carefully enforce the principle, that where a man acts in a capacity of agent for two parties having opposite interests, he incurs very serious responsibilities, and that it is not possible, that the safety of one or other of his clients is not

**LORD PRESIDENT.**—I concur with **LORD GILLIES** and **LORD GLENELG**. It is entirely on the personal exception that the case is to be decided. It is sufficient to postpone Wilson in competition with the representative of Lumsdaine. There is a sound opinion expressed in the note which the Court should emphatically support, and which is the basis of the case. His Lordship observes, that, "if a person acts for two parties, he must do justice between both,—bound to do strict justice to each, in relation to his own interest." The Ordinary thinks that it would be a gross infringement of the duty if he were permitted, as agent for one client, to avail himself of the title-deeds in which the other had an interest, to secure his claim due by the former at the expense of the heritable security of the latter, this too without giving the latter any notice which might have been taken for his protection." I think that principle applies to the present case, and the preference which have been put forward by Wilson.

It was observed by **LORD GILLIES**, with the concurrence of **LORD GLENELG**, that this decision did not imply any imputation on the

WILLIAM ROSS, Suspender.—*G. G. Bell.*

ROBERT WADDELL, Charger.—*Deas.*

No. 304.

June 29, 1837

Ross v.

Waddell.

*Bill of Exchange—Forgery.*—Bill of suspension of a charge on a bill of exchange, refused, in respect that the only ground of suspension was allegation of forgery; that caution was not offered; and that no genuine signatures, anterior to the date of the bill of exchange, were produced.

Proctor v.

Anderson.

1st Division

Ld. Cockburn

Bill-Chamber

N.

J. DUNCAN, W.S.—BROWN and MILLER, W.S.—Agents.

WILLIAM DAVID PROCTOR (Judicial Factor on the estate of Carse), No. 305.

Raiser.

CHARLES ANDERSON, Claimant.—*Sol.-Gen. Rutherford—A. Wood.*

FRANCIS GRAHAME, Claimant.—*Robertson—H. J. Robertson.*

*Right in Security—Competition.*—A creditor (A.) whose right was secured by position and sasine, conveyed this security to B. who was infest; in this conveyance and in the sasine, several erasures occurred; in a competition on the rents of the estate affected by the security, another creditor (C.) whose right was posterior to that of A. objected to the right of B. on account of the erasures, and was refused, but did not impeach the real security of A.;—Held, that it was just and equitable to take such objections, while the right of A. was unimpeachable, and, therefore, B. preferred in the competition, without deciding as to the effect of the erasures.

WILLIAM DAVID PROCTOR, judicial-factor on the entailed estate of Carse, No. 305.

belonging to Charles Gray, raised a process of multiplepoinding for the purpose of distributing a balance of rents remaining in his hands for

1st Division.

Ld. Cockburn.

R.

paying certain preferable annuities. Charles Anderson, physician at Aberdeen, made a claim which was founded on a bond of annuity granted by 1814, by Charles Gray, in favour of Messrs Robinson of Banff, which, sasine was taken in 1815, and which had been disposed and conveyed by them to Anderson in 1818. Anderson took infestment under the conveyance. Francis Grahame of Morphee made a competing claim, in respect of a bond by Gray for £1500, dated in 1816, on which he had obtained an adjudication of Gray's liferent interest in the estate of Carse in 1817, followed by a charter of adjudication and infestment, and decree of expenses and duties, against the tenants of the estate, all in the same year. Grahame stated that both the disposition and the sasine in favour of Anderson were erased in substantialibus in various places; and also that the sasine was inept in respect that the precept was to infest Anderson himself, without mentioning his procurator, whereas sasine had not been taken to him personally, but to his procurator or attorney only, and it was therefore without a warrant. Anderson, besides pleading that the

in their right, and Anderson. The Court therefore  
additional expenses.

C. BLUCE, W.S.—CAMERON and OGILVIE, W.S.—J. J. FR

No. 306.

ALLAN CAMERON, Advocate.—*D. F. Hop*  
MRS MACLEAN CLEPHANE and ALEXANDER SHIELLS  
*Sol.-Gen. Rutherford—G. G. B*

*Process—Advocation—Final Judgment.*—A party ha  
to a sheriff to decern and ordain certain other parties to  
sheriff, after answers had been given in to the petition, b  
record, having pronounced an interlocutor containing fin  
tion was laid for determining on the prayer for decerni  
having immediately brought an advocation of this judgme  
vocation was incompetent, the judgment not exhausting the

June 29, 1837.

2<sup>D</sup> DIVISION.  
Lord Jeffrey.  
F.

IN May, 1832, the advocator, Cameron, took a l  
dent, Alexander Shiells, factor for the respon  
Clephane, of her farm of Ensay, in the West High  
from Whitsunday of that year. The following l  
Shiells to Cameron:—"In consequence of your  
the sheep upon the farm of Ensay at a valuation, fr  
to remove from that farm, I hereby agree to take fr  
Mrs Maclean Clephane, when you quit said farm,  
you may have on said farm of Ensay, at a valuat  
sons mutually chosen and agreed upon. I am," &  
commencement of this lease, and during its course

accepted, he intimated his intention of requiring Mrs Clephane No. 306.  
 the sheep stock thereon at a valuation in terms of the factor's  
 we quoted. Shiells, at the close of the lease, refused to accede June 29, 183'  
 arrangement, alleging that Cameron had mixed sheep usually Cameron v.  
 in Calgarry with the proper stock of Ensay, and was endeavoring Clephane.  
 to have more taken off his hands than belonged to the latter farm.  
 Cameron presented a summary petition to the sheriff of  
 against Mrs Clephane and Shiells, praying the sheriff to decern  
 on them instantly "to take delivery of the petitioner's sheep  
 on the farm of Ensay at valuation, in terms of their obligation to  
 the petition produced herewith, and in the mean time, and until such  
 order is lodged, to pronounce an interdict, prohibiting and discharging  
 Mrs Maclean Clephane, and the said Alexander Shiells, from  
 dealing with the petitioner's stock and possession at Ensay foresaid,  
 and to be liable in the sum of £10 sterling, or such other sum as may  
 be ordered as the expenses of this application and future procedure, or  
 to do in the premises as to your Lordships shall seem meet."  
 The sheriff appointed the petition to be intimated and answers to be  
 filed in the mean time granted interdict as craved, "all in terms  
 of the petition until farther orders." Answers were given  
 accordingly, and thereafter, without a record being made up or closed,  
 a ruling interlocutor was pronounced:—"The sheriff-substitute  
 resumed consideration of the petition of Allan Cameron, therein  
 answered thereto by Mrs Maclean Clephane and Alexander  
 Cameron factor or mandatary, with the copies-schedules of protest  
 respectively by the parties on each other, finds it not denied by  
 either party that the sheep stock in question grazed and now graze  
 on the farms of Ensay and Calgarry; and further finds, that by  
 Alexander Shiells's letter to the petitioner, No. 3 of process, he had only  
 authority to take the sheep stock which the petitioner may have on the  
 farm of Ensay by valuation, at the termination of the petitioner's lease  
 in respect of which, finds it only obligatory upon the respondents  
 to remove the sheep stock actually grazing upon the farm of Ensay at valua-  
 tion; appoints the valuation to proceed forthwith by arbiters mutually  
 chosen in terms of the missive already referred to; appoints the sheep to  
 be valued within the bounds of each farm, and such sheep as may be  
 found within the bounds of Ensay to be considered and valued as the  
 remaining to that farm, and the stock which the respondents are  
 to take at valuation; the sheep not to be disturbed on their respec-  
 tive farms for two days previously to the gathering of the sheep for the  
 purpose of being valued; recalls the interdict for prohibiting the respon-  
 dents from entering into possession of the farm of Ensay, reserving to  
 them to proceed in any action of damages which they may be advised  
 to take."

And, having found caution in common form, brought an advoca-

THE CASE OF JOHNSON AND OTHERS, HOWEVER, HAS BEEN  
inclines him to think that it is still admissible, though  
more properly *dilatory* than entirely exclusive, as that here  
is. However, he has given the respondent the benefit of  
the objection as ill-founded upon its merits, and not on  
been virtually abandoned, in consequence of not being  
proper time.

“ Upon its merits, or on the question, whether the judg  
of was truly a *final* or only an *interlocutory* judgment, the  
some difficulty. But on the whole, he is of opinion, that  
disposes of all that the parties had differed about, and settl  
had been raised in their pleadings, it is properly to be rega  
in the sense of the statute, and acts of sederunt, as  
certainly not such as a warrant for extract or ultimate exc  
Sederunt of 1828, it is expressly provided, that any judgm  
merits are disposed of, shall be held to be a final judgm  
the competency of advocacy, though no expenses are  
distinctly settled by the case of Anderson, 1st June, 183  
where such a judgment was in substance pronounced, it w  
cation, that no words of *decerniture* were employed, t  
necessary as a warrant for extracting. The question, ther  
must be, whether what is authoritatively determined by  
inferior court, does truly embrace all that was in litigati  
and, according to this criterion, the Lord Ordinary is of op  
in this case was final.

“ In order to come to a right conclusion upon this, it is  
to what was substantially in dispute between the parties,  
may have used in their pleadings; and, in short, to ascert  
of those pleadings, they were agreed, and to what precise  
which they called on the Court to determine, was confir  
there was not the least dispute as to the obligatory nature o  
been entered into, or as to the way in which its obligation  
The one party admitted that he was bound to deliver over  
was bound to receive ‘ the sheep stock upon the farm o

n, founded on the allegation of its not being a final judgment; advocate the cause, and in respect that the judgment complained of was

No. 306

June 29, 18  
Cameron v.  
Clephane.

ed, if the admissions should not be thought sufficient; and, second, an application for interdict against removing the tenant in the meanwhile, and until the question of construction was settled. Now, both these points are finally disposed of by the interlocutor of the sheriff complained of. He finds, 1st, That upon the facts of his own admissions, the whole sheep brought forward by him for valuation should be considered as 'the sheep stock' (referred to in the agreement) 'upon the farm of Ensay;' and he gives certain directions as to the way in which those sheep do form that stock may be distinguished; and, 2d, He removes the interdict against his being removed from the farm, and reserves to both parties their right to claim damages *hinc inde, in any separate action.*

By these findings, it appears to the Lord Ordinary that the whole matters in dispute were finally disposed of, and that no farther judicial determination was contemplated, or could be required. The sheriff does not appoint *judicial* valuation, and he had not been called on to make any such appointment, but recognises a valuation already extrajudicially chosen by the parties, and he does not direct them to appoint *port to him*, no reference to his authority in that respect having been made, but after giving judgment upon the only point on which he had been appealed to, removing the interdict, he leaves the matter to proceed in the course in which it was proceeding, but for that special appeal, it would have proceeded, and according to which he plainly understood it would again proceed, after that only difficulty had been resolved.

When this is obviously the substance and tenor of the whole proceedings, it is wholly unnecessary to cavil with a view to this question of competency, to observe, that the conclusions of the original petition are petitory, and not declaratory, and therefore could not be exhausted without a decree. The words no doubt are, that the respondents should be ordained and decerned to take delivery of the sheep upon the farm of Ensay, at a valuation *in terms of their obligation*, but the meaning is only, that it should be declared, that the just construction of their petition imported that they should be bound to take, as the stock of Ensay, all sheep the complainer had required them to take, for upon no other point was there the slightest dispute; and, accordingly, when the respondents came to state the substance of their answers, what it is that *they* required of the sheriff, it is not very remarkable, that what they propose as the antithesis of this conclusion of the complainer, is *in words* almost exactly identical. They, in express terms, require that judge 'to find the complainer bound to deliver the stock on the farm of Ensay, according to agreement,' the substance and palpable meaning here again being merely that he should find the true import of the agreement to be, that the part of what had been offered to the valuers, was not truly the sheep stock of Ensay.

In these circumstances the Lord Ordinary is of opinion, that the judgment of the sheriff has exhausted the whole cause, although it had merely found that the respondents were only bound to take at a valuation, the sheep which were *commonly* or *habitually* grazed upon Ensay, and not all that might have been occasionally there, or might by possibility have been maintained on its pasture; and as the respondents were willing to do this, declared the interdict at an end. But, in any case, the Sheriff has done a great deal more: He has not only made a delivery to this effect generally, but has laid down a distinct criterion, for ascertaining which sheep should be held to belong to this farm, and found in express terms that the respondents 'are to be considered as the stock *which the respondents are bound to take at a valuation.*' Now this appears to the Lord Ordinary to be a complete answer to the prayer of the complainer's petition 'to ordain and decern the respondents to take delivery of the stock on Ensay at a valuation, according to their obligation,' as well as to the corresponding craving of the respondents 'to find the complainer bound to deliver the stock on Ensay according to agreement.' The judgment therefore not only explains the agreement, in a practical and conclu-

as compared with the judgment wherein pronounced the petition was not exhausted by this judgment, appointment without a decerniture.

The advocator, in support of the interlocutor, and judgment admitting advocacy in terms of the Act of merits having been substantially disposed of.

LORD MEDWYN.—I have some difficulty. It is said th

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sive way, which was all that was really wanted,—but it co requisition of both parties, by finding, that the respondents *valuation* (and the complainer consequently to *deliver*) th the range of the agreement by the meaning thus judicially case of Anderson it will scarcely be maintained, that a *l were bound* respectively to deliver and to take the stock th valent to a *decerniture* on them so to take and deliver ; an such a decerniture, it does not occur how it could have b judgment was final.

“ The respondents indeed suggested that the parties mi take and deliver on these terms, or that the valutors migh or that they or the parties might have misconducted, or be conducted themselves in the course of the valuation ; in a have been competent to have come back to the Sheriff as i in spite of the judgment complained of, which they there have been a *final* judgment. Now, in so far as these casee tion of the contumacy or refusal of the parties to obtemper once admitted that it would be both competent and neces Sheriff ; not, however, for any new or additional judgment, of a *decree*, under which it might be legally enforced ; and conduct of the valutors, or other persons, it is apprehende acting under any judicial appointment, nor with any view



interlocutor for a final disposal of the cause, such interlocutor may be advised; but it has never been held that this is a final judgment so as to admit of variation. As to the matter in question, all that the Sheriff has done is to pronounce certain declaratory findings. The gist of this application was to have respondents decerned and ordained to take delivery of the petitioner's sheep, &c. I think the matter was not exhausted, and that the advocacy is incompetent in the circumstances. As to the objection to the competency not having been taken up at the proper time, I always thought such objection should be disposed of in initio litis, as in the case of *Black v. Auld*,<sup>1</sup> January 19, 1832; this is one of those matters which the Court are bound to take up, though at any period of the cause. The other Judges having concurred,

No. 306.

June 29, 1833

Adam v.

Anderson.

THE COURT altered the Lord Ordinary's interlocutor, and sustained the objection to the advocacy; but found no expenses due.

SANG and ADAM, S.S.C.—GIBSON and DONALDSON, W.S.—Agents.

JAMES ADAM, W.S., Advocate.—*Anderson*.

No. 307.

GEORGE ANDERSON, Respondent.—*Patton*.

*Right to Pursue—Arrestment—Sale by Auction.*—An auctioneer was employed by the party to sell his furniture under a previous agreement that it should be sold at the sight of the party and the prices of the articles forthwith handed over to him. The sale took place accordingly, in course of which a creditor of the party arrested the furniture in the hands of the auctioneer; at this juncture part of the prices of the articles sold had been handed over to the party's clerk, part (to the extent of £10) was in the hands of the auctioneer, and part had not been received from purchasers; the auctioneer thereafter presented a petition to the sheriff praying that the party be prohibited from delivering the furniture of which the prices had been paid, or receiving the money, and for warrant to the clerks of Court to take possession of the effects, deliver the same, and receive the prices;—Held, in advocacy, that the auctioneer was not entitled to insist for such prohibition and warrant.

THE respondent Anderson, an auctioneer, was employed by the advocate Adam, W.S., to sell by auction the furniture in his house in Edinburgh. It was specially agreed upon beforehand that the goods should be sold at the sight of Adam or of a person attending for him; that no more should be sold than he thought proper, and that no money, except to a limited extent, should be allowed to remain in Anderson's hands; the sale was to be for ready money, but the prices of the articles, as they were paid to Anderson's clerk, or when they amounted to £10, should be forthwith paid over to Adam; and Anderson was

June 29, 1833

2D DIVISION

Ld. Moncreiff

T.

<sup>1</sup> Ante, X. 205.

above-mentioned), and the proceedings at the sale of the goods on credit had demanded delivery of the goods, the petitioner refused to allow unless the prices were paid direct to the petitioner, the petitioner would incur the risk of a serious loss, and praying for an interdict to prohibit Adam from interfering with the purchasers, or interfering with the furniture, or the effects, thereof, and for a warrant to the clerks of Court to take possession of the effects, and deliver them to the respective purchasers and receive payment of the same.

Anderson, in support of his petition, adduced evidence to be the understanding and practice of the auctioneer, that in the case of a sale of furniture the auctioneer stood in the shoes of the owner of the goods, and stood in the shoes of his right to interfere; and that he was liable, as in possession, for assessed taxes and for the landlord's rent. Adam, on the other hand, adduced evidence to the effect that the footing on which the sale was conducted, and the proof of the taxes and rent having been paid by him, was certain points to Anderson's oath, from which it appeared that the sale had been conducted upon the special agreement already mentioned.

The Sheriff granted interdict, and after various proceedings in the circumstances, the petitioner was entitled, and that of all parties interested, to apply for the petition to be concluded for; and at the same time granted warrant to the Court or any of their assistants to take possession of the goods, and deliver it to the purchasers, and receive payment of the sums so received till the further order of the Court.

The local practice of Edinburgh as to the powers and rights of auc- No. 307  
 s, cannot control those leading principles of law which determine June 29, 18  
 icacy of property or possession, and it can have still less effect on Adam v.  
 esent case, seeing that the sale was conducted on a footing different Anderson.  
 rdinary sales, and in virtue of a special agreement.

erson pleaded in answer—

The respondent, who had guaranteed the proceeds of the roup, and  
 ad, by the actual sale of the furniture in question, incurred a liabi-  
 the purchasers on the one hand, and to the advocator on the other,  
 titled, on the use of the diligence of arrestment in the circumstan-  
 which it was used, to apply to the Judge Ordinary to take measures  
 ich the rights and interests of all parties might be secured.

The object of the application being to secure the rights of par-  
 and the interlocutor complained of having merely directed the  
 on of a course by which these rights might be secured, the advoca-  
 l no legitimate interest to oppose the prayer of the petition, and has  
 h interest in maintaining the present advocacy.

The nature of the transaction involving responsibility on the part of  
 pondent for delivery of the furniture to the purchasers, the duty of  
 ing and accounting for the proceeds, and liability for rent, taxes,  
 overnment-duties, the respondent could not be regarded as a mere  
 er of the furniture, and the arrestment used in his hands was valid.

The evidence of the practice and understanding of auctioneers, in  
 stances similar to those occurring in the present case, and as to the  
 ractically given to diligence so used, is material in justifying the  
 adopted by the respondent, and in proving the actual law upon the  
 t.

Lord Ordinary pronounced the following interlocutor, adding the  
 elow :\*—“ Advocates the cause, and recalls the interlocutors com-

It is very manifest to the Lord Ordinary, that though the judgment of  
 eriff might be a safe and easy way of avoiding the decision of the question  
 resented, it had all the same effect to the prejudice of the advocator as  
 t judgment against him upon that question. The advocator's object in  
 a part of his furniture was to obtain immediate command of the price for  
 purposes. But to tie up these funds in the hands of the sheriff-clerk till the  
 rights of an arresting creditor should be discussed, was entirely to defeat  
 ect, and create even the worse mischief of an expensive litigation; and to  
 the advocator to find security, or give a guarantee, had in substance the  
 ect as to require him to loose the arrestment on caution. The Lord Ordi-  
 nnot deal with the case in this manner, however plausible it may seem when  
 stated. He finds himself bound to determine the question put before him,  
 r, in the circumstances, there was any legal ground for the application or

e Lord Ordinary is by no means prepared to sanction the doctrines which  
 en delivered by the auctioneers with regard to their own supposed rights in  
 sales by auction in this city; and he greatly doubts whether any such local  
 , or rather *understanding* (for there is no actual practice given in evidence),

respondent's clerk, or when they amounted to such a sum as *with paid over to the advocator*; and the respondent was the *object* of this arrangement being to prevent the effect of a person who, the advocator apprehended, might vexatiously dilige[n]ce. On this footing the sale went on under the arrangement, and money was from time to time paid over to him. At last the time came, when there was only a sum of £20 in the respondent's hands, to the extent it is admitted to be good, subject to the respondent's commission, for which the sum is admitted to have been paid in full. But goods had been sold, *the prices of which had been paid*, and goods remained undelivered in the advocator's house. The respondent entitled, *under this contract*, to insist that, upon the goods, *should be paid to him, and* RETAINED BY HIM *till the arrears were paid*? Or, what is the same thing, should be locked up in the sheriff's hands till that should be done. The petition referred to retention, and *taxes*, as a ground of retention. The Lord Ordinary asked the question how far the auctioneer is liable for these preferable claims, if it is proved by the receipts produced, that they were *all paid*, and no objection was presented. The simple question, therefore, is that the Lord Ordinary conceives that the Sheriff was bound to decide in favour of the respondent.

"The prices of the goods not delivered *were never in the hands of the respondent*, and, by the special contract, if they had been paid to him, he was to deliver them instantly to the advocator. Never having been in the hands of the respondent, therefore, they were in no way touched by the arrestment. Under the contract, the advocator had allowed it, the auctioneer no doubt was bound, or mandatory, to recover the money on tendering delivery. The Lord Ordinary found in the late case of Dowal v. Allan, that the respondent's lien being provided for by the money in his hands, beyond what was paid by the advocator, on payment TO HIM, would have been a valid lien in the hands of the purchaser; and as the very question raised relates to the *delivery and receive payment*, the idea of any responsibility on the part of the purchaser is out of the case.

"The Lord Ordinary therefore holds it to be clear, that the

uer was not entitled to present the application to the Sheriff, which is No. 307. he foundation of this process; therefore dismisses the same, recalls the interdict so far as now necessary, and decerns; finds expenses due both in this Court and the inferior court."

June 29, 1837  
Adam v.  
Anderson.

Anderson reclaimed.

**LORD GLENLEE.**—I have no doubt except upon one point, viz. whether the Lord Ordinary should have found the respondent liable for the whole expenses in the inferior court. I am not sure that under the circumstances it was altogether unreasonable to present a petition to prevent the furniture in question being disturbed.

**LORD MEADOWBANK.**—I agree as to the merits, but am for giving the whole expenses.

**LORD JUSTICE-CLERK.**—I have no doubt on the merits, and I go on the circumstances of the agreement as established by the respondent's oath. There is no question as to the sum of £20, to which alone the arrestment applies.

**LORD MEDWYN** concurred.

**THE COURT** adhered as to the merits, and the expenses in the Court of Session, but only found expenses in the inferior court subject to modification; finding additional expenses due.

**JAMES ADAM, W.S.—SMITH and KINNEAR, W.S.—Agents.**

*goods themselves* which could make an arrestment in his hands effectual to reach them? The Lord Ordinary thinks it very clear that he had not. The goods were in the advocator's own house, and the sale was under his own control. No more could be sold than he thought fit; and when articles were sold but not delivered, they still remained where they were, neither in the actual nor in the constructive possession of the respondent.

The end of the thing is, that the respondent, by his application to the Sheriff, attempted to defeat the whole substance of the contract between him and the advocator. Very possibly he may have made it under some imagination of danger to himself. But a man is not entitled, on imagination of danger, to disregard the interest of the party with whom he has contracted, more especially after being warned that such a contingency might occur.

The Lord Ordinary has not entered into all the points discussed in this case, which, though of no great importance in itself, does involve questions of some delicacy. But he is, on the whole, of opinion that, according to the good faith and legal operation of the special contract, the judgment of the Sheriff cannot be sustained."

June 29, 1837.

2<sup>d</sup> Division.  
Lord Jeffrey.  
T.

THE advocator, Brown, raised action before the Sheriff against the respondent, Moncur, setting forth that he had paid to him the sum of £40, minus a payment to account of amount of a bill "drawn by the pursuer upon, and payable to the order of, Stewart, 23, West Richmond Street, Edinburgh, 12 months after date, which bill was indorsed by the pursuer, on the express condition of his immediately furnishing with malt whisky to the amount thereof; that the said Stewart had paid the amount of said bill, but has failed to furnish the said whisky promised;" and concluding for payment of the sum claimed. The respondent, Moncur, stated in defence, that the bill had been indorsed to him by Purves, by whom it was indorsed to himself, Purves being indebted to him in more than the amount; pleading that he was a bona fide indorsee, and that it was irrelevant to the present case whether Brown had received value for his indorsation or not. The Sheriff's statement in the condescendence referred solely to the fact that the bill was indorsed to Moncur, without any statement made of his not being a bona fide holder.

Thereafter Brown referred to Moncur's oath, "swearing to the truth of the statements relative to the said bill or indorsation thereof." The Sheriff sustained, but found it "incumbent on the respondent to show within the limits of the record." Moncur deposed in his defence to a position containing various statements tending to show that he was a bona fide indorsee in taking the indorsation, but not showing want of value. The Sheriff found that the pursuer's allegations were not proved.

which allegation Brown had failed to prove by the reference to No. 308.

The Lord Ordinary “found it sufficiently instructed by the oath that the pursuer was not a bona fide indorsee to the bill in question,” and decided in terms of the conclusions of the original action; finding expenses incurred reclaimed.

June 29, 1837.  
Brown v.  
Moncar.

MR GLENLEE.—This may be a proper claim against the defender, but it does not follow that it is a claim which can be decerned for in the present shape of the bill. I think the Sheriff’s interlocutor is right, and that the facts proved by the evidence do not bear out the libel; the sole ground of action being that the defender gave no value for the bill indorsed to him, and of which he recovered the amount. If we look also to the condescendence, this is the allegation which is in error. Then the reference was sustained by the Sheriff, with an express finding that the pursuer should confine himself to the record; and the question is, whether the oath has made out the pursuer’s allegations, which I do not think it

other Judges having concurred,

THE COURT altered the Lord Ordinary’s interlocutor, and remitted simpliciter to the Sheriff, but found no expenses due.

SCOTT, RYMER, and SCOTT, S.S.C.—J. MEIKLE, S.S.C.—Agents.

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The Lord Ordinary, in his note, after adverting to the statements in the defence, showing mala fides, proceeds:—“Though the reference is generally of facts and circumstances relative to the said bill, and indorsations thereof, the interlocutor sustaining it ‘finds it incumbent on the pursuer to keep within the limits of the record;’ and it is no doubt true, that the want of bona fides is not expressly or separately set forth in the record, but only the want of onerosity. It does not, however, appear to the Lord Ordinary that this can afford any objection to the competency of the present judgment: 1st, Because a want of bona fides is included in a want of onerosity, and may therefore be held to be included in the more general allegation; and, though it may afterwards come out separately, yet be held to have been substantially libelled; 2d, Because bona fides is immaterial to the defence of a party in the situation of the defender, and it is unnecessary to give effect to the want of it, if that is clearly made out in the course of the proceedings; and, 3d, Because the whole process being now advocated, the finding in the Sheriff’s deliverance may be held to be recalled, so as to make the reference what it truly is in its terms, and ought to have been, as a reference to the whole case, viz. an undertaking to prove, by the oath of the defender, not only on what media concludendi, that the sum claimed is truly owing, and the action to it unconscientious and unjust.”

raised an action against the shipowners, libelling that the loss was through improper stowage, and that he had "undelivered" and was answerable to the purchaser for the safe delivery of the punch. The purchaser deposed, as a witness, "that the said punch was delivered on the quay at Newcastle before he was to consider it as his property. Held, that, by the contract of parties, as proved scripto, the punch, shipped, as above, at Leith, became the property of the purchaser, and was delivered to him, and was at his risk during the voyage; that, at his risk, and understood to be so, was confirmed by his acceptance of the bill of lading, and his acceptance of a bill of exchange drawn on him, pending the action, did not take away from him the property in the punch, as to the party at whose risk the punch was actually lost. The punch was lost to the owner (the purchaser), and the shipowner had no title to pursue for the value of it."

June 30, 1837. SEQUEL of the Jury trial reported ante, p. 884, 1

1st Division.

The pursuers presented a bill of exceptions against the presiding Judge, which direction was stated in the report. It appeared that the pursuers, at the time of furnishing the spirits in question, had sent an invoice thereof to the purchaser, bearing that the same had been insured against fire and insurance were charged against the same. On the said invoice, the pursuers were not entitled to recover the value of the said punch from the defendant. The pursuers maintained that upon the matters admitted by the defendant, and proved in evidence before the said Jury, if they found for the pursuers, they were entitled, in point of law, to a decree in their favour. The said Jury found for the pursuers, and decreed to the said Jury."



s renewed when due : That the said bill was so renewed, in consequence of another puncheon being sent a month later : That deponent hired Mr Dunlop to insure the same, and to charge the expenses of it and the freight in the invoice to said deponent : That the said puncheon was to be safely delivered on the quay at Newcastle-upon-Tyne, before deponent was to consider it his property : That deponent has not received a farthing for the loss : That deponent made an affidavit that the puncheon was ordered from Messrs Dunlop, and lost at sea : That deponent got a letter from Newcastle from the agents of the Ardincaple there, saying that he had to make an affidavit before a magistrate, that the puncheon that was lost was his : That the said letter was a circular letter : That deponent made that affidavit, supposing it to be a matter of form, to enable Messrs Dunlop of Edinburgh to recover the amount of insurance : That deponent had no idea that Messrs Dunlop had acted at that time as their own underwriters : That the loss of said puncheon did not cost deponent one farthing : That deponent believes that the loss of the said puncheon was sustained by Messrs Dunlop : That deponent insured the second puncheon at Sunderland, in consequence of Messrs Dunlop advising him to do so.”

The letter of advice as to the second puncheon, referred to in this declaration, was dated 30th September and 3d October, 1833. The price of the spirits and freight amounted to £78, 6s. 4d., being £2, 9s. 4d. more than the bill for the price, and freight, and insurance of the first puncheon. The letter stated that as there was now no hope of the first puncheon being ever heard of, “this puncheon will replace it, and the transaction will stand settled by your former acceptance, all but the trifling balance. If you wish to insure, you can get it done lower in Newcastle.”

The pursuers, in support of the bill of exceptions, pleaded, 1st, that, by the terms of the verdict, and of the direction, they were entitled to assume that the first puncheon was lost through improper stowage, and that the defenders were liable for its price either to Robson or them. That Robson could have no claim for it, as he had sworn that “the first puncheon was to be safely delivered on the quay at Newcastle before he was to consider it his property.” If that were true, the puncheon never became Robson’s, and he could not have claimed its value; and, after the oath, the defenders were effectually protected from any claim at his instance. But farther, the second puncheon was sent expressly to “replace” the first; the bill drawn for the first, was afterwards renewed on account of the second, and Robson was debited only with the price for the second. And as Robson had agreed to receive, and had received, the second puncheon on these terms, the effect was to re-instate the pursuers in their full right to demand from the defenders the value of the first puncheon. Even if Robson himself were competing with them in

was his property and at his risk, during the voyage stood it to be so or not. And, in point of fact, he understood it to be at his risk, since he directed it to the insurance. When it was lost, he, or his assignee entitled to exact its value from the defenders, if it was a fault. And accordingly the summons was expressed in the assumption that the puncheon had remained at the place where it should be landed at Newcastle ; which assumption, I think, is contrary to the fact, as proved by the evidence.

LORD MACKENZIE.—I think this question is attended with difficulty, but I concur in the direction which was given by the court at the trial. The grounds of liability, laid in the summons, are against the pursuers. It is true that the issue taken, as to the defence, was on general terms, whether there was wrongful failure to deliver the spirits, and whether the defenders were indebted, for the value of the spirits, to the pursuers. But that issue cannot be read as a mere assumption taken in connexion with the terms of the summons, and the liability laid in the summons was, that the pursuers "undertook to deliver the spirits, and were answerable to the said Matthew Robson for the puncheon." But it appears to me to be impossible to hold the pursuers liable in regard to the first, and the second puncheon, Robson having effected the insurance. In regard to the first, he did so, by directing the spirits to be insured, and afterwards accepting the bill which they gave for the amount of the price of the spirits, and the freight, and the duty on the second puncheon, he directly effected the insurance. But in both cases the insurance was made either by him, or

ir risk till they landed it at Newcastle, at the same time that they insure it on No. 309. Count of Robson, and take payment from him of the amount of insurance.

LORD COREHOUSE.—When I first looked at the record in this case, I was in- June 30, 1837.  
 ed to think that the direction given at the trial was well-founded, but, on fur- Dunlop v.  
 r consideration, I have arrived, though with great diffidence, at an opposite Lambert.  
 conclusion.

The facts of the case are admitted. The pursuers sold a puncheon of whisky Robson of Newcastle, which they duly shipped on board of the Ardincaple. They transmitted to him a bill of lading, and an invoice of the price, together with draft for the amount, which he accepted. It is clear, therefore, that the pursuers had made constructive delivery of the puncheon to Robson by the ship-ent.

In reference to the question which afterwards arose, there are two views which deserve attention. The first involves a matter of fact; the second depends upon law of the case.

In the first place, the pursuers aver that it was a condition of the agreement, that they should undertake and be answerable to Robson for the safe delivery of the puncheon. Robson has positively sworn that this was the case. The defenders say that he must be in a mistake, because he had directed the pursuers to get an insurance on the puncheon. But that is not a necessary consequence. An insurance would cover only one class of risks to which the puncheon was exposed in its transit, the risks which arose from the perils of the sea. But there are other risks not covered by the insurance; for example, loss by the fault or negligence of the mariners, not amounting to baratry: that is, the very circumstance here alleged to have taken place. The fact of Robson having directed an insurance to be effected, is not incompatible, therefore, with his deposition that it was the understanding and agreement of both parties that the pursuers were to be liable for the safe delivery of the puncheon. Further, it is proved that the pursuers considered this to be the nature of their agreement, for, as soon as they learned that the puncheon was lost, they sent another to Robson. They did not do this in account of any liability attaching to them as insurers, for they were not liable as insurers to make good a loss which arose from the fault or negligence of the mariners. Considering the oath of Robson, therefore, as to his understanding of the nature of the contract, and the real evidence afforded by the conduct of the pursuers as to their understanding upon the subject, I am inclined to think it probable in point of fact, that the contract was of the nature libelled. But if the pursuers were responsible for the safe delivery of the puncheon to Robson at Newcastle, the loss during the transit was a loss to them and not to Robson, and they were entitled to recover the value from the defenders if the puncheon was lost in consequence of improper stowage, which, in the question now raised, we must assume to be the fact.

But, in the second place, granting that the agreement was different from what the vendors and the vendee alleged it to have been, and if the puncheon, the ownership of which was transferred to the vendee by the transmission of the invoice and by the constructive delivery, is to be held to have been at the vendee's risk, it appears to me, even on that assumption, that the pursuers were entitled to recover the value from the defenders, if it were lost by their fault; and that the defence therefore is good. After the storm had occurred, and the puncheon was



the owners of the ship occasioned the loss of the puncheon by stowing it improperly, as was found by the verdict, they were liable for the price of it, either to the pursuers, the vendors, or to Robson, the vendee. Robson does not claim. I am satisfied, therefore, that the right is in the pursuers, that they have a title to insist, and that the action was correctly brought in their name. No. 309.  
June 30, 1837.  
Dunlop v. Lambert.

doubt which was started with regard to the terms in which the summons is framed, appears to me unfounded. I am, therefore, of opinion that the pursuers were entitled to maintain the action, and that the jury should have been so directed.

**ORD PRESIDENT.**—I retain, in this case, the same opinion which I delivered at the trial. By a completed written contract it is proved that the pursuers, after sending the puncheon to Robson's order, were free of all risk or liability on account of the loss.

The property of the puncheon was Robson's, and the risk of it was his. So both parties were both parties of this, that he desired the pursuers to effect an insurance on his account, and was charged by them for the cost of insurance, which he paid.

After all this, it does seem to me to be an extraordinary attempt which is made to give a different colour to the contract, and to qualify the written agreement of parties, by a statement that it was understood in a sense contrary to the tenor of the written contract, and contrary also, I think, to the actings of both parties in reference to the insurance of the puncheon. It appears to me that it would be highly dangerous, if the effect of a written contract could be thus taken away, at any time when it might afterwards appear to be for the advantage of either party of the parties to do so, and thereby to affect the interests of third parties. It is never understood that a written contract could be so done away with; and as it appears to me that the pursuers had not a title to recover the value of the puncheon, in terms of the contract, as proved by legal evidence, I think the bill of exceptions ought to be refused.

**ORD GILLIES.**—I feel much impressed by the observations of Lord Corehouse. It appears to me that the effect of them is taken off, by the terms in which the summons is conceived. The summons sets forth that the pursuers "undertook by agreement, and were answerable to the said Matthew Robson for the safe delivery of the said puncheon." It appears to me that, in point of fact, this is not what had to have been the case, and that, on the contrary, the puncheon was at the risk of Robson during the voyage. Robson directed it to be insured, as being his puncheon and at his risk; and he paid for the insurance which was effected. I think it would involve a direct contradiction to allow him at the same time, to maintain that this same puncheon was not at his risk, but the risk of another. But I said that even although by the original agreement, the puncheon was at Robson's risk, yet that agreement was annulled by the subsequent transactions of the parties.

I shall only say in reference to that view, that it seems to me to be subversive of the foundation of the pursuers' summons which is based on that alleged agreement. I think the direction given at the trial was right, and that the bill of exceptions ought to be refused.

**THE COURT** accordingly disallowed the bill of exceptions, and subjected the pursuers to expenses.

answers, "refused the bill; found expenses due thereof to be given in, and, when lodged, remitted the same, and to report." A certificate of refusal was issued from the Bill Chamber on July 22d. The bill was taxed on August 8th, and on August 11th, the bills, pronounced this interlocutor, "The Lords against the complainer for £16, 14s. 7d., in terms besides the dues of extract." An extract of this judgment by Webster, in these terms: "At Edinburgh, the 1834, in the bill of suspension presented for Robert Mackenzie, Ordinary on the bills, of the day and date, and ordained, and hereby decerns and ordains the payment to the said respondent of the sum of sixteen shillings and sevenpence sterling of expenses, besides fourpence as the dues of extract: And ordains letters of horning, and all other legal execution needful, hereon, in form as effects.—One word deleted. E. ROBERTSON." Robertson was assistant clerk of the Court. Webster presented a bill for letters of horning, and usual bearing to proceed ex deliberatione dominorum, in terms of horning which narrated that he had "obtained sentence"—"before L. Mackenzie, Ordinary, then in a bill of suspension, &c., whereby his Lordship ordered the said Robert Ross to make payment, &c., as the letters of horning, &c., shown to the Lords of our

erwise satisfying that enactment. The A. S., on a preamble, that, No. 310.  
 according to established usage, all extracts of the decrees of this Court, June 30, 1837  
 of other courts of law in this kingdom, bear the dates at which such Ross v.  
 decrees respectively were pronounced, but that, under the present regu- Webster.

ons as to the extracting of decrees established by Acts of Parliament  
 Acts of Sederunt of this Court, questions have arisen and may arise,  
 on the exact dates at which extracts of decrees were completed by the  
 signature of the extractor," proceeded to "enact and ordain, that from  
 after the first of May next, there shall be annexed to all extracts a  
 quet in the handwriting of the officer by whom the extract is signed,  
 ing by whom it was written, by whom it was collated, and at what  
 it was completed by the signature of the extractor. And in all cases  
 ere such docquet has not been duly made, the extract shall be held as  
 robativè." A penalty of £5, was also imposed on the extractor who  
 ould fail to comply with this regulation.

Webster answered that the A. S. did not apply to judgments in the  
 Chamber, where 488 extracts, similar to the present, had been issued  
 e the A. S. was passed; and none had been issued, in which that  
 ulation had been held applicable to them. The Lord Ordinary (Core-  
 se) passed the bill without caution or consignation. Minutes of debate  
 e afterwards ordered "upon the point, whether the diligence under  
 pension be void, in respect of the alleged non-observance of the provi-  
 a of the Act of Sederunt, 6th March, 1829." The minutes were  
 orted to the Court.

*Pleaded by the Suspenders—*

1. The intention of the A. S. was to regulate all extracts of decrees,  
 d it had an important remedial object in view, which was not only to  
 the date when an extract of a decree was issued, but also to record the  
 me of the party collating it, &c. The preamble applied to "all extracts  
 the decrees of this Court, and of other courts of law in this kingdom,"  
 d the words of enactment applied universally to "all extracts."

2. Though the Bill Chamber was not specially mentioned as one of  
 e courts of law to which the A. S. applied, yet it must fall within its  
 actment, if it were a court of law, and if the judgment of August 11,  
 1834, was a decree. But the jurisdiction of the Bill Chamber, although  
 rked by various specialties, was still nothing else than that of a court  
 law, and, especially in processes of suspension of decrees of inferior  
 orts, it was just the jurisdiction of a court of review. And the judg-  
 ment of August 11th, was, in terms, a decree. It decerned for expenses  
 d ordained letters of horning to follow on the decree. And the horning  
 ordingly expressly recited the "decree" as its warrant.

3. There was the same reason for requiring the date, the name of the  
 later, &c., to be affixed to an extract of this decree, as of any other.  
 his was true, even if the date had been the only thing required by the  
 A. S., and there was no ground whatever for saying that the other requi-  
 ses were not equally applicable to this extract as to any other.

ment of the A. S. And the words "all extracts," occurring clause, must be read with reference to the preamble

2. The judgment or sentence of August 11th, was decree within the meaning of the A. S. And it was di any decree of the Court of Session by several marked ch that it did not form a warrant for letters of horning, bu followed by a special bill for such letters; and the let when granted did not bear to proceed per decretum domi ex deliberatione dominorum, &c.

3. The remedy of the A. S. was not required for cases By A. S. 11th July, 1828, § 16, it was provided that ex modified after a certificate of refusal was issued, and that dec should be given out "immediately after the certificate sh issued." As there could be no decree till the issuing of refusal, and as there was no need for any time whatever after before issuing the extract, the date of issuing it was

4. The uniform practice of the Bill Chamber not o understanding of all parties concerned, as to the true mean but also showed how ruinous would be the consequences extracts were now to be declared improbative.

The Court, on considering the minutes of debate, direct of the other Judges to be taken. Lord Cuninghame, havin in the cause before his elevation to the bench, declined other consulted Judges returned this unanimous opinion. opinion, that the Act of Sederunt, 6th March, 1829, doe



in this case is founded. At the same time, we think it advisable that practice should be continued, which it appears has been of late adopted in the Bill Chamber, of affixing the date of completing it to such extracts." **No. 310**  
 On resuming the cause along with this opinion, the Lord President **June 30, 18**  
 ordered that an A. S. should be passed for the purpose of carrying into **Ferguson v.**  
 effect the recommendation contained at the close of the opinion. **Glenny.**

Their Lordships pronounced this interlocutor :—" Find, in conformity with the opinions of the consulted Judges, that the Act of Sederunt, 6th March, 1829, does not apply to the extracts of decrees for expenses in the Bill Chamber, and, therefore, that the diligence is not on that account objectionable; and remit to the Lord Ordinary to proceed, &c., reserving all questions of expenses."

GREGG AND MORTON, W.S.—W. MILLER, S.S.C.—Agents.

**THOMAS FERGUSON, Advocate and Defender.—Ivory—Cook.** **No. 311**  
**WILLIAM GLENNY, Respondent and Pursuer.—D. F. Hope—Miller.**

*Verdict—Proof.*—In an action originally before an inferior Court for repayment of the price of certain goods, on the allegation that they were of inferior quality, and of the quality of the goods having been taken and concluded, while the goods were still in the inferior Court, and the goods having been subsequently judicially sold;—Held that in considering the proof, the result of the sale was not to be taken into account, and that no investigation thereanent could be competently made into.

THE respondent, Glenny, rag merchant in Edinburgh, having received **June 30, 18**  
 an order for rags from Dawson, a merchant in Newcastle, purchased a **2d Division**  
 a quantity from the advocate, Ferguson, rag merchant in Leith, **Lord Jeffrey**  
 which were packed in bags by the latter, and shipped on board a New- **T.**  
 castle trader. Dawson rejected the rags as of bad quality, whereupon  
 Glenny raised an action against Ferguson before the Sheriff of Edin-  
 burgh, concluding for warrant to have the rags sold at such price as might  
 be obtained for them, and to have Ferguson ordained to make repayment  
 of the price. A proof was led at Newcastle and Leith as to  
 the quality of the rags, and whether Glenny had examined them, or had  
 an opportunity of examining them, before they were shipped. The  
 Sheriff found that the rags sold by Ferguson were not marketable rags of  
 the kind required, and that Glenny had neither time nor opportunity for  
 properly examining them, and decerned against the defender for repay-  
 ment of the price. Of this judgment Ferguson brought an advocacy.  
 In the course of the proceedings the rags were sold at Newcastle by  
 order from the Court, and brought a price of 5s. 6d. per ton; the ori-  
 ginal price at which they had been bought by Glenny having been 7s.,  
 and he had paid in paper of his own manufacture.

the shop door. 'If he had not seen the rags before, it is that he should not have taken a look at them then, when final possession, and to deliver, as he soon after did, the cargo they had been bartered. When four witnesses concur, that they saw him go into the loft, or come out of it, and one he was in it along with him for fifteen or twenty minutes, do the rags, and came away, saying, 'they will do,' they state concordant with what his *admitted* conduct would lead one to require a great deal more than those circumstantial variance to all testimony given years after the transaction, to warrant as untrue.

"But, if he did examine the rags for fifteen minutes, being admitted that their quality (whatever that was) in one bag or package was very like another, is sufficient to and to exclude all future challenge on the score of insufficiency was so, is proved by his own leading witnesses, the Dawsons, they themselves accordingly finally rejected the whole parcel of not more than eight or nine bags, out of sixty or seventy of quality is further established by the result of the ultimate the seven lots having there brought a price varying from five varying more than prices are apt to vary at public sales of commodity,—wine from the same pipe, or cotton of the same it be quite true that fifteen minutes was a great deal too little of such a parcel of rags, if the quality of one package or lot tially from that of another, it is in evidence, and indeed is a than sufficient to ascertain the quality of one or two bags quantity of an *uniform* commodity. Half the rags in this case lying in an open heap on the floor, and half to have been holes. It is proved that one bag might be well examined in and much more than the amount of its contents in the same the ground. Fifteen minutes, therefore, was ample time to of a large and fair sample; and as it is not pretended that formable, it is the same thing as if the whole had been ful

of inspecting the rags in question, before removing them from the premises of the complainer in August, 1833; and did upon that occasion inspect them for a period, which, though short, is proved to have been sufficient to enable him to judge of their quality; it being instructed that their quality was uniform in all the different heaps and packages, and the defects which he now alleges being in no respect latent, but palpable and apparent: Finds, 2do, and separatim, That the valuation, or nominal price, at which the said rags were then bought, or taken in barter, by the said William Glenny, being seven shillings per hundred weight, is admitted and set forth by himself, to have been a higher price than he would have consented or offered to pay in cash; and that the said rags, having been afterwards disposed of by public judicial sale at Newcastle, did, at such sale, under the discredit of having been rejected as unmarketable, and after being deteriorated by nearly three years' keeping, realize a price of not less than five shillings and sixpence per hundred weight, and must therefore be held to have been originally worth the money which the said

No. 8

June 30,  
Ferguson  
Glenny.

Now, as the goods certainly *were not better* at the last date than at the former, this fact at once convicts of great exaggeration the statements of such of Glenny's witnesses as swear that they were not marketable at any price,—and would not pay the necessary expense of sorting; and of those, who say that, at all events, they would not fetch more than 3s. 6d. or 4s. at most, in the market. But when it is considered, that Glenny has admitted that he would not have paid so much as 7s. in cash, and that he made that the nominal price, only because it was to be mostly liquidated in paper, of which he wished to get rid, and the balance to be taken in satisfaction of a *doubtful* debt, it may safely be held that the *money price* at which he actually purchased, was not more than from 6s. to 6s. 6d.; when the goods, though not sold till after they had mouldered in Dawson's stores for two years and a half, with the discredit of having been rejected as unmarketable; and though sold all at one time, by public auction, as a condemned cargo, yet realized an average price of 5s. 6d. Now, making but a moderate allowance for the effect of these unfavourable circumstances in depressing the price, it does appear to the Lord Ordinary that they warrant the inference that they must have been fairly worth 6s. 6d., or even 7s., when they were first sold by the complainer. It is in evidence that rags of this kind suffer by keeping; especially if they have ever been wet, and that there were mildews, and marks of damp upon those in question. Nay, it appeared, when they came at last to be sold in 1836, that no less than eight hundred weight had actually crumbled into dust, and totally disappeared during this period; from which it is impossible not to infer that the quality of what still held together must have been seriously impaired. It appears, therefore, to be sufficiently proved, that the goods were really worth the price which Glenny had agreed to pay for them. But even if it should be thought that there is not precise and direct evidence of this fact, it is to be recollected that the complainer is under no obligation to prove any such thing; that the burden of proving marked and clear insufficiency, is altogether on the purchaser; and that it is quite enough for the defence of the seller, if he is able to show, that the evidence referred to, if it does not fully establish the reverse of the purchaser's allegation, is at least palpably insufficient to prove its truth.

“There was a separate defence on the ground of undue delay, in giving notice of the alleged insufficiency; and the Lord Ordinary inclined to think that this was pretty well made out. But as it rather appeared that no plea to this effect was properly set forth on the Record; and as the case seemed sufficiently clear without it, he thought it better not to state it among the grounds of his decision.”

whether a further investigation should be allowed thereon

**LORD JUSTICE-CLERK.**—I have doubts as to the interlocutor should be gone into as to the sale in Newcastle, we no doubt the competency of this. The judgment on the merits is Sheriff's interlocutor, and the case we have before us is whether decided right on the proof which was led. I think there would be in point of form in allowing such an investigation, for which application have been made in *initio litis*.

**LORD MEADOWBANK.**—I agree ; but looking to the justice of some difficulty. The weight of the evidence tends to prove that of inferior quality, and that Glenny had no opportunity of examination depends on the value of the goods at the time of the sale by F precluded by form, I think it would be right to allow an investigation in Newcastle, but I have doubts as to that.

**LORD MEDWYN.**—Had this party expected that a sale of the benefited him in his proof, he would have applied for it earlier. the case without reference to this matter.

**LORD GLENLEE** concurred.

On the merits of the proof THE COURT held that the Sheriff well founded, and accordingly altered the interlocutor of nary, and remitted simpliciter to the Sheriff.

**L. M. McALE, W.S.—M. and J. LOCHAN, S.S.C.**—Agents

whereon the Sheriff granted warrant for intimation by notice in the Gazette, and by transmission of letters to each of the individual creditors named in the petition. These notices having been given, it was objected by the creditors, that a creditor named Goode was resident furth of Scotland, and that decret could not be obtained without calling him, but that the Sheriff had no jurisdiction over such party, the Court of Session being the only forum for foreigners. To this it was answered that it was competent to cite Goode as a party in the Sheriff Court by a supplementary cessio to be conjoined with the present; it being evidently the intention of the recent statute to make it competent for debtors to proceed either before the Court of Session or before inferior courts, without distinction whether any of the creditors happened to be furth of Scotland or not.

The Sheriff sustained the objection and dismissed the petition with expenses.

Fraser then presented a reclaiming note to this Court, in terms of sect. 8th of the Act, praying to have it found that the application to the Sheriff was competent, and to remit to him to recal his interlocutor, and sist process until any creditor residing in England should be called by a supplementary petition and intimation. It appeared that Goode's name had not been included in the list of creditors in the original petition; but it was contended that this omission might be supplied by a supplementary petition, as was the practice in the Court of Session, when a creditor had not been named in the original summons.

LORD JUSTICE-CLERK.—Were it necessary at present to decide whether the interlocutor of the Sheriff is well founded as regards his power to entertain an application under this statute, where there is a foreign creditor, I should have some hesitation in affirming the judgment, finding the application incompetent. Were it to be determined that in all cases where there are foreign creditors, the applications must be to this Court, I am afraid that the object of the Legislature would be in a great measure defeated. However, it is not necessary at present to decide this question, because, by section 3d of the statute, the applicant is required to insert in his petition to the Sheriff “a list of *all* his creditors, specifying their names and designations, and places of residence, so far as known to him.” But the present pursuer did not comply with this condition, for it appears that the name of Goode, one of his creditors, was not inserted in the petition; and I apprehend that the original petition, being in this respect defective, cannot be sustained, and that the defect cannot be remedied by a supplementary petition, but only by a petition de novo, containing a list of every creditor, in terms of the enactment now referred to.

The other Judges having concurred,

THE COURT, in respect that all the creditors were not named in the original petition, adhered to the Sheriff's interlocutor.

before the jury, intended to support the alleged ground of reduction for the pursuer, and a bill of exceptions was taken, in respect of which the Lord President observed, in answer to a question from the jury, "did direct the jury, in point of law, that if they believed the witness to be a suspicious witness to the execution of the deed, they were not to find a verdict for the pursuer."—Held, 1st, That the Court of the direction, precisely as stated in the bill of exceptions, was correct; and, 2d, That it was the duty of the jury to find a verdict for the pursuer, if they believed the witness A, even though they disbelieved the evidence in the case; and, 3d, That this direction was not wrong in Scotland, it being a general rule that a pursuer cannot prove his case against a witness, and there being nothing in the nature of this action to that general rule. Observed, that, where an exception is taken to a portion of a charge, it is important that every other part of the charge (excepted against) should be given in the bill of exceptions, so as to bring before the Court the true import of the portion excepted against. The bill of exceptions was actually given to the jury.

July 6, 1837. **WILLIAM CLELAND**, residing in Bathgate, raised a bill of reduction of a deed of settlement and codicil executed by the late William Cleland, in favour of Mrs Jane Paterson or Cleland, and of the grounds of reduction was, that the instrumentary was not signed by the deceased adhibit his subscription, or hear him acknowledge it. The defenders pleaded that the deed was regularly executed. The following issue went to trial:—

"It being admitted that the pursuer is heir-at-law to William Cleland of Knownoble, and that the said William Cleland died on the 10th day of September, 1834:

"Whether the disposition and deed of settlement, dated 10th December, 1832, and codicil thereto an August 1834 sought to be reduced, are not valid."

land, without having seen him subscribe, or without having heard him No. 3  
 acknowledge his subscription, he was liable to be punished; and it was July 6, 1  
 explained to the witness that he was at liberty to decline giving evi- Cleland v  
 dence. The witness claimed the protection of the Court, and was Paterson.  
 dismissed. But, on the suggestion of the pursuer's counsel, being called  
 back, at last said he was willing to be examined." \* He then deponed,  
 that he and Johnston, the other instrumentary witness, were in the same  
 room with the deceased, and the deed was lying there on a table; that  
 " witness and Johnston signed it; there was no name at the deed when  
 he put his to it; then Johnston signed it; did not see old Cleland sign  
 it, and he never acknowledged his subscription in his presence." \* He  
 also deponed he was not above three minutes in the room.

Alexander Johnston, the other instrumentary witness, received the  
 same explanation from the Court as to the statute 1681, c. 5, and de-  
 clined to be examined. He left the Court, and, after a considerable  
 interval, during which two other witnesses were examined, he was  
 tendered for examination by the pursuer, but the Lord President then  
 refused to receive him.

Other evidence was led, showing, inter alia, that the deed had been  
 framed in Edinburgh, not under the immediate instructions of Cleland,  
 but of an intervening party, named Paterson, who was present along  
 with Cleland when the instrumentary witnesses signed.

In charging the jury, the Lord President " did direct them, in point  
 of law, that if they believed the witness, Robert Muirhead, in point of  
 fact, though a suspicious witness to the execution of the said deed men-  
 tioned in the said first issue, they ought to find a verdict for the pursuer  
 on that issue: Whereupon the counsel for the defenders did except to  
 the foresaid charge, on the ground that, there being no circumstances  
 proved, with respect to the execution of the deed, independent of the  
 testimony of Muirhead, and he being a single and unsupported witness,  
 the Lord President ought to have directed the jury to find a verdict for  
 the defenders on the first issue, instead of having charged the jury, that,  
 if they believed Muirhead's evidence, they might, in point of law, find  
 for the pursuer on the said first issue." \*

The jury found for the pursuer, and the defenders presented a bill of  
 exceptions, to the direction above quoted.

They pleaded, that, from the terms of the charge of the Lord Presi-  
 dent, as set forth in the bill of exceptions, it appeared that the jury had  
 been directed to find for the pursuer, if they believed the single witness  
 Muirhead. That nothing was stated, in the direction, as to the exist-  
 ence of any circumstances corroborating that witness; nor were the jury  
 told that the existence of such corroboration was necessary to warrant

they believed Muirhead, his Lordship must have implied that they were to look at the corroborating circumstances, in deciding whether they should believe him. These circumstances had occurred in the course of the trial, such as the hesitation of Muirhead to give evidence after hearing the terms of the statute 1681, c. 5; the refusal of the instrumentary witness, Johnston, to give evidence, &c. In such a situation, the direction to the jury could not be justly held to be a deposition of Muirhead from all the rest of the case, and that still it was enough to warrant a verdict for the pursuer if they believed it.<sup>2</sup> But, separately, in this peculiar case, that one instrumentary witness was enough to cut down a deed, and that the deed supported only by a single witness, and, therefore, was not conclusive.<sup>3</sup>

**LORD MACKENZIE.**—I am strongly inclined to believe that no such point of law, existed, in the direction which was actually given. I have little doubt that it was then stated, in substance, that there was no evidence besides that of Muirhead, and corroborative of him; that he was a credible witness; but that if the jury thought his testimony duly supported, they were warranted to believe him, and, in these circumstances, to find for the pursuer. Unfortunately the Court can only look at the terms of the bill of indictment, judging of the tenor of the direction excepted against. That direction was expressly stated to have been, that, “if the jury believed the witness Muirhead, in point of fact, though a suspicious witness to the execution of the deed, ought to find a verdict for the prisoner.” Thus the direction simply required the jury to find for the pursuer if they believed Muirhead. It was not for



y thought there was other evidence corroborative of him, and believed his testimony, they might then find for the pursuer, but simply and unqualifiedly, without reliance to any corroboration, that if they believed that witness they ought to find for the pursuer. Under this direction the jury were entitled and bound to find for the pursuer, even though they disregarded all the other evidence in the case, provided only they believed that one witness. That is the import of the direction as given in the bill of exceptions, and I do not think there is any ambiguity or uncertainty in the mode of expressing the direction. But as I consider that to be incorrect, I cannot hold it to be consistent with the law of Scotland. It is a general rule that no pursuer can prove his case by a single witness; and I see nothing in the nature of this action to take it out of that rule. I think, therefore, that the exception should be sustained and a new trial allowed.

**MR. GILLIES.**—I am of the same opinion. A slight variation in the mode of expressing the direction in the bill of exceptions, would have taken away the whole of the exception. But as the bill stands, I think the exception must be sustained.

**MR. COREHOUSE.**—I concur. I am strongly inclined, in the circumstances of the case, to think that the direction actually given at the trial was perfectly correct. But the direction as expressed in the bill of exceptions, cannot be supported. The Court are tied down by the words of the bill, which are quite explicit and free of ambiguity. I think the exception should be sustained.

**MR. PRESIDENT.**—In consequence of the opinions now delivered, the exception must be sustained. Yet it is a case of great hardship for the party, as I fully stated to the jury, in my charge, a variety of circumstances, appearing on the evidence, as corroborative of the testimony of Muirhead. It was in connexion with the observations I had made in pointing out these circumstances, that I told the jury that if they believed Muirhead they ought to find for the pursuer. So far from relying on the isolated evidence of Muirhead as enough of itself to support the case, I pointed out to the jury that he was a witness who stood exposed to unusual suspicion, being called to contradict his own attestation of the signature of the deceased. The defenders, in taking an exception to part of my charge, singled out a particular part of it, and, in consequence of the manner in which the bill has been framed, a different construction is given to that part, from that which it would have received, if the full charge had been given in the bill. I own that such a construction as this ought to make a judge very cautious in subscribing a bill of exceptions against any part of his charge, unless he is satisfied that the bill contains all the other parts of the charge which are necessary for the correct appreciation of the whole charge excepted against, even although, by so doing, it should become necessary to except the whole charge together.

**THE COURT** sustained the exception and allowed a new trial.

**J. ROSS, S.S.C.**—**WOTHERSPOON** and **MACK, W.S.**—Agents.

No. 313.

July 6, 1837.

Cleland v  
Paterson.

and 30, where the complement of the council was twenty-died ; and ten were absent ; and the provost, who had a deliberative vote, concurred with the ten members present, casting vote was given as well as his deliberative vote, W vote, which would have formed an actual majority, even if had been present, and dissented, could be rendered less eff of their being merely absent.

July 6, 1837.

1st DIVISION.  
Lord Cuning-  
hame.  
Bill Chamber.  
B.

It is enacted by the statute for amending the el and councils of royal burghs, 3 and 4 Will. IV. c. 76 vacancy shall in the course of the year occur in the c or office-bearers of any such burgh, by death, disat the same shall be filled up, ad interim, by the remai council, by election, as herein-before provided, at a on five days' notice by the town-clerk, by intimation such remaining members of council ; but any cour office-bearer, so elected, ad interim, shall go out Tuesday of November next ensuing his election, and occurring shall be supplied at the next annual electi

It is provided by the preceding section (§ 24), in tion of magistrates or office-bearers by the council " to be made by plurality of voices, and the chief magistrate, to have a double or casting voice in case

The Magistrates and Council of Inverness were a posed of twenty-one members. In April, 1837, one Ronald Stalker died. A meeting was called, for Ma by the town-clerk to the remaining twenty members

admitted, on payment of the fees, a freeman burgess, under reserva- No. 314.  
of the rights of all parties concerned; and that he then declared his  
tance of the office of councillor, “and qualified himself to his Majesty July 6, 1837.  
king the oath of allegiance and abjuration, and subscribing the same Fraser v.  
the oath or declaration of assurance; and the oath de fidei having Rose.  
also administered to him, he took his seat as a member of the meet-

protest was taken against the legality of these proceedings, on the  
of the ten absent members, and also of some of the registered electors  
burgh; and a bill of suspension and interdict, on caution, was pre-  
d in their name, against Rose, and the ten members of council who  
lected him, which prayed the Court to prohibit Rose “from acting  
at all taking upon him the character of councillor, or member of the  
Council of Inverness,” and the other parties from recognising him  
ch; and concluded that “the whole of the said parties ought and should  
prohibited and interdicted from taking any steps or measures, or doing  
thing, directly or indirectly, whereby the Magistrates and Council of  
rness, at a proper and lawful corporate meeting, duly convened for  
purpose, may be in anywise disturbed, impeded, or interfered with  
e filling up of the vacancy which has occurred in the Council, as  
is, and that in the way and manner pointed out by the statute; and  
er, and in the meanwhile, from doing any act or deed connected  
the management or administration of the public, political, or corpo-  
affairs of the burgh, except upon the footing that the Magistracy and  
cil, in consequence of the vacancy that has occurred in their num-  
consist at present of only twenty lawful members, and that the said  
ncy remains still to be supplied, in terms of the statute, before the  
nd legal number of the said Magistracy and Council can or ought to  
ld to be duly completed, as accords of law.”

support of this application the suspenders pleaded that the election  
member, to fill a vacancy, either in the Council or Magistracy, was  
t of the corporate body, and could not validly be performed except  
a quorum of the corporation was present;<sup>1</sup> that, as the corporation  
sted of twenty-one members, it was necessary, both by the public  
and by the usage of the burgh of Inverness, that at least eleven  
bers, being a majority of the whole, should be present in order to  
a quorum; and as only ten were present on the day of election, the  
E election was null and void. The suspenders pleaded separately,  
the statutory meeting for filling up a vacancy should have been con-  
exclusively to that proceeding alone, and the admission of Rose to

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<sup>1</sup>Ed., June 17, 1824; (ante, III. 150; or new ed. 102); Mason, July 29,  
(1871); MacNab, Dec. 24, 1803 (Dict. voce, Appeal; Appx. No. 2.);  
John, May 28, 1805 (Dict. voce Burgh Royal, Appx. No. 17).

to fill up a vacancy till the next election, was not the presence of a majority of the whole Council providing that due notice should be given, bestowed upon "the remaining members of the Council;" and these were duly called, the majority present possessed. It was necessary to make this provision, because the burgh affairs imperatively required that the vacancy and this might be wholly frustrated unless the statute contended for by the respondents. And besides, the members had attended and voted against the election of the ten members present, with the casting vote, would have carried the election; so that Rose was a constituency which would have composed a majority of twenty members had been present. Besides this, the voting acted by a preconcerted scheme, for the purpose of the burgh, were barred by personal exception from making pleas; and the registered electors had no title to the election which was bestowed by the statute on the Council alone. In regard to the admission of Rose as a councillor, previous special notice, this was quite consistent with the statute and that admission sufficiently satisfied the provision of the statute in question, which only required this to take place as a councillor. And separately, as the election of Rose into the office of councillor was completed or no longer competent to obtain redress by suspension of the election.<sup>1</sup>

suspenders reclaimed.

vising the note, it was arranged that the interdict should be July 6, 1837  
but the bill passed to try the question, and an interlocutor to Fraser v.  
it was accordingly pronounced. Rose.

W. MACKENZIE, W.S.—D. GRANT, W.S.—Agents.

his opinion on the merits, at present, is in favour of the validity of Mr  
mination.

plea of the suspenders is one of strict law, viz., that the vacancy occa-  
Bailie Stalker's decease, was vested in the Town-Council,—that it  
required a majority or legal quorum of the Council, to make a valid elec-  
that no quorum was assembled at Rose's election. But, 1st, It is very  
of the nomination or election, on occasion of the vacancy arising in the  
y Stalker's death, was vested in the Council as a corporate body. This  
urns entirely on the 25th section of the Burgh Reform Act, which ex-  
acts that the vacancy 'shall be filled up, ad interim, by the remaining  
of the Council;' to each of whom a special intimation of a meeting to be  
the purpose (not by the Council, but) by the town-clerk, is to be sent.  
ers of Council are thus individually made quasi electors, in room of the  
the wards;—and the election by such councillors as choose or find it  
to attend, without reference to quorum, seems to be as valid as an  
y a small and inconsiderable number of the constituency is valid on  
sions. In short, this is a power given in particular terms, to a certain  
dividuals, and not to the corporation. And there are strong reasons for  
uction in many different cases of vacancy that may arise in Town-

erves notice also, that the clauses as to filling up the place of vacant  
s,—and that of vacant Magistrates (see sect. ), are very differently

The power is given in the one case to 'the remaining members of  
in the other to the Council. Hence, the former is a personal right,  
by those who attend,—while the latter is a corporate act, and requires

even if the election of vacant Councillorships, under the late Act, were a  
act (as the supplying of such vacancies under the old law was),—still,  
here the want of quorum is created by an illegal concert or combination  
members,—the election, even by a minority, is sustained. This was  
in one branch of the Culross case in 1809 or 1810 (the papers in which  
Ordinary has not had time to seek out and refer to),—and in the later  
irkcaldy, about twelve or fifteen years ago, where the relevancy was  
though the case was given up before the proof was concluded. Now,  
on to absent, is directly alleged here;—and though, of course, that will  
still the *prima facie* aspect of the case is not such as to make it reason-  
oper to give either the absent Councillors, or any founding on their  
s the summary interposition of the Court by suspension, whereby the  
ness of the corporation might, for a time, be brought to a stand. A  
of course, is open to the complainers, if they think they have any case  
be substantiated after mature discussion and investigation.

being the Lord Ordinary's views, it is unnecessary to say any thing as  
petency of suspension in the abstract, in such a case as the present.  
ly remark, that though he does not conceive suspension to be altogether  
it even in cases of election said to be completed, the Court will not  
e disposed to interfere in this form, except in cases where any election  
e complained of is not plainly null and void, *i. e.* on some ground either  
anifest on its statement, or capable almost of instant verification. The  
e is obviously not of that description."

*Marshall.*

*Curator Bonis—Lease.*—Circumstances in which the  
to the curator bonis of a fatuous person, to grant a lease  
of 19 years.

July 6, 1837.

1st Division.  
D.

HENRY MORELAND BALL, curator bonis to Jo  
Kersiebank, who was fatuous, presented a petition  
rent lease of the farm of Kersiebank, part of the est  
expire at Martinmas, 1837; and that it could be let  
per cent, upon a 19 years' lease, but could not be  
under rent, for a shorter term of years. He produ  
man of skill, that it would be greatly for the ben  
estate, to let the farm under a lease of that duration

In the event of the death of Eiston, the petition  
were next in succession to the estate.

The petition prayed the Court "to grant warrant  
curator bonis to the said John James Eiston, to let  
Kersiebank on a lease in the ordinary terms, and to  
years from the term of Martinmas next."

THE COURT granted the petition

J. MEIKLE.—Agent.

No. 317.

— TAYLOR. Pursuer.—*Whioha*

ARTHUR GIFFORD and MANDATARY, Pursuers.—*Sol.-Gen. Rutherford*— No. 318.

*G. G. Bell.*

ARTHUR GIFFORD of Busta, Defender.—*D. F. Hope.*

July 6, 1837.  
Gifford v.  
Gifford.

*expenses.*—The question of expenses in this case (reported ante, p. M'Dougall.  
, having been reserved, the pursuer now moved for expenses.

July 6, 1837.

MR GLENLEE.—I think the party succeeding in the reduction must be enti- 2<sup>D</sup> DIVISION.  
to expenses, unless there should be a number of special reasons showing it to  
been very doubtful in the course of the proceedings which party was right and  
was wrong. The interest which the unsuccessful party may have had in  
ding is nothing. This defender was temere litigans, and that is enough.  
The other Judges concurring,

THE COURT found the pursuer entitled to expenses.

T. RANKEN, S.S.C.—J. and W. NAPIER, W.S.—Agents.

ALLAN M'DOUGALL, Petitioner.—*Patton.*

No. 319.

*actor Loco Tutoris—Minor.*—Circumstances in which the Court granted  
entry to a factor loco tutoris to complete the pupil's title as heir to an entailed  
, and to certain superiorities, in which the pupil's interest required him to be  
in condition to give immediate entry to the vassals.

ALLAN M'DOUGALL, W.S., factor loco tutoris to Donald Patrick July 7, 1837.  
Campbell, presented a petition stating that the pupil was heir to the en- 1<sup>ST</sup> DIVISION.  
tailed estate of Ballevolian; to the superiority of the lands of Arrois and N.  
lands, in which the vassal was demanding an entry, under pain of a  
forfeiture of tinsel; and also to the superiority of the lands of Shenegart  
lands, which were in non-entry, and from which a year's rent was  
payable, so soon as the pupil was in condition to give an entry. He  
asked the Court "to authorise him, as factor loco tutoris for Donald  
Patrick Campbell, to complete his pupil's title to the entailed estate of  
Ballevolian, and to the said superiorities, to enter and receive vassals in  
the said sundry lands holden of the pupil, the said Donald Patrick Camp-  
bell or his predecessors, as superiors; and to grant charters, precepts of  
constat, and all other writs and deeds necessary for that purpose, on  
payment of the feu-duties, and usual casualties of superiority."

THE COURT granted the petition.

BAXTER and M'DOUGALL, W.S.—Agents.

rather; and that there was nothing in the structure or the ordinary rules of construction, on this point, from applyi

July 7, 1837.

1st Division.  
Ld. Fullerton.  
D.

THE late John Cundell, brewer in Leith, and his v  
Legrand or Cundell, jointly executed a disposition  
1794, by which they disponed the heritage, then be  
them respectively, to their only son, Edward Cundell  
was granted "with and under the conditions, bur  
power, and faculty underwritten." Besides the herit  
by the disponers, which was specially described, the  
to Edward Cundell the whole heritage, and the whol  
which might be belonging to either of them at the  
dell's death, and it appointed him executor of both sp  
always and declaring, as it is hereby expressly prov  
that these presents are granted, and shall be acce  
Edward Cundell, with the burden of the payment  
that we may be resting and owing at the time of our  
ally with the burden of paying the following provis  
Dorothea Legrand, and our younger children after  
the said Dorothea Legrand, a free annuity of £100  
two terms in the year," &c., and commencing after  
Cundell. This annuity was declared "to be a real  
able debt upon and affecting the subjects before  
burden shall be inserted in the infeftment to follow he  
these presents are granted under the burden of payi  
garet, Jean, Agnes, and Dorothea Cundell, children



be divided among the survivors equally, including our said son, No. 320.

Cundell." It was declared that, during the lifetime of Mrs  
or Legrand, "each of the patrimonies aforesaid, payable to the  
younger children, shall be burdened with the payment to her of the  
£15 sterling yearly, to go and be applied in part of the annuity  
mentioned provided to her, the said Edward Cundell being entit-  
his mother's death, notwithstanding what is herein before writ-  
retain such a part of the principal sum of their patrimonies afore-  
at the legal interest, will be sufficient for answering and paying  
£15 for each of the said younger children to their mother yearly,  
mentioned, the remainder of said annuity being to fall a burden  
be paid by the said Edward Cundell himself, as before provided."  
provisions were declared to be in full of all legitim, &c. to the  
The deed contained this clause, "reserving always to me, the  
in Cundell, not only my liferent right of the whole lands and  
heritable and moveable, above disposed, but also full power and  
at any time of my life, or even on deathbed, to cancel, alter,  
and revoke the present deed, in whole or in part, so far as  
my children, and to sell, gift, or convey my lands and es-  
heritable and moveable, above written, either gratuitously or for  
causes, and to contract debts, and burden and affect the same  
ch donations, legacies, and provisions, as I shall think proper;  
general, to do every other act and deed, in relation to the free  
limited disposal of my said lands and estate, real and personal, in  
e manner as if these presents had never been granted." The  
power of alteration and reservation was reserved by Mrs Legrand  
Cundell in reference to the estate disposed by her. The deed con-  
an appointment of tutors and curators to the children.

804, another disposition and settlement was executed by John  
l, in which he augmented the annuity to Mrs Cundell to £150  
um, and the provision to each of his younger children, now five  
er, "to the sum of £1500 to each, to be payable at the first term  
tsunday or Martinmas that shall happen after they severally arrive  
rity, the same being subsequent to my death, or if previously, one  
er that event, with interest from the first term of Whitsunday or  
mas immediately after my death." A declaration was added, as  
settlement of 1794, that, in the event of any child dying before  
e or majority, the share of such child should be divided among  
er children, including the son. It was also declared that the ad-  
patrimony of each child should be burdened with the payment of  
er sum of £10, in addition to the £15 already mentioned, as part  
annuity to Mrs Cundell; and Edward Cundell was empowered, as  
during Mrs Cundell's life, to retain so much of the principal sum  
additional patrimony of each child as would annually yield £10 of  
t, as the proportion of Mrs Cundell's annuity effeiring to the addi-

July 7, 1837.  
Waugh v.  
Cundell.

Jamieson and Oliphant, his cautioners in a bank, in August, 1812, he granted a bond and disposition over another of these heritable subjects, to Sir James Cundell, who died on 18th May, 1812.

In 1813, Edward Cundell, being engaged in peculiar circumstances, executed a trust-disposition in favour of John Waugh, James Ogilvy, and James Oliphant. The deed proceeded on a narrative of the grantor's affairs, and bore to be "for behoof of my true, just, and lawful heirs." The deed contained a clause, declaring "that the said trustees shall not import, be construed, or be taken, by any one creditor to another, or to postpone the diligences of any creditor already done or to be done, or the creditors' preferences among themselves shall not be prejudiced, in the same manner as if these provisions were granted."

The trustees sold and realized the trust-estates of it, they, inter alia, paid off the three mentioned, to Mrs Hay Mudie, Sir Alexander Murray, and Oliphant, the whole sum in the bond of due.

In 1833, Mrs Margaret Cundell or Jamieson, of the late John Cundell, raised a process of money against the trustees of Edward Cundell, for the purpose of accounting for their intromissions. Several questions

her's settlements, they were creditors of his, and were entitled to No. 320.  
 benefit of the Act 1661, c. 24. Assuming this to be established, they <sup>July 7, 1837.</sup>  
 maintained various pleas, in order to prove that the payment of these <sup>Waugh v.</sup>  
 creditors of their brother was unwarrantable, until after their <sup>Cundell</sup>  
 claims were satisfied.

trustees pleaded, on many special grounds of homologation, &c.,  
 even if the claimants had been creditors, and entitled to the benefit  
 of the statute, they could not, in the circumstances, challenge the pay-  
 ment of the heritable debts. But they maintained, separately, that the  
 trustees were not creditors of their father for their provisions, as no  
 part either the principal or interest was exigible till after his death,  
 and the whole remained revocable by him at any period of his life. The  
 trustees, therefore, were not creditors, but mere legatees of their  
 father, and the statute 1661. c. 24, did not apply to them. They had  
 no ground of preference which entitled them to challenge the pay-  
 ment of the heritable debts.

Lord Ordinary "repelled the objections to the condescendence of  
 the deed in medio, in so far as those objections rest on the payment by  
 the raisers, the trustees, of the heritable debts contracted by Edward  
 Cundell to Mrs Hay Mudie, Sir Alexander Keith, and Messrs Jamieson  
 and Company; quoad ultra, appointed the case to be enrolled, that parties  
 be heard on the disposal of the remaining points in the cause."\*

NOTE.—"The objections forming the subject of the discussion which has  
 taken place are founded on the preference supposed to have been held by  
 the trustees, as the creditors of John Cundell, the father, over the creditors of the  
 son, Edward Cundell, the son, and the alleged undue neglect of that preference  
 by the nominal raisers, the trustees of Edward Cundell, in consequence of which  
 it is maintained by the objectors that the nominal raisers have rendered  
 themselves personally liable for the sums paid to the heritable creditors mentioned  
 above interlocutor.

The Lord Ordinary thinks it clear that these objections cannot be sustained.  
 In the first place, he has great doubts whether the objectors can be considered as  
 creditors of the father John Cundell, entitled to take the benefit of the Act 1661,  
 From the express terms of the statute, and the nature of the provisions  
 made by the settlements of John Cundell, he rather thinks they cannot be so con-  
 sidered. But 2dly, It is unnecessary to enquire into that point; because, confes-  
 sion being made that no diligence was done by the objectors within the three years, in terms of  
 the statute; and because that defect could not be supplied by the circumstance of  
 Edward Cundell, the son, granting a trust-deed to the raisers, for the payment of  
 Edward Cundell's, creditors, without any reference or distinctive allusion to  
 the debts of his father. 3dly, In so far as the objectors found any thing on their  
 side, they are entitled to reduce any of the securities in question, on the ground that  
 they were granted within a year after the father's death, the present process  
 does not admit of such a discussion, as it is confined to an accounting with the  
 raisers; and as there is no action for reducing those securities, or even calling  
 in court the parties who took benefit from them. 4th, The trust-deed, under  
 which the raisers acted, and to which the objectors, by their own account, acceded,  
 was a trust-deed executed by Edward Cundell, the son, for payment of his own  
 debts, among whom the objectors were classed. Such being the case, it is clear  
 that the trustees, had no title to raise a question in regard to any supposed pre-

makes such provisions in favour of his children, that the for example, when he grants a bond to them which may to principal or interest, during his lifetime. But that provisions in this instance. Neither the principal nor the after his death. And in addition to this, the settlement were granted, contained in express terms the most ample power was fully reserved, in so far as the children were regard to the widow. Such provisions do not make the thing else than legacies. And it should also be observed concurred in executing the settlement of 1794, they did form of a mutual contract, but merely granted a joint each of them retaining power of revocation. It might p ent case if the claim of the younger children had been fo is no such claim, as they have renounced their legitim. ther such claim could obtain the benefit of the statute, as sence, the creditor of his parent for legitim. But it is u as the claimants have renounced their legitim.

I am therefore of opinion that according to well-establish of settlements, the claimants were not creditors of their f and not being creditors, they are not entitled to the ben Lord Ordinary has not expressly decided this point, but his note, to be his opinion, and he has also stated other

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ference held by any parties representing themselves as c the father, and it is not even averred upon the record apprised the trustees of any claim of preference in that cl they considered themselves entitled to it. Lastly. It is not

ment, many of which might be quite satisfactory if it were necessary to resort to them. It is, however, unnecessary to go into these questions, as I should prefer to leave the judgment of the Court upon the single ground that the claimants are the editors of their father, as that ground is insufficient of itself, and does not require the aid of any other. No. 320  
July 7, 1831  
Waugh v. Cundell.

**MR. MACKENZIE.**—I concur; and I think it a decisive circumstance in the question whether these children were creditors, that the provisions were revocable at any time at their father's pleasure. He could not be constituted the debtor of the children by such provisions. The mere circumstance that the term of payment in the provisions was after the father's death, though extremely important, might have been in itself decisive that there was not a debt reared up against the children. Had the obligation of the father been of an indefeasible nature, it might have been a very different question; but as it is, there is no difficulty. In regard to the other grounds of the Lord Ordinary's judgment, some are sufficient I think to support it, but there are others as to which my opinion would not be so clear without farther discussion. There is one strong ground in support of the judgment, no reduction of these heritable securities has ever been attempted, and that the children are not even parties in this process. It is quite impossible to sue the trustees personally in an action like this, which I suppose is just a claim for damages against them; at least I do not see how else it can be described. Without going into any other ground except that of the children not being creditors of their father, there is enough to warrant us in adhering.

**THE LORD PRESIDENT.**—I am of the same opinion. And as the various reasons which the Lord Ordinary has assigned in support of his judgment, are merely given in evidence, and are not embodied in the interlocutor itself, I think it unnecessary to state them individually. The claimants were not creditors but mere legatees of the father, so that the statute does not apply to them; and that is sufficient to warrant us to adhere. Our interlocutor, I apprehend, should specially set forth this as the ground of our judgment.

**THE LORD GILLIES** declined himself on account of relationship to one of the children in the heritable securities.

**THE COURT** pronounced this interlocutor:—"Find that the reclaimers, the daughters of the late John Cundell, are only legatees, not creditors, of their deceased father; and, with this finding, adhere to the interlocutor reclaimed against, and refuse this note: Find the reclaimers liable in expenses since the date of the judgment reclaimed against, and reserve the question of expenses incurred prior thereto, for the determination of the Lord Ordinary."

**J. and W. DYMCK, W.S.—W. MACKENZIE, W.S.—Agents.**

facts of the case, the apprentice had already found caution his contract of indenture, by means of the cautioner who was now a party in the suspension.

July 7, 1837.

1st Division.  
Lord Cuning-  
hame.  
Bill Chamber.  
D.

In 1834, John Munro, Jun., entered into an indenture for a term of years, to John Clark, cabinetmaker, father, John Munro, senior, became bound as cautioner for the currency of the indenture, Munro, junior, left who gave a charge on letters of horning, raised indenture, for implement of the contract of indenture 3s. 6d. during each day of Munro junior's absence the term of apprenticeship, besides payment of £20 penalty stipulated in the indenture.

Munro, senior, and Munro, junior, presented a bill of exchange, that, though Clark was bound not only to instruct him in his trade, but also to supply him with bed, board, and clothing, during his apprenticeship, he had entirely failed to fulfil these obligations; that he had been absent from his premises, so frequently, and for so long a time, that Munro, junior, of the benefit of instruction and supervision; that he had struck and kicked Munro, junior, when asked him as to the mode of executing a job, and that, being done in an outrageous and abusive manner, on the day when he quitted him; and that he had not supplied Munro, junior, with adequate sustenance whilst boarding with him. Clark expressly denied this, and stated that Munro, junior, had deserted his service

Clark reclaimed.

No. 321.

**LORD GILLIES.**—I think the interlocutor should be adhered to. The two parties are directly at variance, as to the facts of the case, and the apprentice has already found caution already, as he has a cautioner in his indenture, who is here going with him. July 7, 1837.  
Russell v.  
Rae.

**LORD COREHOUSE.**—I am of the same opinion. The apprentice has found caution to his master for the fulfilment of all his obligations as apprentice; but the master, of course, has found no corresponding caution to the apprentice. I think the bill ought to be passed as it is.

The other Judges concurred, and THE COURT thereon adhered.

ROY and WOOD, W.S.—A. DUFF, W.S.—Agents.

JOHN RUSSELL, Suspender.—*M'Neill—W. Bell.*

No. 322.

JAMES RAE, Charger.—*D. F. Hope—Patterson.*

**Process—Suspension—Communis Error.**—A bill of suspension was presented containing no formal conclusion for suspension of the charge, but merely a prayer for letters of suspension in common form; the bill though objected to as incompetent, was passed, and letters expedite which contained a regular conclusion to have the charge suspended; the competency of the letters, as disconform to their warrant, was objected to; it having appeared that in practice a considerable discrepancy in the style of bills of suspension prevailed;—The objection repelled, in respect of the discrepancy in the practice; but observed, that in correct style a bill should contain a distinct conclusion, drawn from the narrative and grounds of suspension, stating that the decree and charge, &c., should be suspended, which should be preceded by a prayer for letters of suspension.

**RUSSELL** presented a bill of suspension of a charge by Rae for payment of the price of certain heritable property. No caution was offered, and **Lord Ordinary** (Medwyn) refused the bill. Thereupon a second bill was presented. After stating the reasons in respect of which the suspender submitted that the charge was wrongful, so as to warrant an application for letters of suspension, the bill contained the following prayer: "Therefore, the complainer beseeches your Lordships for letters of suspension in the premises, without caution or consignment, in common form; or otherwise upon caution.—According to justice, &c." July 7, 1837.  
2D DIVISION.  
Ld. Moncreiff.  
T.

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There may at first appear some ground for the charger's complaint, where he alleges on the danger of making all questions between the masters and apprentices to depend on suits in the Supreme Court, by passing such Bills of Suspension as the Court may think fit. But the answer is obvious; the charger forced the suspender into Court, by giving him a charge, which can only be suspended at present by the Supreme Court. If the apprentice had really been guilty of desertion, the master might have applied to the Justices or Judge Ordinary to get him to return, and he might have sued the complainers for damages before the Sheriff. He has himself only to be sorry for being now involved in a litigation in this Court."

without caution or consignation."

A record was made up on the merits, embracing of the formality of the bill and expedite letters. (C) pleaded—

No process, in respect (1.) the bill contained no mention of the diligence. (2.) There is no warrant for suspension of the diligence, which has been inserted in the bill.

The suspender on the other hand pleaded—

The charger's plea of no process is not maintained. He did not reclaim against the Lord Ordinary's interdict and by implication, repelling the objection to the bill of suspension. (2.) That on its merits the bill succeeds in obtaining that bills of suspension, with a prayer in the bill for suspension, are in accordance with daily practice. And (3.) that a warrant for letters of suspension, is a sufficient warrant for introducing into the expedite bill the conclusion contained in the present letters, which is the normal conclusion of all letters of suspension.

The Lord Ordinary (Moncreiff), before closing the case, heard parties on the objection to the competency of the bill, the objection raised in the charger's first plea in law, and the Lord Ordinary of the Second Division," ordered short case to be called.

*Argued for the Charger—*

1. The bill, to be regular and formal, ought to contain a prayer for suspension of the charge and a prayer for letters of suspension.



assed bill. The expeding of the letters is nothing more than the act of engrossing the bill, the will being substituted instead of the prayer of the bill.<sup>1</sup> The present letters therefore are incompetent, being disconform to their warrant.

No. 322.  
—  
July 7, 1837.  
Russell v.  
Rae.

*Argued for the Suspender—*

1. Looking to the nature and object of a bill of suspension, it ought not to contain a conclusion for suspending the charge, however appropriate such conclusion may be in the expedite letters. A bill is a pleading in which the suspender shows cause why a warrant for expeding letters of suspension should be granted; its object being merely to stay execution in the mean time, and to obtain the requisite warrant for letters suspending the diligence until the charge is produced and the matter dismissed;<sup>2</sup> and this is illustrated by the style of the will of letters of suspension. In the juridical styles the formal conclusions in the bill and in the letters are not counterparts of each other, the clause in the bill being mere subsumption amounting in effect to no more than an expression of the suspender's own opinion of his case.

2. The objection to the letters as disconform to their warrant is incompetent, the bill of suspension being now out of Court. Besides it cannot be pleaded by way of exception, not being discoverable ex facie of the letters, and incapable of being instructed even by recovering their warrant, since the question of law would still remain whether these letters being undoubtedly "in common form" were or were not warranted by the fiat.

3. In regard to practice, the books of styles are not absolutely conclusive, although the older formalists support the suspender's view;<sup>3</sup> while the usage of the profession, although not uniform, also tends to support the same view.<sup>4</sup>

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<sup>1</sup> Jurid. Styles, 979, 993, 301, and 302; Erskine, IV. 3, 18, and 21; 1 Ross, 380; Mackenzie's Instit. IV. 3; Note in Brownlee, supra.

<sup>2</sup> Stair, supra; Hope's Min. Pract. by Spottiswoode, p. 76.

<sup>3</sup> Dallas, Part IV. p. 70, 117, 121 (quarto ed.); 6 Bell's Forms of Deeds, 324,

<sup>4</sup> In the appendix to the suspender's case a table was given showing the result of search made by his agents of the warrants of signet letters filed at the signet office. The course followed was thus stated: "Instead of pursuing the search through any one entire year, it was thought better to take at random all the passed bills for one month, in several successive years. Thus the month of January 1812 has been taken, because that is the year on which the signet office record of passed bills of suspension and advocacy, apart from other passed bills, commences. Then the same month in the years 1815, 1820, 1824, 1826, 1828, and 1830; and more recently the two months of June and January have been taken, and the examination continued till the month of June 1836. The annexed return, showing the result, sufficiently explains itself, and all the suspender has to state is, that the bills and years have been taken merely at random, and that in the months and years so taken, every bill of suspension presented and filed is included. Moreover, the names of the practitioners who have sanctioned the supposed irregularity are given, and the suspender appeals with confidence to this list of names as more than sufficient to counterpoise the authority even of the Juridical Society." The general

repelled the objection to the competency of the letters of suspension, but found no expenses due, and remitted to the Lord Ordinary to proceed accordingly.

No. 322

July 7, 1837  
Munnoch.

CAMPBELL and MACDOWALL, S.S.C.—J. CULLEN, W.S.—Agents.

ARCHIBALD MUNNOCH, Petitioner.—*Marshall*.

No. 323

—A party while in an infirm state of health having been served tutor-at-law to an infant nephew, and having two years afterwards applied by petition to be relieved of his office, on the ground of his health having become still more infirm, and other relatives of the pupil making no opposition, the Court allowed the petition, and appointed a factor loco tutoris.

ARCHIBALD MUNNOCH presented a petition setting forth that in 1835 July 7, 1837  
as nearest male agnate, been served tutor-at-law to the infant 2<sup>D</sup> DIVISION  
a brother deceased, which office he had undertaken at the solicitation of the infant's other relatives, although the state of his health was such as to confine him constantly to his house, and prevent him taking any part in the management of business; that the estate of the pupil consisted of soap-works and other premises, a farm, cash and outstanding debts amounting in all to about £12,000; that he had endeavoured to manage the estate by naming a maternal uncle of the pupil to be factor loco tutoris, but that his former debility had now become more aggravated, and he was unable to continue to perform in any way the duties of his office, that in these circumstances, there being a reasonable cause for his resignation, it was in the power of the Court to relieve him of his office, and to provide otherwise for the management of the pupil's estate.<sup>1</sup> He prayed the Court to sustain his renunciation of the office of tutor-at-law, or at all events to declare the said office at an end, and to remit the expenses to be examined.

An application was presented unico contextu with this petition for the appointment of a certain party as factor loco tutoris.

The petition having been intimated to the relatives of the pupil, the party proposed by the mother's side appeared by counsel at the bar, and consented to the prayer of the petition of the tutor, and to the appointment of the party proposed as factor loco tutoris.

THE COURT, looking to the state of the petitioner's health, granted the prayer of the petition, and appointed a factor loco tutoris in terms of the application thereanent.

J. F. WILKIE, S.S.C.—Agent.

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<sup>1</sup> Stair, I. 6, 24; Erskine, I. 7, 29.

1st Division.  
Ld. Fullerton.  
D.

of Session against William Ewing, residing at South  
payment of a set of law-accounts, incurred in num  
which he had acted as the law-agent of Ewing. Th  
mons was 7th November, 1836. Ewing concurred w  
lodging a joint minute, agreeing to hold the sum due  
be £2481, with £479 of interest, and the Lord Ordin  
cree for that amount in favour of Wotherspoon on  
The accounts had never been submitted to the audi  
extracted the decree, and raised a process of adjudica  
tage belonging to Ewing. In this process, the Lord  
23, 1837, pronounced this interlocutor:—"In respec  
this is the first process of adjudication brought against  
subjects libelled, appoints intimation thereof to be m  
Book, and on the walls of the Parliament House, to s  
tors of the defender, for the purposes and in the form  
statutes thereanent."

On June 12th, a reclaiming note against this interlo  
by defences, was presented by Andrew Bell of Bla  
Ewing was a bankrupt at the date of lodging the at  
that he was now pursuing a cessio in the Sheriff-Cour  
which process the defender had been appointed trustee  
by interlocutors of May 17 and 29, 1837; that Ew  
concert with Wotherspoon, and to the prejudice of t  
creditors; and that the decree taken by Wotherspo  
ledged balance of accounts, was irregular, and in the  
words of Act of Sederunt Edinburgh 6 1806 which

The defender then pleaded, that, as this was a first adjudication, there as no ground for dispensing with any of the ordinary forms, before pronouncing decree, as there was no hazard thereby occasioned to the pursuer of being postponed in a race of diligence. No decree of adjudication could therefore be pronounced *hoc statu*; but the defences should be received and a record made up in common form, before pronouncing any decree. And this course should the more readily be adopted, as there existed an objection to the decree of 17th February, 1837, which was constantly verified, the fact being admitted, that decree was taken without obtaining a report from the auditor.

The pursuer answered, that, as he only asked a decree of adjudication, reserving all objections *contra executionem*, the defender would not be thereby prejudiced, as it was open for him afterwards to point out an objection, if any existed, against the decree of 17th February, 1837. And as the defender was avowedly acting for a body of creditors, adverse to the pursuer, there was that species of competition which justified the court in granting such decree of adjudication. In regard to the objection stated against the decree of 17th February, 1837, it would be shown, when the proper stage for discussing it arrived, that the Act of Sederunt did not affect the validity of that decree.

The Lord Ordinary, on June 20th, “allowed the defences for the defender, Andrew Bell, to be received by the clerk as of this date; quoad ~~the~~, refused the prayer of the reclaiming note; found the said reclainer liable to the pursuer in the expenses incurred by him in relation to the note in the Inner House, and before the Lord Ordinary; modified ~~same~~ as interim expenses to four guineas; and decerned for payment thereof accordingly to the pursuer against the said Andrew Bell; and ~~ordered~~ this decret to be extracted *ad interim*, and decerned.”

On June 28th the pursuer produced another libelled and signeted summons of adjudication against Ewing, which he craved might be conjoined with the first, and, in respect of the intimation made, that decree of adjudication should be pronounced in the conjoined process. The Lord Ordinary “conjoined the other summons of adjudication at the pursuer’s instance above-mentioned with the present process, and added, declared, and decerned against the defender, conform to the conditions of the libel in both actions, reserving all objections *contra executionem*, and allowed the decret to go out and be extracted *ad interim*; ordered the petitioner, Andrew Bell, to give in a condescendence of grounds of his defence by the second box-day in the vacation, and the pursuer to answer the same by the third sederunt-day in November ~~next~~.”

The defender again reclaimed, and prayed the Court to alter, “and to refer to the Lord Ordinary to hear parties upon the defences, or to order them to make up a record.”

No. 324

July 11, 1837

Wotherspoon

v. Bell.

No. 324.

July 11, 1837.  
Russell v.  
Crichton.

**LORD GILLIES.**—This is a first adjudication; and, looking at the Act of Sederunt, it rather appears to me at present that the Act of 1711, 1837, was taken in direct contravention of it, and is therefore, inclined to recal the interlocutor of the Lord Ordinary Lordship to allow a record to be made up in common for decree.

**LORD COREHOUSE.**—I think the judgment of the Lord Ordinary altered, and a record made up before pronouncing decree. In my opinion, I am influenced chiefly by the consideration that the Act of 1711, 1837, is only as a matter of indulgence, and under the same considerations, that the Court departs from its ordinary form in making adjudications, and summarily pronounces decree reserving executionem. But in a first adjudication, no necessity for ordinary forms exists. Had this been a second adjudication, I should have held the plea in reference to the Act of Sederunt to satisfy the Court in refusing to grant the usual decree reserving executionem. A first adjudication stands on a totally different footing.

**LORD MACKENZIE.**—I am of the same opinion. I see no objection to justify the Court in departing from the ordinary course of decree in this process. A record should first be made up in common.

**LORD PRESIDENT.**—I am of the same opinion; and I may say that it appears to me to be doubtful whether the decree of 1711, 1837, is struck at by the Act of Sederunt.

**LORD GILLIES.**—I am not prepared to say, that if this had been a second adjudication I should have refused to pronounce decree under the Act of 1711, 1837. But it is unnecessary to go into a case which is not

Their Lordships altered the interlocutor of the Lord Ordinary to allow a record to be made up in common for decree of adjudication; and remitted to the Lord Ordinary, reserving all questions of expenses.

W. J. RUSSELL and MACKENZIE, W.S.—A. ROBERTSON, W.S.—

No. 325.

JAMES RUSSELL and MANDATARY, Pursuers. *D. F. v. Andrew Crichton*, Defender. *Sol. Geo. Rutherford*

*Process—Petition—Proof.*—A petition raised an action of damages for an alleged infringement of patent; after a condescendence lodged, he moved for an order of inspection of the defender's

AMES RUSSELL of Bescot-hall, Staffordshire, and his mandatary, Andrew Liddell, ironmonger in Glasgow, raised an action of damages against Andrew Crichton, gas-tube manufacturer in Glasgow, on account of an alleged infringement of a patent held by Russell, for the manufacture, particularly the welding, of gas-tubes. After a condescendence and answers were prepared, the pursuers moved the Court to pronounce an order, allowing persons of skill, and also the pursuer's mandatary, Liddell, to inspect the manufacture of the defender, and to examine his process, for the purpose of giving evidence at the trial. They alleged that such course was followed in similar cases in England,<sup>1</sup> and particularly in the process at the pursuer's instance, in which an order for inspection was pronounced by the Vice-Chancellor, a copy of which was now laid before the Court; and that it was necessary to allow such inspection, in order to prevent the infringement of patents with impunity, which might always be done if the party who committed the infringement were permitted to resist all inspection of his manufacture. In support of the motion, affidavits were produced by scientific persons, stating that, in their judgment and belief, the pipes made by the defender appeared, from inspection of them, to be made by the patent process; and specimens of pipes made by both the pursuer, and defender, were produced, in reference to the affidavits. The defender stated that his process for manufacturing gas-tubes was materially different from the patent process; that it was a secret process, unprotected by any patent, and would entirely lose its value if an inspection of it were permitted; that the application for inspection was at least premature; and that, in any event, such inspection should only take place in the presence of neutral parties named by the Court, and not in presence of the mandatary of the pursuer, who was a gas-tube manufacturer, nor of any person in the pursuer's employment. After minutes of debate had been prepared, and reported to the Court, their Lordships expressed an opinion that some mode of inspection of the defender's work must be allowed, otherwise any patent might be infringed with impunity; that such inspection should be afforded, as to enable inspectors to inform themselves on every thing relevant to the points in dispute; that the law-agent of the pursuer should be permitted to attend, as had been authorised by the Vice-Chancellor's above-mentioned order; and that all those who were admitted to the inspection must be aware of its being their bounden duty to make no farther disclosure afterwards, than was required for doing justice in this process. Their Lordships then pronounced this interlocutor:—"Appoint the defender, An-

No. 325.\*  
 July 11, 1837  
 Russell v.  
 Crichton.

1st Division.  
 Lord Fullerton.

Decided on June 1st, 1837, but omitted under that date.

Russell v. Cowley and Dickson; Repertory of Arts (Law Reports), vol. II., p. 168; Russell, Nov. 21, 1834; Crompton, Neesom, and Roscoe's Reports, vol. I., p. 64.

this action; it being the object and intention of the said viewers to give such evidence to the Court as the cause, as will enable them to prove the infringement patent, if the facts be so as alleged in the action; the Lords farther appoint the pursuer, Andrew Liddell, inspecting the defender's manufactory, as aforesaid, and to the following viewers, viz., John M'Call, William W. Christie, ironfounder, &c., and accompanied by the defender's solicitor, of his (Liddell) manufacturing pipes, or tubes, for gas or other purposes, and methods of doing the same; for which purpose Liddell, is to put his machinery to work in presence and to afford every facility to them to ascertain the welding tubes, in every respect, as has been allowed in the works of the defender: And the Lords farther appoint the inspections shall take place *quam primum*, the one or other, at sight of the Sheriff-Depute, or any of his days' previous notice to be given by the pursuer's agent, with power to the viewers to continue or as from day to day, if necessary, till finished."

J. MACANDEW, S.S.C.—FERGUSON and DUNCAN, S.S.

No. 326.

COLIN CAMPBELL, Pursuer.—For

the succeeding autumn at Inverary. The defender now applied to the place of trial changed to Glasgow, where a Judge and counsel would be present and interpreters in attendance at the Jury Sitings, and which would be altogether more convenient. The pursuer contended for the right to name the place of trial, and that the witnesses resided nearer Inverary than Glasgow; and this was a question as to Highland marches, which a Highland jury would best understand, and they would also be more able to follow and appreciate the evidence.

No. 326.  
July 11, 1837.  
Tait v.  
Duncan.

THE COURT granted the defender's application, one of their Lordships stating that Highland jurors were very apt to put different interpretations on evidence given in Gaelic, and to quarrel as to the interpretation of the interpreter.

—Agents.

ALEXANDER DUNCAN TAIT.—*D. F. Hope—Robertson.* No. 327.  
HONOURABLE LADY DUNCAN and SPOUSE.—*Sol.-Gen. Rutherford—Miller.*  
(Competing.)

*Trust—Legacy—Vesting.*—Terms and provisions of a trust-deed of settlement, which held not sufficient to import a postponement of the vesting and payment of the residue of the trust-estate in unlimited fee-simple, beyond the death of the settlor and the majority of the residuary legatees.

By disposition and deed of settlement dated in March 1820, the late Alexander Duncan, W.S., conveyed to certain trustees, whom failing to his own nearest lawful heirs whomsoever, his whole heritable and moveable property; providing always that they should be “obliged to account and apply their whole intromissions with the trust-subjects hereby mentioned, and the rents, issues, and profits arising from the same, in manner following,” viz. 1st, For payment of the expense of making up titles executing the trust; 2d, for payment of the truster's debts, including a sum of £2000 contained in a bond granted by him to his youngest daughter, Mary Duncan; 3d, For payment of annuities and legacies; which the deed proceeded—“and with regard to the rest, residue, remainder of the said trust-estate, and the value and proceeds thereof not converted into money, including as a part thereof the capital sums not set apart or reserved for answering and paying the several annuities

July 11, 1837.  
2D DIVISION.  
Lord Jeffrey.  
T.

This bond, dated in 1811, contained two clauses of return, 1st, to the heirs of Alexander Duncan; 2d, to the heirs of the granter, which were so expressed as to import no limitation on the right granted.



the annuities aforesaid, in manner following, viz. half thereof to Mary Simson Crawford, my surviving child of the marriage between the said Captain Ford, and the now deceased Anne Duncan, my eldest daughter, and the heirs of the body of the said Mary Simson; and the other just and equal half thereof to Alexander Duncan, only child of the marriage between Captain Ford and the Royal Navy, and the said now deceased Mary Simson, daughter, his wife, and the heirs of the body of the said Alexander Duncan Tait, but under this provision always, as it is provided and declared, that in case the said Mary Simson, my granddaughter, shall happen to decease without leaving issue of her own body, the half of the residue or remainder settled on her shall belong to the said Alexander Duncan, son, and the heirs of his body; and on the other half, without leaving heirs one or more of his body, the half and remainder settled on him shall belong to the said Mary Simson Crawford, my granddaughter, and the heirs of her body, and the said grandchildren, without leaving heirs one or more of their bodies, that then the whole of the said residue and remainder shall belong to my own nearest heirs or assignees exclusive of the legal heirs or representatives of my said daughters either of them; and also exclusive of Henry Twysden, Isobel Duncan or Twysden, my niece, and the heirs of the said trustees are hereby requested and authorised to distribute the said residue and remainder of my trust-estate according

ue of this settlement, any thing herein before contained to the No. 327.  
 notwithstanding. And in case my said grandchildren, or either  
 shall happen to be in minority at the time of the death of the July 11, 1837.  
 ver of myself and my said wife, I hereby appoint my surviving Tait v.  
 before named, and the survivors and survivor of them, or the Duncan.  
 aforesaid, to be guardians and curators to such minor or minors,  
 ging the estate and subjects to which they may happen to suc-  
 virtue of these presents, until they respectively attain the age of  
 complete."

uncan died in 1821, being survived by Mrs Duncan, his wife,  
 in 1825. Subsequent to this event, Mary Simpson Crawford,  
 ie grandchildren, provided for in the above settlement, attained  
 She was married to Sir Henry Duncan, who afterwards died,  
 two children of the marriage. Alexander Duncan Tait, the  
 andchild favoured by the settlement, attained majority in 1834,  
 ll unmarried.

after doubts having arisen as to the rights and interests of these  
 and the duration of the trust, the surviving trustees brought an  
 f declarator and multiplepoinding, calling all parties interested,  
 eluding to have it found and declared either that the trust had  
 ired, or that it was still in force, and must continue to subsist  
 death of both the truster's grandchildren above mentioned; and  
 vent of its being found that the trust had already expired, con-  
 in common form, as in a multiplepoinding. Alexander Dun-  
 and Lady Duncan severally put in defences to the action, the  
 maintaining that the trust had come to a close, and that he was  
 to have paid over to him, in fee-simple, one half of the free resi-  
 the trust-estate; while Lady Duncan, on the other hand, main-  
 hat the trust must continue to subsist until the death of both  
 s, and that the substitution of each to the share of the other, in  
 t of the death of either without issue, was not vacated by the  
 ances of their having both attained majority.

Lord Ordinary, after appointing Cases to be lodged, made avizan-  
 h the cause to the Court, and issued the subjoined note.\*

he parties having concurred in expressing their wish for an early deci-  
 ie Inner House, the Lord Ordinary has reported this case without a judg-  
 d cannot say that he has yet come to any mature or confident opinion on

sidering it to be a *questio voluntatis*, his leaning is certainly in favour of  
 an Tait, and that chiefly upon these grounds:—1st, That the leading in-  
 to the trustees is expressly *to pay over* the residue to the two grand-  
 after the decease of the widow.' 2d, That the trustees are appointed  
 to the grandchildren, if in minority, at the death of the widow, for the  
 purpose of 'managing the property, to which they may succeed by these  
*until they respectively attain the age of 21 years complete,*' plainly im-  
 it, when they attained that age, they were, both and each, to be admitted

nary's apprehension, that neither of them could ever re-  
ultimate substitution of the truster's nearest heirs, in th  
without children, being precisely and identically in t  
mutual substitution to each other, under the clause im  
legitimate effect, therefore, of this construction would be  
cendants of the truster, and, beyond all doubt, the per  
settlement, would, in no event, derive any benefit whate  
their own persons, but must be dealt with as if they  
from whom the actual inheritors might spring, or as pe  
the property was to accumulate, for the advantage of a  
representative of the testator.

" It will be readily admitted, that, in a questio volunt  
tion is to be preferred to one which would lead to suc  
does not appear to the Lord Ordinary (though the dec  
expressed), that that suggested by Mr D. Tait is liable  
It is only necessary to hold, that all the provisions ab  
either of them dying without issue, were meant only for  
*before the succession opened to them* by the death of th  
make all parts of the deed at once consistent with each o  
is manifestly its leading destination, and conformable to  
tural and usual disposition of property among such relati  
that Lady Duncan is thought to be quite wrong, in the  
read the introductory or qualifying words, '*in manner fi*  
with the conditions on which she relies. These words  
would represent, to qualify the *special* disposition and  
*grandchildren*, but are merely introductory to the direct  
*generally*. The direction, in short, is not as she wou  
grandchildren, sub modo, or, '*in manner following*,' b  
apply the residue '*in manner following*,' viz. to the  
widow's decease), and, in the event of their dying (it u  
without issue, then to the truster's nearest heir, &c.  
their true connexion, do not in the least affect the c  
another.

for Alexander Duncan Tait—

No. 327.

the generally advanced period of life of the trustees, as compared with the age of the two defenders, and from there being no provision for carrying on the trust upon the failure of the trustees, its continuance for a tract of time could not have been contemplated.

July 11, 1857.

Tait v.

Duncan.

The presumption of law is in general against entailing or tying up property, and this is more especially applicable to a case where the trustees are directed to pay over the residue of moveable property to persons so named.

The regulating clause of the deed, by which the trustees are directed, after the death of Mrs Duncan, “to pay over the said residue and the income of my trust-estate, and the rents, issues, and profits accruing thereon, or to assign and convey the rights and securities of the same, in and to the persons who shall always to payment of the annuities aforesaid, in manner therein expressed,” viz. one equal half thereof to Lady Duncan, and the heirs of her body, and the other equal half to Alexander Duncan Tait, and his heirs, —is inconsistent with the subsistence of the trust, the payment of the annuities being directed to be made notwithstanding the subsistence of the trust, no deeds being directed to be granted by the trustees, nor investments to be made at their sight, in order to maintain the destination, and the direction being merely that the moveable property shall be equally divided between the two residuary legatees; in contrast, contrasting strongly with the case of Campbell’s Trustees<sup>1</sup> (1836), in which, though there was a direction to pay, yet the sentence directed the trustees also at the same time to entail the

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*prentrix*. Even upon the opposite construction, the Lord Ordinary is not satisfied with her Ladyship’s exposition of the law. The alleged clause of the deed is not expressed in the proper form of such clauses; and, in particular, it does not provide that, in the event stated, the property shall revert to the *granter* thereof, but only that it shall belong to his nearest heirs. Now, Mr Erskine says (3, 8, 45), that this does not import a prohibition to alter, and such seems to be the ground of the decision he refers to; Wauchope, 22d Nov. 1752 (Mor. 4404). It seems also to be settled, that such clauses do not prohibit gratuitous alterations, where the original destination was to heirs *alioqui*, and not to stranger disponees. See case of Marquis of Clydesdale, 1726 (Mor. 1262), affirmed on appeal. Now the grandchildren of the testator are the heirs at law. In the case of Irving, in 1824, referred to by the Lord Ordinary, the disposition was to a sister not the lawful heir. Those cases, as they are not mentioned in the cases; but for the reasons already stated, the Lord Ordinary thinks all this branch of the argument as well as that of *mutual* substitution, is *excluded* by the construction to which he

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<sup>1</sup> Ante, XIV. 770.

and authorised to settle and secure" the residue of  
ordingly," cannot control words of direct will and  
not imply a substitution of the one grandchild to  
there is no distinction made in the deed betwixt t  
and the rents and profits, so that if the trust was to  
of one of the grandchildren without issue as to the  
of reasoning, subsist as to the liferent also, which is

6. The appointment of the trustees as curators fo  
and subjects to which the grandchildren might suc  
deed, "until they respectively attain the age of 21"  
inconsistent with the idea of the continued subsiste  
that term.

*Pleaded for Lady Duncan—*

1. Upon a just construction of the several claus  
viewed in connexion with each other, and especia  
the provision made for the continuance of the trust  
testator's heirs-at-law, in the event of the failure  
by him, the direction to the trustees to settle and  
funds according to the prescribed order of successio  
clause by which that direction is so far qualified  
grandchildren respectively, if they should marry, to  
in favour of their spouses, out of the funds to whic  
in virtue of the said settlement; it is clear that it w  
tion of the testator, that the substitution of each of  
of their respective children, to the share of the othe

s, "in manner following," and the subsequent provisions No. 327.  
ed to, necessarily import.<sup>1</sup>

use of return, providing that, on failure of both the testator's <sup>July 11, 1837.</sup>  
without leaving heirs of their bodies, the whole of the <sup>Tait v.</sup>  
<sup>Duncan.</sup>

l belong to his own nearest heirs or assignees whatsoever,  
their legal heirs and representatives, supports the construc-  
ended for; as does also the direction with which the clauses  
n and return are followed up, authorising the trustees to  
secure the residue of the estate accordingly."

stitutions in question are conceived in such form as to  
effectual in law; for the present is no absolute or unlimited  
to either grandchild, but is modified and limited by the  
stitution and return, which are conditions of the grant.

a case of mutual substitution, and, as such, imports a pro-  
st any deed being done in prejudice thereof by either of  
implying that the grant in favour of the grandchildren re-  
conditional, and that the substitution must receive full  
event of one of them dying without issue.<sup>2</sup>

g in view the gratuitous nature of the present deed, the  
g inserted therein a clause of return, declaring that, in the  
grandchildren dying without issue, the estate should be-  
wn nearest heirs, he thereby made it a condition of the grant  
n should not be defeated in case the event provided for  
lace.<sup>3</sup>

ove views derive force from the consideration, that the set-  
be carried into execution through the intervention of  
hold the subject for the general behoof of the principal  
sted, according to the respective rights provided to each by  
he testator, which rights and provisions these trustees are  
powered and enjoined to secure accordingly.<sup>4</sup>

ing the presumption of law to be against substitution in  
ill, if the intention of the testator be sufficiently expressed,  
give it effect;<sup>5</sup> and this presumption no longer applies in  
trust.

; and in the event of its being found that the pursuers are

v. Campbell's Trustees, *supra*.

8, 44; Williamson v. Littlejohn, 1684 (M. 4331); Moffat, 1724  
Iacredie v. M'Fadzeon's Executors, 1754 (M. 4402).

Johnston, 1740, Kilkerran v. Fee Absolute, No. 2; Beatson, 1747  
ohnston v. Irving, June 22, 1824 (ante, III. 163; new ed. 110;

. Myles, June 27, 1809 (F.C.); Glendinning v. Walker, Nov. 30,  
V. 237; new ed. 241; and F.C.); Scougal v. Walker's Trustees,  
ante, XII. 910), affirmed.

1740, affirmed in 1743, Stewart and Craigie, 343.

the consulted judges returned the following :

**LORD PRESIDENT.**—We are of opinion, that the trust is to be paid over to Mr Duncan Tait his share of the residue of the principal and profits accruing therefrom, or to assign and convey the same and securities of the same.

We do not see any terms in the trust-deed which imply, or indicate the intention of the truster, that the person of the trustees beyond the lifetime of the widow and grandchildren.

The liferent to the widow is a separate matter, not a question ; but in regard to the grandchildren, it is not a question of theirs, leaving the fee to remain in the persons of the trustees, after the decease of the widow, to pay over, not the principal and profits of the estate, but the residue and remainders, and convey the rights and securities of the same, in equal shares to the grandchildren, without any restriction or limitation whatever, except to each other, if they died without issue ; and the after the death of the truster's own nearest heirs and assignees, exclusive of the trustees, then the trustees are directed to settle and secure the same accordingly.

But, if they had executed any such settlement, it could not have limited the previous destination, which expressly gives the fee of the residue or remainder.

The opposite construction, as is well stated in Lord Brougham's opinion, necessarily have this strange effect, not only that neither of the trustees could receive anything whatever, till the death of one of them

, by the destination, the grandchildren have no broader or better right to the No. 327.  
 its and profits of the residue, than they have to the residue itself.

**LORD MONCREIFF.**—I concur in the Lord President's opinion. I am perfectly July 11, 1837.  
 Tait v. Duncan.  
 able, that by a certain forced construction, in order to extricate the settlement  
 an absolute absurdity, it might be held that it was the testator's meaning, to give  
 the rents and profits of the estate to the grandchildren, without inferring that the  
 disposal of the capital fund was to be under the same rule. But I think not only  
 that this construction is altogether arbitrary, but that the more just and legal in-  
 ference is, that because the rents and profits were so given within the same opera-  
 tion of words which appointed the payment of the capital itself, if the one could not  
 be withheld without running the settlement into absurdity, neither could it be the  
 meaning to withhold the other, appointed to be given by the same words. The  
 mention of rents and profits, as if it were superfluous in this view, presents no  
 difficulty to my mind. It is a very common clause, where it is clearly intended  
 that trustees are to convey the fee or principal at a fixed term. But, besides, there  
 might be rents or profits in the hands of the trustees, to which the liferentrix or  
 executors had no right.

It appears to me, in general, that there is no difficulty in reconciling all the  
 clauses of the deed with the supposition that the trust was not intended to subsist  
 beyond the life of the liferentrix. But, independently of this view, and supposing  
 that a case of proper substitution was created, I still think that the obligation to  
 pay on the death of the liferentrix is absolute, and that no such substitution could  
 control the power of the legatee to dispose of the fund. It might be a good sub-  
 stitution, if the money were left undisposed of; but of no effect to restrain the  
 power of the institute. I rather think, that it was a conditional institution, puri-  
 ty and extinguished by the event. But taking it to be a substitution, I am of  
 opinion, that that would not alter Mr Tait's right to receive payment as appoint-  
 ment or deprive him of the power of disposal of the money.

**LORD FULLERTON.**—The case is not free from difficulty; as the deed is ex-  
 pressed in terms which it is perhaps impossible to reduce into absolute consistency.  
 But, upon the whole, I am disposed to adopt the conclusion arrived at by the  
 Lord President and Lord Moncreiff, that Mr Tait is entitled to the immediate and  
 restricted possession of the half of the residue.

In the first place, I consider the clause appointing the trustees to "pay over the  
 residue," &c., at the death of the liferentrix, to be an express direction to denude,  
 consequently to be inconsistent with the farther continuance of the trust.

Secondly, I think that the nature of the various provisions, contingent on the  
 issue of the testator's grandchildren without issue, as well as the form of expres-  
 sion of those provisions, obviously point at the subsistence of the trust, during the  
 period when they were intended to take effect.

And the only legitimate conclusion seems to me to be, not that the mere pre-  
 scription arising from the latter consideration should control the express terms of  
 the clause fixing the termination of the trust, but that these latter provisions should  
 be construed consistently with that express clause, and should be held to apply  
 to the case of events there mentioned occurring during the undoubted conti-  
 nuance of the trust, that is, during the lifetime of the liferentrix.

There may be difficulties attending this construction, as well as any others which  
 have been resorted to: But it involves no absolute inconsistency with any of the ex-  
 press clauses of the deed; and viewing the question as one of presumption, it pre-



and the survivors or survivor; "and failing all these acceptance, my own nearest lawful heirs whomeoever." of trustees, he conveys all his property, heritable and ceptions. The first exception is in favour of the trustee predecease, or by death after that of the testator, but w sal, then in favour of his granddaughter Mary Simson ( case she shall die in minority and unmarried. And it n that though this bequest is given by exception from the the legatees named expressly in absolute property, yet t trust was not to be limited to any short period of dura of such decease of Mary Simson Crawford, in minority special articles should be comprehended in, and make pa to the trustees for the uses of the trust.

The trustees are then empowered, in reference to the debts due to it, transfer shares of stock in bank, &c., in moveables; as also to establish in their own persons, ti heritages (with one exception); to sell these, levy the r appoint factors for management of the trust-estate; an do all "and every thing requisite and necessary for t hereby granted."

Then follow the purposes of the trust, the trustees bei for and apply their intromissions with the trust-subjects, sing from them, as follows: viz. 1st, For payment of 2dly, For payment of the truster's debts, funeral expen allowance for his widow and family, from his death til should be recovered; "and including also among my sterling, for which I granted a bond to the now dec

an, my wife, for her support and maintenance during all the days of **No. 327.**  
 after her decease, to pay over the said residue and remainder of my **July 11, 1837.**  
 ate, and the rents, issues, and profits accruing therefrom, or to assign **Tait v.**  
 he rights and securities of the same (but subject always to the pay- **Duncan.**  
 annuities aforesaid), in manner following." This is said to be a direc-

ediate unconditional payment or conveyance over. But—  
 it had been the case, there could have been no room for any direction  
 rents, issues, and profits." The capital being immediately payable  
 ould be no such rents, &c. to be paid over.

payment or conveyance is "in manner following," and then follow  
 as to the disposal of this residue, and profits thereof, which makes  
 o read the general direction to pay or convey with reference to these  
 id not in any abstract way; and it immediately appears that these  
 not be executed with effect if the payment or conveyance was to be  
 d unconditional.

it is particularly worthy of attention, there follows, in the end of the  
 tive to the disposal of this residue and its profits, these words, "and  
 ees are hereby requested and authorised to settle and secure the said  
 emainder of my trust-estate accordingly,"—distinctly and expressly  
 trustees not to make any simple and immediate payment or convey-  
 ut to take care, in all events, that their acts should be such as to se-  
 the directions of the truster. How this was to be done is not pointed  
 : by continuance of the trust, or by the constitution of new securities;  
 way, and through the acts of the trustees, it seems plain that it was  
 e effectuated.

: are these directions? They are to convey—"One just and equal  
 o Mary Simson Crawford, my granddaughter, only surviving child of  
 between the said Captain James Coutts Crawford, and the now de-  
 Duncan, my eldest daughter, his wife, and the heirs of the body of the  
 mson Crawford; and the other just and equal half thereof to Alexan-  
 Tait, my grandson, only child of the marriage between Captain James  
 of the Royal Navy, and the said now deceased Mary Duncan, my  
 ghter, his wife, and the heirs of the body of the said Alexander Dun-  
 t under this burden always, as it is hereby expressly provided and  
 t in case the said Mary Simson Crawford, my granddaughter, shall  
 cease without leaving heirs one or more of her own body, the half of the  
 nainder of my estate hereby settled on her, shall belong to the said  
 uncan Tait, my grandson, and the heirs of his body; and, on the  
 he shall die without leaving heirs one or more of his own body, the half  
 sidue and remainder settled on him shall belong to the said Mary  
 ford, my granddaughter, and the heirs of her body; and failing both  
 lchildren, without leaving heirs one or more of either of their bodies,  
 whole of the said residue and remainder shall pertain and belong to  
 est heirs or assignees whatsoever, wholly exclusive of the legal heirs  
 tives of my said grandchildren, or of either of them; and also exclusive  
 wysden; the eldest son of Isobel Duncan or Twysden, my niece, and  
 his body." Then, after the clause of power to the trustees above-  
 e deed goes on,—“But without prejudice, nevertheless, to the said  
 Crawford, my granddaughter, in case she shall be married, to settle

ance over or them must defeat the will of the trustor, & been seen, are expressly empowered and required to g the trustees execute the trust so—how can they pay o profits so—or settle and secure the residue so, that the directed to be conveyed to Mary Simson Crawford shal without leaving heirs of her body, belong to Alexande half of the residue directed to be conveyed to him, shall, out heirs of his body, belong to her ; and that both he trustor's own legal heirs or assignees, wholly exclusive tatives, if the immediate duty of the trustees be to pay residue simply and absolutely to these two favoured persons use of a special power to them to settle part of their resp contract, if they were to receive the full halves in un frequently with full power to dispose of them wholly by a these powers were given in contemplation of the parties i of the trustor's wife, and when the fee of the halves had neither the expression, nor the place of the powers, appe interpretation. Nor do we think, that if the funds i without limitation, to these parties, there could be any w of right to the fee in them from the term of the trustor's any marriage contract executed by them before the death The trustees, then, having sufficient powers, and their t thing but the true meaning of the trustor, and take effe full effect, we are not able to think that the trustor's me of the residue should be immediately made over in free p ally, to Mary Simson Crawford and Alexander Duncan '

It is said that this provision is merely a substitution, a with clauses prohibitory. it creates no limit on the rich

, the return being to the heirs of the granter, not to the granter himself, it No. 327.  
 reate any limitation against even gratuitous alterations, to establish which,  
 of Wauchope, 22d December, 1752 (Mor. 4404), is referred to. We <sup>July 11, 1837</sup>  
 at case not sufficient to support the doctrine. For in that case the clause <sup>Tait v.</sup> Duncan.  
 tained in the bonds of provision granted in implement of a contract of  
 (so found); and therefore it was incompetent to insert in them any clause  
 ffect went beyond a mere substitution, or to give such effect to such a  
 inserted. It is impossible, therefore, to rely on it as establishing any ge-  
 ctrine of the kind alleged.

, it is observed that when a grant is to heirs alioqui successuri, a clause of  
 as no force beyond a substitution; and the case of the Marquis of Clydes-  
 th January, 1726 (Mor. 1262), is referred to on this head. We doubt also  
 ciency of this decision to support the doctrine rested on it. For in that  
 party contending for the benefit of the clause of return, was not the heir  
 the return was provided, but a prior heir-male, called only as a substi-  
 l in whose favour the return was not conditioned.

nswer, however, which appears to us to be the true one on this point is,  
 clause here is not a clause of return, but a clause of direction to trustees.  
 ough it has been said that clauses of return are to be strictly construed,  
 re aware of no authority for applying such strict interpretation to clauses  
 tions to trustees, particularly where provided with sufficient powers "to  
 the trust," and general instructions "to settle and secure the estate" ac-  
 to these directions. Such trustees, we think, have no duty but to find out  
 e true meaning of the truster; and when found out, to give it effect, in the  
 it is best fitted for that purpose; but at any rate in some form, so that it  
 be defeated. In whatever way, therefore, the present trustees ought to  
 ir duty, we do not think they can comply with the demand of Alexander  
 Tait, because that is a demand not agreeable to the true intention of the

been observed by the Lord Ordinary, that this interpretation would de-  
 e parties primarily favoured of all use of the trust-funds for a long time,  
 their right to the rents and profits of these funds is not separable from  
 ht to the capital. In this we do not agree. It is the residue, i. e. the  
 f the residue of the trust-funds only to which the limiting conditions of the  
 ections apply. There is no direction of that kind having application to the  
 d profits, or from which it can be inferred that the trustees were to secure  
 that they should remain subject to the rights of any person in any contin-  
 We see no words to prevent the paying or assigning over of these annually  
 arise, after the death of the truster's wife, Mary Simson or Duncan. They  
 able or assignable over immediately, just as the capital also might have  
 there had followed no conditions referable to it, by which such immediate  
 or assignation was restrained. The separation is effected by the applica-  
 he limiting conditions to the capital, and the non-application of them to  
 s and profits accruing annually. On the whole, then, we remain unable to  
 at the claim of Alexander Duncan Tait ought to be sustained.

cause was this day finally advised.

MEADOWBANK.—I concur with the minority of the consulted Judges.

various special legacies and annuities by another deed, the residue of his estate, heritable and moveable, by the trust-deed. After nominating his wife and certain gentlemen to be survivors or survivor of them, whom failing, by death, the nearest lawful heirs whatsoever, he assigns to them the residue of the trust, for certain ends and purposes, excepting therefrom the annuities. He names the trustees his executors, with power to the trustees who are declared to be a quorum, whom failing, with power to the survivor, to uplift and receive the whole of his effects, to make and execute the same, and to sell and convert into money, and then apply the same as pointed out. The trustees are directed to lay out the residue of the estate in such securities as they shall deem best, *in their own names*. There is no direction whatever to select any series of substitutes, and nothing, in fact, indicative of a settlement. The trustees are then to pay over the annual income to this residue, the disposal of which is committed to the trustees, without doubt, first, that the persona predilecta as to its annual income be the testator's widow. The persons preferred to the fee, as his grandchildren, the present competitors; and, looking to the future regarding them, which must be taken in their entire state, the true will of the testator, I cannot bring myself to any other conclusion than that the deed does not provide for a continuance of the trust beyond what has already occurred. So long as Mrs Duncan survived, she was entitled to the residue of the produce of the residue, under burden of the annuities, the trustees are directed to pay. Lady Duncan was married to two children; and, being of age, she is entitled to have the residue paid over to her. Mr Duncan Tait, having been a minor

to the deed which directs the trustees "to pay over the said residue and No. 327.  
der, &c., or to assign the rights and securities of the same" to the grand-  
n. It appears to me that the proviso for the payment of the residue, &c. July 11, 183  
"subject always to the payment of the annuities aforesaid," is an import- Tait v.  
use as indicative of the true meaning of the testator. For it clearly contem- Duncan.  
the event, that the grandchildren, having got possession of their shares, are  
them only subject to such payment, the trustees being liberated from their  
sibility, and their duties being terminated on having so "paid over," in terms  
trust-deed. I certainly agree with the Lord Ordinary in having discovered  
ds indicating any provision for paying the income or interest of the shares  
er of the grandchildren. The issues and profits are only to go along with  
ds themselves. But if this is truly so, and it is to be held that the trust is  
inue till the deaths of either or both of the grandchildren, it must follow  
ither of them can receive any thing from the residue of their grandfather's  
which seems to have been so anxiously provided for them. If the duty of  
stees is to watch the interest of the testator's other nearest heirs whatso-  
hey must wait for the possible event of no lawful issue being left by the  
d grandchildren. But this does not appear to me to be at all reconcilable  
plain meaning and intention of the testator. He had had the misfortune to  
th his daughters during his own life, and he seems to have looked to the  
ity of his grandchildren also dying early; and he accordingly made anxious  
on in the clauses above referred to for the possibility of their dying before  
cession opened to them. He was also undoubtedly desirous, in reference  
event, that on his grandchildren dying without lawful issue, his own near-  
s, and not those of the grandchildren, viz., their paternal relations, should  
l; and this the trustees are directed to guard against, and to settle and  
accordingly. I can lay no stress on the argument so much enlarged upon  
he clause of return, being unable to hold that doctrine at all applicable to  
e. But if it were so, the Lord Ordinary's observations would deserve at-  
. On the whole, I am for deciding in favour of the pleas of Lieutenant

D GLENLEE.—I have no doubt that the proper time has come for the trus-  
perform their duty, and not to keep up the trust to all eternity. The  
period for denuding has arrived, and they are to be exonerated. In point  
the real interest of Lady Duncan and Mr Tait accrued at the death of the  
though their affairs were to be managed by the trustees during their mino-  
The trustees have brought both a declarator and a multiplepoinding, and  
ly to denude on granting a deed at sight of the Court. Two claims as de-  
are given in; one, that Tait should be absolute and unlimited fiar of the  
be paid over, as the true meaning of the deed of the testator. Why should  
se a disposition expressly in terms of the deed? I had some difficulty as  
two sets of opinions: One gives Tait the full right, while the three Judges  
Gillies, Mackenzie, and Corehouse) give no opinion as to the right, but  
us to take the terms of the deed, let the result be what it may. I incline  
opinion. Supposing there had been no trust-deed, but a direct settlement,  
ator might have put in the express provision that one dying should suffer  
of a half of the succession. A declarator will be competent after such  
and it is rash to modify the will of the testator. An instruction to entail on

No. 328. GEORGE WILLIAM HOPE, Pursuer.—*D. F. Hope*  
*C. Hope.*

ROBERT SPEARES, Defender.—*A*

*Teinds—Warrandice—Superior and Vassal.*—Term held not to import an obligation on the superior to reli-  
mentations of stipend.

July 11, 1837. In the year 1721, the lands of Kinninmont were  
ties by Sir Thomas Bruce Hope of Craighall, herita  
2<sup>d</sup> DIVISION. lands and teinds, to Thomas and Robert Pitcairn, b  
14. Moncreiff. the same terms. The reddendo was expressed as  
F. therefor yearly, the said Thomas Pitcairn and his  
heirs and successors, of feu-duty, the sum of four h  
pounds eleven shillings three pennies Scots mon  
bolls well-dight good and sufficient bear, six boll  
well-dight oats, fifteen threaves of straw, and, in t  
Sir Thomas Bruce Hope, three shillings Scots for  
sixty-nine poultry and a half, or, in my option, fou  
Scots for each of the said poultry, with the sum of  
for each capon, of three dozen capons, and to furni  
five carriages of coals at the manor-house of Cra  
three carriages of a horse to and from any place  
fourteen miles distant from Craighall: all these

w will ; and also to free and relieve the said Thomas Pitcairn, and No. 328.  
 foresaids, from all cess, outreeks of horse and foot militia, and other  
 ic burdens whatsoever, ministers' and schoolmasters' stipend and sa- July 11, 1837  
 (except the sum of seven pounds three shillings four pennies Scots Hope v.  
 ly, payable by the said Thomas Pitcairn, and his foresaids, to the Speares.  
 olmaster of Ceres,) beyond the feu-duty afore-mentioned, teinds and  
 alties payable furth of the said lands, to my superiors thereof, and  
 of all years and terms bygone, present, and to come."

he feu-duties payable in terms of these charters were about the agri-  
 ral value of the lands at the date thereof. These feu-charters con-  
 ed no conveyance of the teinds.

1729, Sir Thomas Hope sold to Charles Earl of Hopetoun the lands  
 baronies of Craighall, comprehending the lands of Kinninmont, with  
 teinds thereof, the following clause being contained in the disposi-  
 :—" And in regard the said Charles Earl of Hopetoun has paid the  
 price to me for the said teinds as he has done for the stock of the  
 lands and baronys above disposed, it is expressly stipulated that I  
 ld warrant the said teinds against further augmentations of minister's  
 nd, and all other eviction whatsoever : Therefore, and but prejudice  
 e absolute warrandice above-mentioned, I bind and oblige me, and  
 foresaids, to warrant, acquit, and defend the haill teinds, parsonage  
 vicarage, of the said haill lands and baronys afore disposed, from all  
 er augmentation of ministers' stipends, or other burdens or imposi-  
 whatsoever that can be imposed upon the sd<sup>s</sup> teinds, parsonage and  
 age, of the said haill lands and baronys, in all time coming."

here was also the following exception :—" As also, excepting and  
 rving always furth and from this present warrandice, all charters and  
 ositions, and precepts of clare constat, and other feu-rights granted  
 e, my predecessors and authors, to the vassals, feuars, and possessors  
 e said lands, baronys, and others afore disposed, with the pertinents."  
 he personal obligations for relief of ministers' stipend, &c., contained  
 e feu-charters above-mentioned, did not appear in the record of  
 ns, and were not repeated in the subsequent renewals of the right.  
 ource of years the late General Sir Alexander Hope acquired by  
 ress the estate of Craighall, and stood in the right of Sir Thomas  
 e, the original superior and granter of the feu-charters, while the  
 nder Speares became proprietor of both halves of Kinninmont, and  
 eeded to the right of the original vassals. Since the date of the  
 ters, no payment for ministers' stipend had been made by the vassals  
 account of the lands of Kinninmont, such payment being for the first  
 e demanded from Speares in 1828.

peares having fallen in arrear of the feu-duties payable to the supe-  
 and which he refused to make forthcoming on the ground of a  
 ater claim against the superior, as bound to relieve him of the stipend  
 able out of the teinds of the lands, Sir Alexander Hope, in 1832,



of stipend exigible on account of the lands, and the conclusions were groundless and inconsistent with the feu-charters, which must regulate the rights of parties.

The Lord Ordinary appointed the parties to prepare their attention chiefly to the question, Whether of the superior generally, or by the terms of the charter in the present case, there is an obligation laid on the superior of augmentations of ministers' stipend, in order to be reported to the Court?"

*Pleaded for Sir Alexander Hope—*

1. The terms of the clause of warrandice, in the present case, are not such as to found a claim against the present superior for augmentations of stipend allocated subsequent to the charter. This is established by a series of cases where the terms have been held insufficient to operate such relief.<sup>1</sup> In the present case, on the opposite tendency, the constitution of the obligation is supported by very explicit expressions, and in none of them had the superior a right or heritable right to the teinds of the lands. The grantor of the feu-right, who was proprietor of the lands, although he did not convey the teinds with the lands, granted a clause of relief, which is to receive greater teinds than conveyance of the teinds could have had, and this is an absurdity.

2. Even assuming that the clause in the charter imports an obligation, the obligation contended for against the grantor and

pearing *ex facie* of the records, is not binding upon a singular and onerous successor in the superiority.<sup>1</sup> No. 328

*Pleaded for Speares—*

July 11, 1833  
Hope v.  
Speares.

1. The terms of the clause of warrandice infer the relief insisted for.<sup>2</sup> The obligation of relief from stipend would have had no meaning at all, unless it had referred to a future claim therefor, no stipend having been payable for the lands at the date of the charters, nor down to 1828.

2. The only title upon which the superior can claim the feu-duties now in question, is the feu-charter under which the defender holds the lands of Kinninmont; and by it the right of demanding the feu-duty is made to depend upon the superior relieving the vassal of minister's stipend. In precepts of clare constat, and other renewals of the investiture, all the conditions of the original charter are held to be repeated, unless in so far as they are departed from or altered by the express agreement of parties.<sup>3</sup>

3. As the feu-duty payable for the lands was their yearly agricultural value at the date of the feu-charters, and as no stipend was ever paid by the vassals prior to 1828, the superior would be obliged, according to the decision in *M'Donald v. Heriot's Hospital*,<sup>4</sup> to relieve the vassals of any claim for stipend or any similar burden. But assuming this law to be questionable, in the present case there is an express obligation of relief from stipend and all other public burdens.

The Lord Ordinary made *avizandum* with the cause to the Court, adding to his interlocutor the subjoined note.\*

<sup>1</sup> *Nasmyth v. Storie*, Dec. 17, 1740 (M. 10276); *Gall v. Mitchell*, Feb. 6, 1729 (M. 10306); *Duke of Argyle v. Creditors of Barbreck*, 1730 (M. 10306); *Lady Castlehill v. Stewart*, 1731 (M. 10275); *Salmon v. Lord Boyd*, July 25, 1751 (M. 4181); *Tailors of Aberdeen v. Coutts*, Dec. 20, 1834, ante XIII., 126; *Stair II.*, 3, sect. 53 and 46.

<sup>2</sup> *Cunningham v. Cuthbertson*, Jan. 27, 1829, *Shaw's Teind Cases*, 175; and *Cases* there referred to in Opinion of Majority of Court; *M'Ritchie's Trustees v. Sir Alexander Hope*, Feb. 26, 1836, ante XIV., 578.

<sup>3</sup> *Stewart v. Russell*, June 3, 1813 (F.C.); *M'Leod v. Ross*, 5 *Brown's Sup.* 115; *Nasmyth v. Storie*, Nov. 9, 1748.

<sup>4</sup> Feb. 12, 1828, *Shaw's Teind Cases*, 156; and April, 1830, 4 *W. and S.*, 98.

\* "The Lord Ordinary will not enter particularly into the argument of these *Cases*. He will only say, that he reports the cause solely on the ground on which Lord Jeffrey reported the case of *Pedie v. Heriot's Hospital*, viz., the application which is here made of the decision in the case of *Macdonald*. He is humbly of opinion, 1. That on principle, and according to the authorities, there is not even in the first title of the vassal any obligation of warrandice against future augmentations of stipend; 2. That such an obligation cannot be inferred against a superior, merely from the nature of the feudal title, whatever may have been the value paid for the land: where the teinds are not conveyed, any estimate of the value of the lands supposes them to be taken with their natural burdens, if not expressly excepted; 3. That the attempt to maintain this against a singular successor in the superiority, where no words at all are inserted in the vassal's seisin, as if such an obligation were a *natural incident* to the feudal tenure, shows in a very strong light the singularly dangerous nature of the plea itself; and 4. That it can make

guar successor in the superiority.

On the first of these points, we are of opinion, that no nally constituted. It has occasionally been supposed, that between the judgments which have been pronounced in t red in this matter. But any such discrepancy has only t the rule to the special circumstances of particular cases ; i fixed. It is, that in order to create and leave such a bur must be a distinct warrantice to this effect,—not nec particular words, but by the use of terms which unequiv tion. The course of practice by the parties subsequently ferred to in order to explain their understanding of the n one way or other, an unequivocal obligation to relieve mentations must be established, and no mere implication, will suffice.

Now, on applying this rule to the terms of the grant b pear to us to import any such obligation. We need not It is sufficient to refer to the explanation given of them i to say, that we think they can all receive a satisfactory co ing up this burden, which is not one of the natural in tion.

This being the case, the second point is superseded ; fc tion created, it is unnecessary, or rather impossible, to transferred.

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no difference whatever on the legal state of the question, demand of the superior for payment of his feu-duty. To a take for-granted that the feu-right is burdened with such a thing to be proved.

“ The Lord Ordinary cannot but regard the case of Ma

The cause was this day put out for advising.

No. 328.

LORD JUSTICE-CLERK.—I am not prepared to say that I think this so clear a case. July 11, 1837.  
Morrison v.  
Munnoch.

LORD GLENLEE.—I doubted at first. The teinds here are not expressly conveyed; but by the whole clause I think Sir Thomas Bruce Hope meant to convey the teinds. If the only object was to relieve from minister's stipend, I can conceive a right to be relieved while the superior held the teinds, as a claim of recourse against the titular. Though the teinds are not conveyed by dispositive words, they are virtually conveyed. It would be intolerable to relieve this party, and I agree with the principles adopted by the consulted Judges.

LORD MEADOWBANK.—I also concur in their opinion.

LORD MEDWYN.—I agree. Holding this to be a conveyance of the teinds, it is very like the case of North Callange,<sup>1</sup> and the decision must not be inconsistent with that case.

THE COURT having considered the opinion of the consulted Judges, decerned in the declarator as to the defender's relief from payments of teinds, superseding quoad ultra till next Session, and allowed interim decree to be extracted.<sup>2</sup>

JAMES HOPE, W.S.—WALTER COOK, W.S.—Agents.

HUGH MORRISON, Pursuer.—*J. Murray.*  
ROBERT MUNNOCH, Defender.—*A. Wood.*

No. 329.

*Jurisdiction—Process—Foreign.*—A party, domiciled in England, contracted a maritime debt, to the amount of £14, for ship-furnishings made in Leith by a ship-chandler there; the ship-chandler used arrestments (in the hands of a debtor residing in the shire of Edinburgh) to found jurisdiction, and raised an action for payment, before the Court of Session:—Question, whether such action, the sum being under £25, was competent in that Court, or ought to have been brought, in the first instance, before the Sheriff (of Edinburgh) in respect of the provisions of Stat. 1 W. IV. c. 69, § 21 and 22, although the debtor resided abroad.

In the circumstances above stated, the Lord Ordinary dismissed the action as incompetent. The pursuer presented a reclaiming note, and the Court ordered minutes of debate, after which the parties compromised the case. July 11, 1837.  
1st Division  
Ld. Fullerton  
D.

LAWSON and GILMOUR, W.S.—J. MILLER, S.S.C.—Agents.

<sup>1</sup> Ante XIV. 578.

<sup>2</sup> Sir Alexander Hope having died in the course of the proceedings, his son and successor, George William Hope, was sisted as pursuer in his stead.

the executry of his deceased brother WILLIAM BOW  
ing on the decree, and the defenders presented a bill  
case was entirely of a special nature. There was  
facie vitiation of one of the bills; and in regard to  
at one time been written by the deceased William  
lee, acknowledging that he had received payment  
hers. But this letter was afterwards stated by the  
probability, to have been a mere ruse, resorted to  
pose. A plea of minority was also urged by Alex.  
the late William Bow was alleged to have acted as  
der Mrs Brownlee, under a family trust, for behoof  
lee, the affairs of which required to be extricated  
between these several parties.

The Lord Ordinary refused the bill, as it was of  
or consignment, and there had been considerable  
riff Court: but, on a reclaiming note being presen  
mously altered and passed the bill.

FISHER and DUNCAN, S.S.C.—J. STUART, S.S.C.

No. 331.

— KENNEDY, Pursuer.—*Montgomerie*  
HIS CREDITORS, Defenders.—J. ALEXANDER

*Cessio—Interest—Proof.*—Held that a creditor of the  
has been duly cited as such, is not admissible as a witness  
sition to the cessio (though he has made no appearance a  
except that he is a creditor and has an interest in the issue

pearance. Kennedy objected that, as they were creditors, they No. 331.  
 parties to the suit, and could not competently be examined. The July 12, 1837  
 decree was taken and sealed up, and the question was now raised, in Kennedy v.  
 regarding the cessio, whether it was competent to open up the sealed de- His Creditors  
 crees.

The opposing creditors pleaded, that those creditors who did not appear as defenders, and oppose the cessio, were not objectionable, especially the fact of their having given evidence would operate as a personal bar against their ever afterwards being allowed to appear as parties and oppose to the process. By giving evidence, therefore, they truly discharged their interest in the depending process, and so became competent witnesses.

The pursuer answered, that, even though the non-opposing creditors actually to bind themselves to offer no opposition as parties, that they could not discharge their interest in the process; that if the cessio was refused, whether they appeared as opposing parties or not, they would leave the pursuer left open to their diligence, as much as to the diligence of the other creditors; and that the general rule applied to this debarring any one, who was a defender in a process, or who had an interest in its being defended, from giving evidence in support of the process.

MR. MACKENZIE.—I apprehend that there is no authority for holding that a creditor of the pursuer of a cessio, can give evidence as a witness in the process in support of the defence. If one creditor may do so, all the creditors who appear as defenders, may equally do so. And even although the giving of evidence might bar a creditor from afterwards appearing and making direct opposition as a defender, I do not think he is thereby made a competent witness. It would not be enough, though he offered to discharge all right to appear as a defender. He would require to offer a discharge of all right to do legal diligence against his debt against the pursuer, as fully as if the pursuer had obtained decree in cessio, before he could truly discharge himself of interest in the issue of the process. The cessio, if refused at all, would leave the pursuer exposed to the diligence of all his creditors alike; a creditor appearing as a witness would therefore have the same interest in the issue of the process, with a creditor appearing as a defender. I think all the creditors, therefore, are inadmissible, under the general rule which excludes parties, or witnesses having an interest; and when I consider frequently it happens that creditors are under the influence of strong excitement and anger, on such occasions, I can see no ground whatever for relaxing the general rule in this instance.

The other Judges concurred, and the Court found the evidence inadmissible.

On considering the other parts of the proof, THE COURT refused the cessio *hoc statu*, and subjected the pursuer in the expense of the proof.

July 12, 1837.

Lord Justice-  
Clerk.

At the registration for the county of Ayr in Walker, schoolmaster in Tarbolton, lodged a claim to be enrolled as a voter. The pursuer, Gray, and James Brown, ma, and tradesmen there, had been employed to examine upon, and gave evidence in the Registration Court claim was rejected by the Sheriff, on the ground of the registration in 1836, Walker again lodged a claim following terms :—" I, Robert Walker, schoolmaster claim to be enrolled as a voter in the county of Ayr last year on the culpable and wilful mis-statement of Tarbolton, viz., Mathew Gray and James Brown, that Tarbolton schoolhouse contained four rooms, and consisted of five rooms, viz., parlour, kitchen and a fifth room is worth 25s. per annum, and falls to be noted of £9, 18s. sterling. I further claim on the claim of the foresaid house, and under the same roof. A Tarbolton church, given to the schoolmaster, &c., by decree of Division in 1821, value £1 per annum, and land of upwards of £10, all in the parish of Tarbolton Ayr. Signed at Tarbolton, the 18th day of July, 1837.

" R

Thereafter Gray, founding upon the statement of claim, raised an action of damages against Walker intended to represent, and did represent him to have

er put in defences, stating, inter alia, that Gray and Brown, who No. 382.  
 posed to him in politics, had not entered his house so as to ascer-  
 number and value of the apartments it contained, and in conclu- July 12, 1836  
 ting forth as follows:—"Again, with respect to the statement Gray v.  
 the defender in his claim for enrolment, it is positively denied, Walker.  
 was intended to represent, or does represent, that the pursuer was  
 f culpable and wilful perjury. As already mentioned, the defen-  
 ject was simply to explain to the Sheriff the reason why he had  
 prived of his vote in the previous year; and with this view he  
 out the fact, that the pursuer and Mr Brown had made a culpa-  
 wilful mis-statement in their valuation, in so far as they had re-  
 ed, that the defender's dwelling-house consisted of four rooms,  
 n point of fact, it consisted of five different apartments. But, in  
 his explanation, he certainly never intended to charge the pur-  
 Mr Brown with perjury, that is, with making a statement upon  
 ich they knew to be false. All that he meant to convey was,  
 y had made an erroneous statement as to a matter of fact, in de-  
 the subjects occupied by him, without taking the proper means  
 taining the truth, by a careful inspection of the premises.

remains to be observed, that if the statement complained of in the  
 enrolment, contrary to the defender's understanding, can be held,  
 fair construction, to imply an accusation of perjury, he most wil-  
 takes this opportunity of judicially retracting the charge, and, at  
 the time, expressing his sincere regret for having inadvertently  
 se of expressions of such an injurious tendency. Most assuredly  
 nder does not now, and never did believe or suspect that the pur-  
 s guilty of perjury on the occasion referred to. On the contrary,  
 no hesitation in declaring his conviction that there is not the  
 t ground for such an imputation."

n admission that the defender in July, 1836, prepared and trans-  
 to the Sheriff-Clerk of the county of Ayr the claim as above  
 an issue was sent for trial, "Whether the whole or any part of  
 words are of and concerning the pursuer, and falsely and calum-  
 accuse the pursuer of perjury, and were maliciously inserted in  
 claim or schedule, to the loss, injury, and damage of the pur-

mages laid at £500."

land, for the pursuer, maintained that the writing in question con-  
 n accusation of perjury,—that it was false, calumnious, and like-  
 licious, and did not come within the privilege of judicial slander,  
 nder having made mis-statements knowingly.

pursuer adduced evidence to show the impression produced in the  
 ation Court, when Walker's claim was read, and also to the cha-  
 f Messrs Gray and Brown.





d what the nature was of the charge made. The claim was to be read in open No. 332  
 court, and the witnesses spoke to the impression it made at the time. Keeping July 13, 1831  
 these things in view, you have also to look to that branch of his defence, where Robertson v  
 the defender disclaims the intention of accusing the pursuer of perjury. This is Ainslie's  
 to be taken into consideration if you should think damages due; but you will also Trustees.  
 consider why this was not done before the action was raised.

THE JURY found for the defender.<sup>1</sup>

W. MENZIES, S.S.C.—JOHN BOWIE, W.S.—Agents.

MRS CHRISTINA ROBERTSON, Pursuer.—*D. F. Hope—Moir.* No. 333.  
 AINSLIE'S TRUSTEES, Defenders.—*Sol.-Gen. Rutherford—*  
*G. G. Bell—Neaves.*

*Bankrupt—Composition—Pactum Illicitum.*—A bankrupt and his creditors  
 having agreed to a composition by private contract, and one of the creditors hav-  
 ing become cautioner in the composition and granted composition bills, the bank-  
 rupt granted to this creditor an assignation of his whole effects, with the view of  
 the creditor operating payment to himself, over and above his proportion of the  
 composition sum;—Held that such assignation was illegal, and verdict given ac-  
 cordingly.

IN the end of the year 1829, Robertson and Company, merchants in July 13, 1831  
 Leith, of whom the sole partner was the late Alexander Paterson Ro- 2D DIVISION.  
 bertson, became insolvent, and a meeting of creditors took place on the Lord Justice-  
 4th November. Some days afterwards Robertson made the following Clerk.  
 offer of composition :— R.

“ *Leith, 4th December, 1829.* ”

“ We hereby make offer to you of a composition of seven shillings per  
 pound, on your respective debts due by us, payable by bills, in three  
 equal instalments, at six, nine, and twelve months, from the 15th De-  
 cember current, with the security of Mr William Ainslie, and Mr John  
 Ainslie, merchants, Leith; also of one shilling per pound more at eigh-  
 teen months, payable by our own bills, on condition that this offer is  
 accepted to by all our creditors, previous to delivery of said bills.

(Signed) “ ROBERTSON & Co.”

“ to the Creditors of Robertson &  
 & Co., Merchants, Leith.” }

On the same date, William and John Ainslie, who were relations of the  
 bankrupt, and creditors to a considerable amount, formally bound them-  
 selves “ to the effect stated in this offer,” which was accepted by the  
 creditors. Composition-bills were thereafter granted by the Ains-

The same verdict was returned, pro forma, in the action at the instance of  
 the pursuer.

taken, and thus granted by the said William Ainslie  
for the sole use and behoof of the said Company,  
Alexander Paterson Robertson, as an individual, and  
condition and stipulation that we, the said Robertson  
said Alexander Paterson Robertson, should not only  
said William Ainslie and John Ainslie, the whole gra  
tion belonging to us, whether in bond or otherways,  
warehouses in Leith, with full power to sell and disp  
their own behoof, and which delivery has already  
that we should grant the assignation underwritten:  
said Robertson and Co., and I the said Alexander  
sole partner of that Company, and also as an individ  
transferred, conveyed, and made over, likeas we do  
fer, convey, and make over, to and in favour of the s  
and John Ainslie, and their heirs and donators who  
goods, gear, debts, sums of money, corns, cattle, b  
and whole moveable property of whatever description  
the said Robertson and Co., or to me, the said Alex  
bertson, wherever situated, without exception or limi  
larly without prejudice to the foresaid generality,  
bonded grain," &c., with full power to dispose of the  
declaring, that in the event of us, the said Robert  
the said Alexander Paterson Robertson, within on  
date, repaying the whole sums advanced by the said  
John Ainslie, on our account, with all expenses incu  
tive to the premises and relieving and indemnifying

William and John Ainslie the whole sums advanced by them, and No. 333.  
 r relative expenses, shall be their absolute property, and at their  
 posal); which assignation above written, we, the said Robertson July 13, 1837.  
 ., and I the said A. P. Robertson, bind and oblige ourselves, and Robertson v.  
 esays, to warrant," &c. Ainslie's Trustees.

he same date, Messrs Ainslie granted to Robertson the following  
 tter:—"As you have this day granted an assignation in our fa-  
 f all the grain and other effects at present belonging to you, in  
 of the obligations we have come under, for a composition to your  
 s of seven shillings in the pound, we hereby engage, that in case  
 any reversion remaining after paying all these obligations, and  
 enses you may have incurred in winding up the concern, to make  
 e same to you; and, in case of your death before that event takes  
 o make over the reversion to Mrs Robertson, and which is to be  
 sole disposal. It is also understood, that we are to retain full  
 it of John Balfour and Co.'s bills, amounting in whole to £3000."  
 first instalment of the composition was paid by the Ainslies, from  
 dvanced for this purpose by Robertson, and the other instalments  
 aid as they became due.

lay, 1835, William Ainslie having died in the interim, his trustees  
 cutors, including John Ainslie, presented a petition to the Admiral  
 , setting forth the assignation above-mentioned, and that the Messrs  
 had entered into possession of the grain so conveyed (of which  
 son's property chiefly consisted), but that with their sanction Ro-  
 had intromitted with various parcels of this grain,—that in con-  
 with the whole transactions there remained due to the petitioners,  
 esenting the assignees, a balance of £1000 and upwards, which  
 quired to be settled,—and praying the Court to authorise the grain  
 sposed of, or at least so much of it as should be necessary to satis-  
 petitioners' claim.

efence against this petition, Robertson, alleging that he had made  
 s to the Ainslies more than sufficient to cover the obligations con-  
 by their composition-bills, and the amount of their just claims,  
 ,—

he assignation founded on by the petitioners is illegal, and can  
 e no action, in respect that the petitioner was an acceding creditor  
 espondent's offer of composition of 8s. per pound, by which his  
 is discharged, quoad ultra, except in the event of the non-payment  
 composition. In endeavouring to enforce full payment of this  
 ie petitioners are attempting a fraud upon the other creditors who  
 l to the composition, on the express understanding that all the  
 s, including the petitioners, were to be placed on the same

ven. if it were competent for a creditor who had once acceded to  
 r. of composition, thereafter to stipulate for full payment of his

1. As the regular and normal deed upon which cannot be rescinded or taken away incidentally, declarator, or other process before the Supreme ( plea of invalidity is incompetent in this action.

2. That plea is totally groundless in itself, the the assignation not having been entered into at a position was accepted of, or given as the price of sion ; but being a new and subsequent undertaking lawful consideration, and duly instructed by writing, fully valid and binding, whether viewed as a revival of the former debt.<sup>1</sup>

After a variety of procedure, the Admiral pronounced interlocutor on a closed record :—“ Finds the petitioner finds the letter, No. 35 of process, of 7th June, late William Ainslie, Esq. and John Ainslie the assignation granted of that date by the respondents finds that, in so far as its terms take the respondents needs for full payment of the bills referred to in the to support the prayer of the petition, therefore of No. 1 of process, to the extent prayed for, and decrees to the final determination of this question, appoints

days from this date, to lodge a state showing are prepared to establish as due to them, holding account with the respondents upon the same footing at the period of their bankruptcy, for sums the decrees, and to this extent reserves the effect of the act consideration of all other questions raised under it.’

upon the trustees brought an advocacy, which having been No. 353.  
to the Jury Roll, the following issue was sent for trial, Mrs  
a Robertson, as disponee and executrix of Robertson, who had July 13, 1831  
the course of the proceedings, being held as pursuer: Robertson v.  
Ainslie's  
Trustees.

being admitted that the pursuer, Mrs Robertson, is general dis-  
posed executrix of the late Alexander Paterson Robertson,—  
being also admitted, that about the month of November, 1829,  
on and Co., of which the said Alexander Paterson Robertson  
sole partner, became insolvent, and that the creditors of the  
y accepted of a composition of 8s. per pound on their respective

being also admitted, that the late William Ainslie, and the defen-  
Ainslie, were then creditors of the said Company; and that the  
Alexander Paterson Robertson granted to them the assignation, No.  
cess,—

whether the said assignation was granted by the said Alexander  
Robertson, and accepted by the defenders, John Ainslie, and  
William Ainslie, or either of them, in consequence or implement  
rupt stipulation, agreement, or mutual understanding, betwixt  
Alexander Paterson Robertson and the said William and John  
or either of them, that the debts then due to the said William  
Ainslie, or either of them, should be paid in full?"

pursuer led evidence to show that the assignation had been con-  
d from the commencement of the transaction as to the composi-  
was not a subsequent arrangement, and that at the date of the  
on, there was as yet no concluded contract between Robertson  
reditors; maintaining, in law, that although there were no fraud,  
ssignation might, under the circumstances, be corrupt and ille-  
that whatever might have been the case had a cautioner engaged  
contract, the present case was entirely different where the as-  
were creditors as well as cautioners.

efenders, without leading evidence, answered that here was no  
fraudulent stipulation; that Messrs Ainslie took the risk of  
the whole composition to the creditors, which they would have  
ged to do had the price of grain fallen, and the subsequent as-  
was, in the circumstances, not contrary to law; that, looking  
relative back-letter, this was only a stipulation that Messrs Ainslie  
paid in full in case of there being a reversion, and was a dif-  
se from an absolute assignation.

JUSTICE-CLERK, in charging the Jury, observed,—I have no difficulty  
to the law applicable to this issue. When there is an agreement to a  
on either under the Bankrupt Act or by private contract, if it be settled  
he bankrupt and any one creditor, that that creditor is to receive a larger  
the others, or full payment of his debt, undoubtedly such arrangement is  
transaction, and no effect can be given to it by any Court. It would

*Reparation—Solatium—Road.*—Certain road-trustees be made, in the course of which a large heap of stones the footpath and partly on the carriage road, where they out any precaution being taken to warn travellers : a gig stones in the dark, and a person driving it was seriously killed : Held that the road-trustees were liable in damages that they had no personal knowledge of the obstruction, a tractor who was habited and reputed competent for the operation specially charged to be careful ; and pleaded that they were pable negligence of his servants. 2. In assessing the sum account of the death of the son, a boy of ten years of age of the personal injury sustained by the father.

July 18, 1837. JAMES FINDLATER, coal-merchant, Perth, left D of 23d October, 1836, to return to Perth along 1  
1st Division. Inchtute. He was driving a gig, in which his so  
L. President. ten years of age, was along with him. The night  
was overturned on a large heap of stones which had  
on the footpath, and partly on the carriage road, 1  
vice of the contractor employed by the road-tru  
placed to mark the spot, and no person was station  
Findlater was sober, and was driving cautiously at  
quence of the overturn, he sustained considerable p  
ring medical treatment for its cure, and his son was  
that he died in a few days afterwards. Findlater  
damages against the road-trustees, libelling that th  
road had been formed by the operation of the road  
surveyors or contractors, or other person or persons

ment of £500, in name of reparation and solatium for the death No. 334.  
 on; and £500, in name of damages for injury to himself. The July 19, 1835  
 s, besides other defences, stated that even if the stones had been Clarke v.  
 own, as alleged, it was done without their personal knowledge; Brooks.  
 ey had employed a competent contractor, who was specially charged  
 areful; and that the obstruction could only have been occasioned  
 culpable negligence of his servants; but, as the office of trustees  
 atuitous, they pleaded that they were not liable for such culpable  
 ence, which was not imputable to them, as they sufficiently fulfilled  
 luty, provided that the contractor or servant whom alone they  
 iately employed, was habite and repute respectable, and compe-

following issue went to trial before a jury:

being admitted that the defender is treasurer to the trustees on  
 npike-road from Perth to Dundee, through the Carse of Gowrie,  
 hture,

Whether, on or about the 23d day of October, 1835, the pursuer  
 ie late Henry Findlater, his son, while travelling in a gig along  
 d road near the west half-way house, were overturned through the  
 r negligence of the said trustees, or others in their employment, to  
 s, injury, and damage of the pursuer?"

he trial the Lord President overruled the plea above quoted, which  
 t up in defence by the road-trustees, and, on the facts of the case,  
 y found a verdict for the pursuers, assessing the sum due, on ac-  
 of the death of the pursuer's son, at £500; and the sum due on  
 it of the injury to the pursuer himself, at £300. An exception  
 ken to the direction of the Lord President, in reporting which the  
 ngs of the parties will be more fully noticed.

RITCHIE and HILL, W.S.—BELLS and RUTHERFURN, W.S.—Agents.

ATRICK CLARKE and MANDATARY, Pursuers.—*D. F. Hope—*  
*A. M'Neill.*

No. 335.

WILLIAM BROOKS, Defender.—*M'Neill—G. G. Bell.*

estment—*Reparation.*—A case of a special nature, in which a jury July 19, 1835  
 ed a sum of damages for a wrongous arrestment of certain goods.

1st Division  
 Ld. President

J. TAYLOR, S.S.C.—A. PATERSON, W.S.—Agents.



No. 336. JAMES BORTHWICK (Manager of North British Insurance Co.)

*M'Neill—Whigham.*

July 21, 1837.

Borthwick v.  
Langmuir.

ALEXANDER LANGMUIR and OTHERS (Ralston's Trustees),

*Sol.-Gen. Rutherford—Cowan.*

*Et e contra.*

*Insurance—Policy.*—Circumstances in which, verdict found that life-insurance was obtained by the misrepresentation or by the undue influence of material facts, by the party insured, or those acting on her behalf.

July 21, 1837.

1st Division.  
Ld. President.

On December 3, 1833, the late Mrs Ralston, relict of James Ralston of Warwickhill, transmitted a proposal for a policy of life-insurance on her life, to the North British Insurance Company at Glasgow, through their agents at Kilmarnock. One of these agents had visited her at the time when she signed the usual declaration of good health. She stated herself to be of the age of 60 years, next birthday, and the amount of the proposed insurance was £2500. Both parties subscribed by herself as to her health, and the certificate of the medical attendant and private referee, imported that she was in good health, and that, in reference to her past and present health, the issue of an insurance on her life would not be attended with any unusual hazard. The Insurance Office agreed to enter into the policy, which was issued on 10th December. The premium of £150, 19s. 8d. corresponded to the sum assured, at the rate where there is no unusual hazard to the life of the party. Mrs Ralston died of apoplexy on 2d December 1834. The Insurance Office soon afterwards learnt circumstances respecting the state of Mrs Ralston's health, which induced the payment of the policy. Alexander Langmuir and others, trustees under Mrs Ralston's settlement, raised an action for payment of the policy; and the Insurance Office lodged defences, besides which they raised an action of reduction of the policy. The ground of the defence was that the state of Mrs Ralston's health, at and prior to the issue of the policy, was such as to render her life unusually hazardous; that misrepresentations on this subject had been made to, or important information had been withheld from, the Insurance Office: and that whether this was done fraudulently or not, it must void the policy, by reason of its express terms, and to the implied condition of full disclosure, which was of the essence of the contract.<sup>1</sup>

Defences were lodged in the reduction, and, a record being entered, the following issues went to trial, it being fixed that the Insurance Company should stand as pursuers:—

“Whether the policy of insurance, No. 23 of process, bearing date the 10th of December 1833, is valid and effectual, or whether it is void and of no effect, by reason of its express terms, and to the implied condition of full disclosure, which was of the essence of the contract.”

<sup>1</sup> Forbes and Co. March 9, 1832 (ante, X. 451).

an insurance by the pursuers, of the sum of £2500, on the life of the late Mrs Agnes Ralston of Warwickhill, for a year from the 10th December, 1833, was obtained from the pursuers by the misrepresentation, or by the undue concealment of material facts by Mrs Ralston, or by any one acting on her behalf? Or,

“ Whether, under the said policy, the pursuers are indebted and resting owing to the defenders in the said sum of £2500, or any part thereof, with interest thereon?”

At the trial it appeared, on the pursuer's proof, *inter alia*, that between the 15th of September, 1833, and December 3, when the proposal for an insurance was transmitted to the office in Edinburgh, Mrs Ralston had required and received the constant attendance of a surgeon, whose visits during that period exceeded thirty in number; that during part of this time she laboured under serious indisposition; that she had been four times bled, besides being repeatedly blistered, and having her head shaved, and having emetics and other medicines administered to her. The surgeon was afraid of a tendency of blood to the head, and on one occasion when he was called in (15th September), as he found that the blood did not follow the lancet freely, he applied nine leeches to the temples, besides blistering on the breast. The visits of the surgeon were frequently prolonged for hours at a time, and repeatedly amounted to five, six, and seven hours together, and on one occasion he was detained all day. Between 3d December and 10th December, when the policy was signed, the surgeon's visits continued, and Mrs Ralston was again bled on 10th December. The same surgeon continued to attend her till January, 1834, when she went to reside in Kilmarnock, after which another surgeon was called in. In that same month the new surgeon found her, on one of his visits, lying in bed insensible. He considered it an attack of apoplexy, and opened a vein; but as she soon became convulsed and foamed at the mouth, he supposed it to be epilepsy. In February, and again in March, she had a fit of falling sickness. This gentleman's attendance continued at intervals till the death of Mrs Ralston on 2d September.

The first mentioned surgeon was the person who had signed the certificate which accompanied the proposal for the policy of insurance. That certificate stated Mrs Ralston to be then “ in perfect health,” and made other statements of a similar tenor. At the trial this surgeon explained that he had considered his signature at the certificate to be a mere matter of form.

The concurrent testimony of three medical gentlemen, Drs MacLagan, Macintosh, and Robertson, who heard the pursuer's evidence led, imported that there was nothing on the face of the declaration and certificates transmitted along with the proposal for the policy, which should have led the Insurance Office to make farther inquiry; that nothing appeared there to lead the Office to believe that Mrs Ralston had laboured

No. 336

July 21, 1834

Borthwick

Langmuir.

No. 336.

July 21, 1837.  
 Borthwick v.  
 Langmuir.

under such indisposition, as she had been affected with from September, and subsequently, or that she had been under treatment which had now appeared in proof; that it was impossible these things should have been fully explained to the office; that the circumstances were such as to render an insurance on the life of a woman, more than usually hazardous; and that they (the deponents) had signed a certificate of her being in good health, at the time her surgeon's certificate, of that import, was signed. X

The defenders led some evidence which failed to take off the pursuer's proof, and the Jury, after a charge from the Lord, found for the pursuers.

J. NAIRNE, W.S.—G. M'LELLAND, W.S.—Agents.

*X The Pursuers having now closed their evidence, the Defenders gave up the case, and the Jury the*

## APPENDIX.

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### No. I.

OPINION of LORD COCKBURN, in *Kerr v. Blair and Others* (Earl of Eglinton's Trustees), referred to ante, p. 793.

“ THIS case is of vital importance to the future condition of jury trial in civil causes in this country.

“ This mode of investigating facts was originally<sup>1</sup> introduced with such caution, that no entire cause was allowed to be sent for trial, but only such detached issues as the Court of Session thought ‘expedient.’ If this had been deemed safe, as an ultimate system, there was no reason for altering this provision of the original Act. But it was altered very materially, and by a very marked step, in the very next statute;<sup>2</sup> which declares certain causes to be proper for trial by jury, and accordingly enacts, that these shall be sent to the Jury Court for trial, except in the single event (as I think) of there being legal questions, which, in the opinion of the Court of Session, ought to be determined first. The third Act<sup>3</sup> not only enlarged the description of these cases, but took away the power formerly given to this Court, of abstaining from remitting, in order that supposed questions of law or relevancy might be discussed here. The fourth and last Act<sup>4</sup> confirms these cases as appropriate to trial, and makes it competent to fix the facts, even of consistorial cases, by verdicts.

“ These statutes all demonstrate a steady and progressive confidence in the system of trial by jury, and an increased tendency to have the character of the cases that are to be so disposed of fixed by Parliament. Accordingly, so far as I can discover, no attempt has ever been made till now to get the Court to exercise any discretion as to the fit application of this system to any of these enumerated cases. Wherever a case has been brought within the statutory description, it has always been understood that its course, in so far as the facts were concerned, was determined.

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<sup>1</sup> 55 Geo. III. c. 42 § 1, 1815.

<sup>3</sup> 6 Geo. IV. c. 120, 1825.

<sup>2</sup> 59 Geo. III. c. 35, § 1, 1819.

<sup>4</sup> 1 Will. IV. c. 69, 1830.

" But the doubt that has now been raised is, whether the statutes fix whatever, as cases, of which the facts, if they are to be investigated at all, are to be investigated by juries? The doubt is, whether it be not competent for the Court to withdraw even the enumerated causes from trial, whenever it may think trial inexpedient?

" The plain result of this is, that it places the extent to which trial is to be practised entirely in the discretion of the Court. It entitles every party to contest the fitness of his particular case for trial; and justifies, and even tempts, a vexatious preliminary discussion on this subject, even in the case of damage—such as that arising from injury to land where the title is in question. Lords Ordinary, instead of being guided by general rules, win the parties by their inflexibility, may order trials, or they may order untried proofs by commission, according as their habits make them view the extent of given subjects familiarly or with dismay. And if a majority of the either Division should recur to the opinion which was held, at no great distance of time, by many most eminent lawyers, that trial by jury is beneficially applicable to no case whatever, the whole system might silently disappear.

" I can find no ground for such a result in the statutes. Not that the intention of the section of the Act of 1819 is so clearly expressed as it might have been, but that the doubt had been anticipated; but that the pursuer's construction, which promotes the undoubted object of the legislature, and is, therefore, the one to be favoured, is, to say the least, as satisfactory as that of the defenders, who would directly to obstruct it.

" The 59 Geo. III. c. 35, § 1, not only specifies what are to be heard by the jury causes, but enacts that, being so, they shall be sent at once to the jury for trial. And the Jury Court is not merely authorised, but is imperatively required to settle an issue or issues, and to try the same by a jury.' The sections seem to me to introduce all the provisions that were thought proper for the disposal of questions of preliminary law or relevancy, in relation to the enumerated causes. The import of them is, that such questions are to be decided by this Court before the remit. But if the case should pass this stage without a remit being made, I am inclined (though I admit that there has been some objection against this) to think that these questions could not afterwards be referred to the province of the Jury Court consisted in merely trying the case.

" And when the first part of the 12th section empowers the Jury Court to send the case back for the discussion of such legal matter as should be decided in trying to settle an issue, it rather appears to me that there is some ground for maintaining that this only relates to the non-enumerated cases. It relates to cases remitted to them as aforesaid; which words may, without any violence, be applied so as to include—not the causes finally disposed of by the three sections—but those immediately preceding the 12th clause, being all the causes, though not enumerated, it was competent for this Court, or for the Admiralty, to remit. It was not unreasonable to give more opportunities of discussing questions in these cases than in the enumerated ones, because they might be more complicated, which was the reason why they were not put on the roll of jury causes. However, this view is certainly not without difficulties.

" But assuming that this first part of the 12th section embraces all causes, ever, the second part, which expressly relates only to causes to which tri

beneficially applicable,' stands in a very different situation. The gates may be left very open for points of preliminary law, and yet shut very close against speculations as to the expediency of proofs by commission. It is said that the words, 'in the course of settling an issue or issues,' must be held to comprehend, judicially, the very same things, in every part of the same clause. I am not aware of any necessity for such construction, where there are relative words which give the same expressions different meanings in different places even of the same section. We must give the statute the greatest amount of consistency that we can, upon the whole.

"Now, the attempt to extend this second part of the clause to the enumerated cases, is met by two obstacles, both of which, to my mind, are insurmountable:—1st, I cannot reconcile this construction with the previous positive enactment, that these enumerated cases are proper for trial by jury. To say that a case is 'appropriate for jury trial,' seems to me exactly to say that it is a case to which jury trial is 'beneficially applicable.' Therefore the defender's construction makes the two parts of the Act contradict each other. What the statute should have enacted, according to them, is, that trial by jury was beneficially applicable to no case whatever, unless the Court of Session should think so. Their construction makes the 12th section repeal the first. 2dly, I cannot reconcile this construction with the 13th section, which enacts in express terms (though it be printed parenthetically), that the Court has no power to take proof by commission, by remit, or in presentia, in the enumerated cases. I cannot believe that the statute meant to exclude these modes of proof from the enumerated cases, except on the supposition that it meant that these cases should positively have their facts investigated by jury; because otherwise it virtually debars them from being investigated at all.

"If the case therefore had depended on this statute alone, I should have held, that, the cause being on the catalogue of proper jury cases, and there being no question of law, and the facts being disputed, it was not in the power of the Court to prevent a trial. But the matter is made clearer by the subsequent Act.

"The 6th of Geo. IV. cap. 120, enlarges the description of appropriate jury causes, and compels this Court to send them forward for trial without waiting to discuss any legal question. But due provision is made for the disposal of such matter by a clause which was not noticed at the bar, but seemed to me to be decisive. It is the 33d which introduces a totally new set of regulations upon this subject. Its substance is, that when any legal question, proper to be settled before trial, shall occur in the Jury Court, that Court may either send back to the Court of Session or not, as it shall think proper; and that if sent back, the case shall proceed, quoad the law, as a Court of Session process. But this is only as to the law;—it is as to 'such question of law or relevancy.' There is no indication, but the reverse, of any intention on the part of the legislature to retract its previous description of causes to which trial was beneficially applicable, and leave it to this Court to say to what causes it was appropriate. For the result, in reference to the facts, as stated in the close of the section, is, that if, 'after the determination of such question, there shall remain matter of fact to be ascertained between the parties, the said matter shall be tried by jury, and the parties shall forthwith proceed before the said Jury Court, or one of the Judges thereof, to prepare an issue or issues for trial.' So that the case is taken from the Court of Session in the first instance, because it is held appropriate for trial; and when it is restored to this

Court on account of emerging law, the authority of the Court is exhausted as this law is cleared away, and the necessity for trial; if there be settled, revives.

"The Act of 1830,<sup>1</sup> which abolished the Jury Court, declares that which formerly behoved to be tried in that Court, shall thenceforth be tried in the Court of Session. It does not enlarge the catalogue of jury causes; does it abridge it, or warrant any new mode of ascertaining their facts upon whatever necessity there was, under the previous statute, for trying juries.

"I do not consider the case of *Leslie* as any authority on the point. This precise point, viz. of the competency of withholding a trial on the ground of a commission or a remit was more expedient, was not mooted there. In *Gifford's* speech, however, in *Lady Mary Crawford's* case, satisfies me that had been purely a claim of damages, he would have held a trial unavoidable.

"Something has been said, and a good deal more insinuated, with respect to the policy of the system of compelling a court to try any cause by jury, to which a court may think that trial by jury is not beneficially applicable. That is not a judicial consideration. I shall only say, therefore, that if this point ever come before us, I anticipate no difficulty in making up my own mind. Meanwhile, I feel no uneasiness in relying on the experience of England, where there is no other way except by jury in which the common law can determine facts; and where, nevertheless, there are sufficient practical means for trying the trial of really untriable cases."

## No. II.

In regard to the note (ante, p. 100, *Macrae v. Macrae* or *Hyndman*), I beg leave to mention that the substance of the more detailed opinion of *BALGHALY*, there noticed, is already given in the opinions of his Lordship, ante, p. 62, and p. 100. The references made by his Lordship are the 2 St. 4, 61; 2 Bankt. 4, 41; and 4 Bankt. 27, 6; 2 Ersk. 5, 59, and 6 (Laird of), March 8, 1639 (8374); 3 Craig, 6, 8, and 9; 3 Bankt. 3, 11, 286; Voet. 28, 1, 40.

## No. III.

*Jury Trial.*—For the purpose of removing certain doubts as to the Bills of Exception, a note, framed by the Dean of Faculty, was transmitted by Lord President to Lord Chief Justice Tindall. That note, with the answer of Lord Chief Justice, are subjoined.

After quoting 55 Geo. III., c. 42, § 6, 7; and 59 Geo. III., c. 35, the note proceeded as follows:—

"It will be observed, that in terms of the 7th sect. of 55 Geo. III., c.

<sup>1</sup> 1 William IV., cap. 69, § 2.

quoted,—one very peculiar as to the form of presenting and preparing an exception,—no reference is made as to evidence or any documents being introduced.

“ It would rather appear that the exception was intended to be simply the objection drawn up at the trial, with the interlocutor directing the trial, and the verdict indorsed thereon.

“ Farther, the clause provides, that if the Division shall allow the said exception, they *shall* direct another jury to be summoned for the trial of the issue or issues.

“ Hitherto there has not been any rule for inserting the whole evidence in a bill of exceptions, although not required for explanation of the point raised.

“ Thus in the case *Ralston v. Rowat*, 27th February, 1833, an objection having been taken to the admissibility of a witness on the ground of interest, no other part of the evidence in the trial was set forth in the bill, than the examination in initialibus of that witness, on which the objection was raised and sustained at the trial. That case underwent great discussion on the bench (see 11 Shaw 451 and Fac. Coll. p. 269), the Lord Chief Commissioner sitting as one of the Second Division. The judgment was appealed, and there is a very full opinion of Lord Wynford in the appeal reports for 1833. See Shaw's Supplement, Vol. I. p. 92, July 10, 1833. But not a remark was made on the form of the bill of exceptions as improper, insufficient, or inappropriate.

“ Other similar instances might be stated.

“ If, in every case, the whole evidence must be set forth, two results are dreaded, which will be most unfortunate.

“ 1. That bills of exceptions will practically prove the means of enabling the House of Lords to review the whole cause on the facts.

“ This result is said in the recent work on Jury Trial, pp. 349–51, to have occurred already in the case of *Barclay v. Allardyce*, by the *direction* inserted in the judgment.

“ 2. That the point of law which the party desires to raise by the bill of exceptions, and which was decided as a point of law at the trial, will be considered on the bill of exceptions, under the influence of its importance, and bearing on the result in the particular case, and when there is great risk that the mind may be affected by views which ought not to influence the judgment on the point of law.

“ The Court are aware that it has been recently proposed in all cases (or nearly in all cases) to introduce *all the evidence* into bills of exceptions.

“ It is submitted that there are many classes of cases in which this ought not to be done; and this Memorandum has been submitted, to bring under the review of the Court the points which may arise in many of these cases, and to suggest some questions, on which English practice may be useful and important.

“ The points appear to be,

“ 1. If a witness is *rejected* solely on account of an objection to the witness, not connected with the cause or matter of the trial,—a general objection—*e. g.* infancy, relationship, enmity, &c., is it necessary or proper, in the bill of exceptions, to set forth the whole evidence in the trial,—both that given *before* the rejection of the witness, and *after* that judgment?

“ 2. *Same Question.* When a witness is *received* and an objection of the *same* sort repelled?

“ 3. *Same Question.* If evidence is *rejected* (say a written document),—objected to on grounds of the same character,—*e. g.* on the want of stamp, authentication



" 4. *Same Question.* If evidence is *received* when objected grounds?

" 5. The same Question. When objections, sustained or the cause, or when the grounds of the judgment excepted cause?

" 6. Suppose a particular question is, after objection, *always necessary* (whether *required* to understand the objection *not*)?

" (1.) To set forth the whole evidence of the witness, to put; or only when that evidence must be stated in order to and judgment?

" (2.) Or the whole evidence in the trial, both what was the examination of the witness to whom the question objected?

" 7. *Same Question.* When a particular *line* of evidence, ment is objected to?

" 8. If the deposition of a witness, who is dead or unable evidence has been taken on commission, is *rejected* on *general* tionship, improperly taken, &c.), is it necessary to set forth it tion so rejected, and even when no reference was made at the the evidence, as affecting the objection, and when its content known to the Judge at the trial?

" 9. If a witness is rejected on a general ground, and no *testium* arises, or any matter peculiar to the cause, is it necessary evidence which the witness would have given?

" 10. *Same Question.* If the deposition is *received* after grounds?

" 11. If a party excepts to a statement of fact, and it is not said that the statement in any way affects the whole evidence?

" 12. If a bill of exceptions is taken, and the trial is set aside?

" 13. Suppose two statements are made, and the first is given, which is then rejected, and the second is not the in such case the exception is taken to the first, or to the second, or to both, or to neither, or to both by the court?

" 14. Is a bill of exceptions taken, and the trial is set aside, except when a bill of exceptions is taken, and the trial is set aside, or by the Judge?

" 15. When the facts in the cause are founded upon in support, or of the judgment pronounced?

remise, that where the law laid down by the Judge to the Jury at the trial of the cause is founded on the general facts of the case, the whole of the evidence given to the Jury at the trial must be stated on the face of the bill of exceptions. This is a general and indeed universal rule. But when the exceptions taken have no reference whatever to any general question arising in the cause, but relate entirely and exclusively to some matter arising collaterally and incidentally in the course of the trial, then, I conceive, it is sufficient to set out the whole of the evidence relating to such matter, upon which the exception is founded.

“ It is obvious, therefore, that where any doubt exists, whether the general evidence in the cause may, or may not, have any bearing on the exception which has been taken, that it will be safer to treat the case as falling within the general rule, and set out the whole of the evidence ; because, on the one hand, the inconvenience suggested in the papers referred to me, of an undue weight being allowed to the evidence which does not support the exception, can never occur in practice, at least in England, the attention of the Court of Appeal being always confined strictly and exclusively to the exception taken at the trial ; and, on the other hand, the statement of the whole evidence, though it may turn out to have been unnecessary, prevents all danger of the cause being sent down again to supply any deficiency in the statement upon the record.

Having made this general remark, I proceed to answer the particular questions proposed to me.

No. 1. In the case put in No. 1, I think it is sufficient to state all the evidence as it was given at the trial, which in any way raises the objection to the witness's competency, and upon which the exception to such witness was founded ; and that it is not necessary to state the whole of the evidence before or after such rejection ; for, in such a case, the Court above cannot go out of the precise exception taken ; but if the witness was properly rejected, must affirm the judgment ; if improperly rejected, must send the cause back to another trial. The instances given in No. 1 are not grounds of incompetency by the English law ; but I can suppose the case of an objection on the ground of *infancy*, where a question of law might be raised on the construction of Acts of Parliament.

No. 2, No. 3, and No. 4. I think the same answer and upon the same principles to be given to these three questions, assuming, as I do, with respect to No. 4, that the grounds of objection to the evidence are collateral to the cause, and not arising in any manner out of the facts of the cause itself.

No. 5. Generally speaking, in a case falling within the description of No. 5, the whole of the evidence must be stated in the bill of exceptions. But there may be cases under this head, in which it is manifest that some of the evidence given at the trial is altogether unnecessary for the decision of the point of law raised by the bill of exceptions ; and if the Judge whose opinion is excepted against, and the counsel on both sides of the cause, agree to the omission of such facts, I think such facts may be safely and properly left out. *Consensus tollit errorem*. If, however, the Judge, or either the one or the other counsel, insist that the objection is not intelligible, unless the whole evidence is introduced into the bill ; or that, by the omission of any part, a different colour is given to that which remains, or a different impression will be made by it on the minds of the Judges, the whole must be set out. It may also be observed, that, with such consent as before mentioned, the whole may in many cases be stated more compendiously in the bill of exceptions,

than by inserting the detail of the examination and cross-examinations; for very frequently the same fact is proved at a trial in succession repeating nearly the same words; or a single fact by many witnesses to different steps of a transaction from which easy inference. In such, and similar cases, it is obviously a great deal of unnecessary labour to state the result only; as that "trial on the part of the plaintiff, so and so," instead of the detail. And there seems no possible objection to this course with a case mentioned.

No. 6. Where the Judge against whose decision the exception is taken on each side, can agree as to what is requisite to be set out in order to raise the question of law which was excepted to, I think it need not be set out; but where there is any difference of opinion as to the evidence of the witness, to whom the objected question was put (such agreement as aforesaid) the whole of the other evidence must be set forth.

No. 7. The same answer applies to the case where a particular document, or a particular document, is objected to; supposing the case of fact falls within No. 6.

No. 8. Under the circumstance, stated in the query No. 6, the question itself need not be set out; but the whole evidence on which the objection is founded must be stated, as mentioned above in the answer to No. 6.

No. 9. Where the witness is rejected I think it is not necessary to state the evidence he would have given; indeed, I do not see how the witness can be called upon to allow testimony which was not given to be put in. But the object and purpose for which he was called, and the time of calling him, must be set out.

No. 10. When the evidence of the witness is received and an objection is confined to matters collateral, and there is no reference whatever to the evidence given by the witness, or to the cause, I think it unnecessary to state the evidence itself.

No. 11. I think it is necessary, in this case, to set out the evidence; and the necessity appears to be stronger than in the case of No. 10. But as there, so also in this case, if the Judge approves and omits parts of the evidence which are immaterial, or to state it in a compendious manner, I can see no objection; assuming it appears, as to the points excepted against, to enable the Court to give judgment. If in any case there is a doubt as to this latter point, it is to set out the whole evidence.

No. 12. In England, the effect of maintaining exception is to set aside the verdict; the judgment, in that case, being an award of a new trial. The cause is to be tried before another jury.

No. 13. I know of no mode of proceeding in England by which a judgment could be set aside as to that issue only against which the exception is taken. The judgment is general, and goes to the whole, that there is no issue. At the same time, if the other issue was decided to the advantage of the party, it is so manifestly the interest of both to avoid unnecessary expense, that a suggestion from the Court that the parties should agree not to

ing on the latter issue, upon the second trial, would instantly be acceded to. But if either party question the propriety of the finding, I do not see that he can be deprived of the opportunity to try it over again.

No. 14 and No. 15. I think there are cases where the whole evidence in a cause is set forth in a bill of exceptions, besides those mentioned in the queries No. 14 and 15; to some of which I have adverted in my answers to the queries Nos. 5 and 6: And it is also expedient to do so, whenever there is a reasonable doubt that a statement very short of the whole may, from circumstances, be insufficient to raise the point for the discussion of the Court above.

(Signed) N. C. TINDAL.\*

Bedford Square, 14th Nov. 1836.

#### No. IV.

Besides other Acts of Sederunt,† the Court, on March 11, 1837, passed an Act, apportioning the duties of certain vacant offices of Clerks of Session, among the remaining Clerks, in terms of 1 Will. IV., c. 69, § 13.

On June 27, 1837, their Lordships passed another Act, "Considering that, during the reign of William IV., and since his decease, before the 24th day of June instant, when QUEEN VICTORIA was proclaimed, there were summonses &c., inhibitions, &c., publications of interdictions, charters, &c., charges to enter heir, &c., suspensions, &c., and other writs and diligences raised or issued, and which were not at all, or not fully, executed and perfected, before the said 24th day of June instant: And seeing there was no interruption in the Royal authority, &c.; Therefore the said Lords, &c., do declare that they will allow and sustain the said summonses and others foresaid, with all that has followed, or may follow thereupon, in like way and manner, and to have that force and effect, as if the same had been perfected and received full effect and execution during the life and reign of our said late sovereign; and that it shall be lawful to execute and further prosecute and follow out all summonses, and others foresaid, in the name of her present Majesty, albeit the said summonses, and others foresaid, have been raised or issued in the name of the late King: And further, in respect that the Court did adjourn over from Thursday the 22d to Tuesday the 27th days of June instant, the Lords declare that the 23d, 24th, 25th, and 26th days of June instant, shall not be numbered as part of the reclaiming days, or of the space assigned to elapse upon any act or order of Court, or in reckoning the year and day in processes that were about to fall asleep."

On July 6, 1837, their Lordships passed another Act, "Considering that the correct style of Bills of Suspension ought to contain a conclusion, drawn from the narrative and reasons of suspension, that the decree and charge or other proceed-

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\* In communicating his opinion to the Lord President of the Court of Session, Lord Chief Justice Tindal says,—“I now send you the opinion which I hold upon the different points mentioned in the printed paper which accompanied your Lordship's letter. It agrees in substance with the opinions of Mr Justice Littledale, Mr Baron Park, Mr Justice Bossanquet, Mr Baron Alderson, and Mr Justice Patteson, with whom I have communicated on the subject.”

† See ante, p. 927, foot-note.

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#### ERRATA IN VOL. XV.

- In place of the rubric of *Thomson, Dec. 9, 1836, ante, p. 1* given in the General Index, *Process X. 2*.  
In the petition for reducing an upset price, in a process of sale at the foot of p. 499, it is stated that a motion was made for an adjournment in respect that all parties concerned consented. This is a mistake, as it was not in the process of sale that the motion was made.
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#### ERRATUM IN VOL. XIV.

- In place of the rubric, p. 1137, § 2, read as follows :—(2. cross-examined one of the pursuer's witnesses, offered evidence made by that witness on cross-examination, by evidence extrajudicially made by him, when not on oath :—July 13, 1836, ante, XIV. 1128), that such proof was

# INDEX OF MATTERS

IN

VOLUME XV.

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## ACCOUNTING.

1. A heritable bond stipulated that the rate of interest for the first five years should not exceed 4 per cent; the full legal rate was exigible after that period: the creditor lived for several years after the lapse of that period, and after his death a question arose between his representatives and the debtor, whether the interest had been continued at the rate of 4 per cent: Held, in the circumstances, that the debtor was not liable for more than 4 per cent, in respect, inter alia, that the creditor had, without objection, received an account, and a balance from the debtor, on the footing that the interest continued at that rate, and also that the market rate of interest during the years in dispute, did not exceed 4 per cent. Stocks, June 9, 1837, p. 1095.
2. Circumstances in which, where a summary application was presented to the sheriff, by the proprietor of a newspaper, against a clerk recently in his employment, concluding for immediate restitution of the amount of certain accounts, as uplifted by the clerk without authority;—Held that it was an incompetent proceeding, in respect that the matters in dispute between the parties formed a proper subject for an ordinary action of count and reckoning. Macallan, May 19, 1837, p. 956.

See Plaine, Dec. 3, 1836, p. 194.

See *Arrestment*, 4.—*Interest—Trust*, 3.

## ACQUIESCENCE.

1. Circumstances which, held to infer acquiescence, and to bar a party, personally exceptione, from claiming a share of a succession of which he was originally in right. Gray, Feb. 7, 1837, p. 494.

See *Contract—Homologation—Process*, X. 28.

## ACT OF GRACE.

- 1.—(1.) A party was convicted under 9 Geo. IV. c. 39, of taking salmon in close-time, and the Justices fined him in £3, besides £1, 3s. of expenses; the sentence ordained “execution to pass hereon by poinding in terms of said act, and by imprisonment in the Jail of A. for the period of two months, unless said sums be sooner paid:”—Held that, although the question was attended with extreme difficulty, the party was entitled, after imprisonment, to the benefit of the Act of Grace.

tion. *Id.*, 2 Col. 20, 207, p. 200.

**ACT OF SEDERUNT.**

1. March 11, 1837. Apportioning the duties of Clerks of 1 W. IV. c. 69, § 13, p. 1317.
2. June 27, 1837. (1.) Allowing and sustaining all Summ the execution of which was commenced in the reign of perfected before the proclamation of Queen Victoria, to admit of being followed out in the name of the Queen. currency of the reclaiming days, &c., during the period adjourned in consequence of the death of King William,
3. July 6, 1837. Enjoining that Bills of Suspension, in contain a conclusion, that the decree and charge, or ot plained of, should be suspended; followed by a prayer ( sion; under the certification of nullity if the said concl if any other material deviation from the proper style occ

**ADJUDICATION.**

Where only one creditor raised a summons of adjudic creditors lodged defences:—Held that a record should mon form, before pronouncing any decree of adjudica the grounds for allowing a summary decree, reserving ol mon in any second or posterior adjudication, did no Wotherspoon, July 11, 1837, p. 1268.

See *Bankruptcy*, 2—*Entail*, 14, (2.)—*Crawford*, July 6,

**ADMIRALTY.** See *Jurisdiction*, 4.

**ADVOCATE (HIS MAJESTY'S).** See *Title to Pursue*, 3, (2.

**ADVOCATION.** See *Process*, 17.

**AFFIDAVIT.** See *Bankruptcy*, 14.

**AGENT AND CLIENT.**

1. In an action for payment of an account for conducting Court of Session,—circumstances in which held that ou charged, and not professional services. *Bayne*, Nov. 16
2. A subject was struck out of a process of ranking and the creditors and common agent, and was afterwards agent as trustee for the postponed creditors in the ran circumstances, that the common agent was not entitled sion of 27 per cent on the price of the subject—particula

AGENT AND CLIENT (Continued).

4. Objection repelled to an auditor's report on an account of expenses of process, that during part of the currency of the account the pursuer's agent had no attorney's certificate. Clyne, May 31, 1837, p. 1051.

See *Agent and Principal*, 1.—*Compensation*, 1.—*Proof*, II. 1, (2, 3.)—*Right in Security*, 2.—*Reparation*, 4.—*Small Debt Act* (2.)—*Transaction—Arbitration*, 2.—*Expenses*, 2.

AGENT AND PRINCIPAL.

1. A party's agent, by his instructions, sold a lease; the party forwarded to the agent an assignation containing a receipt and discharge for the price, which the agent delivered up to the purchaser on receiving the price:—Held, in a subsequent action by the seller against his agent and the purchaser, that no circumstances of collusion between them were established, sufficient to take off the effect of the written discharge held by the purchaser. Swan, Dec. 13, 1836, p. 251.
2. The trustee on a sequestrated estate held also a commission of factory from a heritable creditor, with full power to uplift and discharge the debt due to him; the trustee made up titles, as such, to the heritable property, sold it, and drew the price; in the dispositions to the purchasers he acknowledged the prices to have been paid him as factor for the heritable creditor: in the books of the estate he charged himself with these prices, but of the same dates entered them on the credit side as paid to the heritable creditor; he, however, did not as factor execute any discharge in favour of the estate, and, in his accounts with the creditor, he stated a certain sum as retained by him to answer the expenses of sale; this sum he applied to his own uses, charging the expenses in his accounts with the estate, which were subsequently audited and passed by the commissioners; having become bankrupt and resigned,—Held, in a competition between the new trustee and the heritable creditor for an outstanding balance of the prices of the properties, that for the sum retained by the former trustee to answer expenses the estate was accountable, and that it must be held as in their hands for the satisfaction of the expenses chargeable against the heritable creditor. Gibson, Nov. 24, 1836, p. 143.
3. Held, in conformity with the case of *King v. Shirra*, January 23, 1827, that an action against a bank-agent, in his character as such, on account of a bank transaction, in which the agent was alleged to have acted wrongfully, was incompetently laid. Russel and Aitken, May 23, 1837, p. 989.

See *Arrestment*, 4, 5.—*Entail*, 12.—*Lien—Sale*, 2, 3.—*Husband and Wife*, 6.

ALIMENT—ALIMENTARY FUND.

1. Circumstances in which, held, in a competition upon the arrears of an alimentary annuity, that a first assignation thereof, was preferable to a second, where there was as strong ground for presuming the assignation to have been made for an alimentary debt, in the first case as in the second; and farther, that the first assignee was preferable to the cedent. Waddell, Nov. 26, 1836, p. 151.
2. Circumstances in which the Court awarded aliment at the rate of £60 per annum, on account of a child of 2 years of age residing with its mother. MacEwan, Dec. 22, 1836, p. 302.
3. An heir of entail died without a settlement, and left a widow and five children, all in pupillarity; the free rental of the estate was £384,—Held, in the circumstances, that a sum of £100 per annum should be awarded to the widow, in name of aliment for the heir, and £150 in name of aliment to herself. Jackson, Dec. 24, 1836, p. 313.

See *Arrestment*, 2.—*Husband and Wife*, 3.—*Factor Loco Tutoris*, 1, 5.—*Testament*, 1.

AMENDMENT OF THE LIBEL. See *Process*, I.

ANNUITY.

- 1.—(1.) The value of an annuity dependent on lives, when estimated for the purpose of drawing a composition from an obligant whose estates had been



## ANNUITY (Continued).

sequestrated, to be calculated as at the date of the sequestration, and at the date of settlement.

(2.) The Northampton tables adopted as the rule of calculation.

(3.) Right to composition not excluded by no claim having been till after the discharge.

(4.) Creditor not bound to deduct value of a heritable security in the bond of annuity over the estate of another co-obligant, with the composition and all other payments, still left the annuity to Ferguson, Nov. 16, 1836, p. 25.

APPEAL. See *Process*, X. 5.—*Corporation*, 1, (3.)

APPRENTICE. See *Master and Servant*, 2.

APPROBATE AND REPROBATE. See *Foreign*, 1.—*Title to Pursue*, 7.

## ARBITRATION.

1. An arbiter has power to award expenses, without any special clause effect in the submission. Robertson, Dec. 6, 1836, p. 199.

2.—(1.) Where the agent of one of the parties to a submission, impropriate decree-arbital obreptione, and by improper and unfair procedure—the decree is liable to reduction.

(2.) Circumstances in which this rule was applied. Calder, Feb. p. 463.

3. The terms of a decree-arbital were somewhat ambiguous, in defining servitude-right of cutting reeds and rushes within a loch, as combining servitude-right of pasturage on the space between the summer-mary loch and its winter flood-mark: a proof was allowed as to the content of the loch, and rushes, &c., and of the practice in using the servitude-arbitring which, decree was pronounced in terms of the decree—thereby elucidated. Cuninghame, Dec. 20, 1836, p. 295.

See *Union Canal Company*, Dec. 3, 1836, p. 194.

## ARRESTMENT.

1.—(1.) A deposited certain sealed packets, the property of his debtor, in the custody of C, who made them the subject of a multiplepoinding; another creditor of B, claimed, and used arrestments in the hands of C in a competition between A's executor-creditor and D, that D could competently attach the packets subject to the right of pledge or vested in A, for satisfying the debt due to him by B.

(2.) The executor-creditor of A having been confirmed to his property, though not specially to the subject of the fund in medio, and additions having been made to the inventory pending the proceeding specially with reference to the subject of the fund,—Held that, by his action and the additions made thereto, he had a sufficient title and could insist in his claim over the fund. Bridges, Nov. 15, 1836, p. 8.

2. The wife of a retired barrack-officer, living in separation from her husband, had been found entitled, by decree of the Commissaries, to an alimenter yearly out of his pension, which was regularly paid; having arrested her husband's funds in security and for payment of the annuity, the Court refused the arrestments, on the husband's producing a discharge by the wife of sums of anniment already due, together with an assignation in her favor authorizing payment of the £10, and a certificate by the proper office barrack department that this allowance would be made good to her husband. Gregor, Feb. 25, 1837, p. 681.

3. A party died intestate, leaving four next of kin, the creditors of or next of kin used arrestments in the hands of a debtor to the deceased, being now debtor to him (the arrester's) debtor; two of the other next of kin afterwards expede a confirmation, specially including the whole debt due to the deceased, the arrestee then paid the debt to the executor, and obtained a discharge from them:—Held (by a majority) the arrestee was still liable to the arrester, in respect that, by the s

ARRESTMENT (Continued).

- Geo. IV. c. 98, the moveable estate of the deceased vested ipso jure in the surviving next of kin, to the effect of being either assignable or arrestable, though no confirmation had been expedite at the date of such assignation or arrestment. Frith, March 3, 1837, p. 729.
4. The factor on a trust-estate rendered to the trustees an account of charge and discharge, showing a certain balance in his favour, but never gave in a complete state of his intromissions; thereafter a creditor of the factor used arrestments in the hands of the trustees of the sums due to him, and brought an action of furthcoming;—Held, in an advocacy, that there were no termini habiles for giving decree in the process of furthcoming for the balance appearing on the account or to any other amount, until a complete state of the factor's intromissions should be made up; and that the duty of exhibiting such a state was legally incumbent on the creditor. Cunninghame, Feb. 28, 1837, p. 687.
  5. A merchant consigned to a commission-agent a certain quantity of oil for sale and return; the agent sold the oil in his own name on the merchant's account to two different parties; a creditor of the merchant thereafter used arrestments in the hands of the agent, the price of the oil not having been recovered from either of the purchasers at the date thereof—Held, that the arrestments were ineffectual, and that the circumstance of the agent having taken a bill from one of the purchasers, and discounted it prior to the arrestment for his own accommodation, made no difference in regard to the efficacy of the arrestment. Johnston, May 12, 1837, p. 904.
  - 6.—(1.) Where the holder of a fund, due to a third party, possesses a right of retention as against that party, such right is equally available against the arresting creditor of that party.  
(2.) Circumstances in which this rule was applied in favour of trustees, holders of a legacy due to a party who involved them in improper litigation, and was subjected in expenses; the trustees being found entitled to retain these expenses out of the legacy, in a question with the legatee's arresting creditors, though part of the expenses was incurred, and the decree for expenses was pronounced, only after the arrestments had been used. Brodie, June 27, 1837, p. 1195.

See *Partnership*, 1.—Clarke, July 19, 1837, p. 1305.

ASSAULT. See *Reparation*, 5.—*Cessio*, 7.

ASSIGNATION. See *Alimentary Fund*, 1.

ATTESTOR. See *Bankruptcy*, 3.

ATTORNEY'S CERTIFICATE. See *Agent and Client*, 3, 4.

AUCTIONEER. See *Sale*, 3.

AUGMENTATION. See *Church—Teinds*, 1.

BANKRUPTCY.

1. In an application for a discharge under the 61st section of the Bankrupt Act, Held,  
(1.) That contingent creditors must be computed, along with other creditors, in estimating the concurrence of the four-fifths; and,  
(2.) That, where a petition was presented, and intimated, before the requisite concurrence was obtained, its original incompetency was not cured, by subsequently obtaining the requisite concurrence: and petition accordingly refused. Gilfillan, Nov. 26, 1837, p. 149.
2. A bankrupt who was in right of certain heritage, died without conveying it to the trustee; the trustee onerously became bound to dispoise the heritage to a third party, and dispoised it, but died without obtaining a special adjudication in his favour; the Court thereafter granted a petition for a special adjudication of the heritage, in favour of the succeeding trustee, to enable him effectually to implement the conveyance by the prior trustee. Beattie, Nov. 29, 1836, p. 157.
3. It was fixed by a final interlocutor, that the bankrupt pursuer of a reduction

## BANKRUPTCY (Continued).

could only insist, on finding caution for expenses; he found a caution attester, but the attester became bankrupt during the preparation of the cause: Held that the defender might object, before the Lord Ordinary farther procedure, until a new attester should be found; and that the 11th July, 1828, § 118, did not apply to the case. *A. B.*, Nov. 29 p. 158.

4. A party purchased lands under a ranking and sale, and obtained a discharge and was infeft: after possessing for a considerable number of years he became bankrupt without paying the price, and his estates were sequestrated. A heritable creditor, who was entitled to about one-third of the proceeds of the ranking and sale, presented a bill of suspension and interdict to prevent the bankrupt from conveying the lands to his trustee, and craving that he should be resold under the ranking and sale which was still in dependence. The trustee stated that he kept the accounts of these lands separate from the general estate of the bankrupt, and that he was willing to accept a discharge which should declare the conveyance to be "under the burden of the preferences legally constituted over them."—Bill refused, with exception in respect of the statutory right of the trustee to exact a conveyance which should only transfer to him the bankrupt's right, tantum et tale as it was in the bankrupt. *Gordon*, Dec. 3, 1836, p. 187.

5. A petition for approval of composition was presented to the Court and required concurrence, as the ranking of the creditors then stood; and afterwards was ranked, and opposed the petition, which was, in consequence, refused by the Lord Ordinary, in the time of session, acting under authority from the Court; before the reclaiming days expired, other creditors ranked, whose concurrence restored the requisite proportion of votes in favour of the petitioner, who presented a reclaiming note against the Lord Ordinary's judgment.—Held,

(1.) That the whole of the creditors, including those who ranked after the Lord Ordinary's judgment, must be computed in estimating the proportion of concurring creditors.

(2.) That no new petition was necessary, as the presentation of the first petition was warranted by the state of the concurrence at its date; and

(3.) That it was competent to the Lord Ordinary to pronounce a judgment refusing the petition, but that such judgment was liable to review by any other judgment of a Lord Ordinary. *Nicolson*, Dec. 3, 1836, p. 187.

6. Letters of horning were issued against a debtor on 27th February, 1835, on a charge given, which was followed by denunciation in March, the letters of execution being then duly registered and marked; in 1836, a second charge was given on the same letters, and the debtor denounced, when the execution of charge and the denunciation were duly recorded, but the letters were again registered or marked, reference being merely made to them in the execution of horning:—Held, on a petition for sequestration at the instance of the creditor, that the evidence of bankruptcy was not objectionable on the ground of the letters wanting a certificate of registration in 1836. *N. Bank*, Dec. 20, 1836, p. 289.

7. In granting the petition of a trustee, for confirmation in common form the Court refused another part of the prayer which craved their Lordships approve of a resolution of the creditors authorizing the trustee to come to a private bargain as to the disposal of the bankrupt's stock in trade, on such terms as he might consider beneficial to the estate. *Low*, Dec. 1836, p. 290.

8. Circumstances in which the Court held that the transactions and dealings of a party, with a bankrupt, were not such as to render him subject to execution by the trustee, under § 32 of the Bankrupt Act, as a person "connected with the bankrupt's business." *Nisbet*, Jan. 28, 1837, p. 439.

9. Circumstances in which the Court granted a petition for sequestration

**BANKRUPTCY (Continued).**

bankrupt, though opposed by the trustees under a private trust-deed for the whole creditors, who were vested both in the heritage and moveables of the bankrupt, and had effected partial sales of the moveables:—in respect, *inter alia*,

(1.) That the creditors who acceded, had done so, under the condition of the bankrupt giving such explanation of his affairs as they should deem satisfactory, and that the petitioning creditors were not satisfied with the explanations given;

(2.) That all the creditors had not acceded; and,

(3.) That, under the private trust, a great deal of litigation was about to ensue respecting alleged preferences by the bankrupt. Lockie, Feb. 14, 1837, p. 547.

10. Where a party, whose estate had been sequestrated under the Bankrupt Act, absconded from the second diet of examination appointed by the sheriff, without taking the oath prescribed by the 33d section of the statute,—Petition for approval of a composition offered by a friend of the bankrupt and agreed to by the creditors, refused as incompetent. Wilkie, Feb. 28, 1837, p. 686.

11. A party was engaged in a trading concern which was wound up in 1819, all the debts being then paid up; in order to pay these, the party borrowed money from his friends; he ceased to be a trader after 1819, but a considerable part of the borrowed money was not paid up, when a creditor, holding a bill dated in 1836, presented a petition for sequestration—Held that the party was not liable to sequestration as a trader. Ogilvie, March 4, 1837, p. 746.

12. A creditor, who was ranked on a sequestrated estate, concurred in discharging the bankrupt on a composition of 3s. per pound, and granted a receipt for the composition on his own debt at that rate, and discharged it; the bankrupt afterwards raised an action against him for payment of a debt due by him to the bankrupt prior to the sequestration, but which was not given up by the bankrupt among the debts due to him; the creditor then raised a reduction of the discharge under the composition contract, and the receipt for the composition on his debt, as having been fraudulently obtained;—Verdict found, in the circumstances, that the discharge and receipt were obtained by fraud, or fraudulent concealment, on the part of the bankrupt. Baillie, March 23, 1837, p. 893.

13.—(1.) The clerk or shopman of a bankrupt was employed by the trustee after sequestration; he made a claim which included arrears of salary incurred prior to sequestration, as well as an allowance for his services since that period; the trustee, with the sanction of the commissioners, paid him a sum of money and obtained a settlement of the claim; Held, that such payment could not be sustained, in so far as it was made on account of wages or services prior to sequestration, and that the sanction of the commissioners did not warrant the trustee in giving a preference, out of the funds of the estate, to an ordinary debt of the bankrupt.

(2.) A bankrupt, with concurrence of his trustee, petitioned for discharge; some of the creditors successfully opposed the petition, and the Court found the bankrupt liable in expenses, and the trustee also liable "*qua trustee*:" the trustee afterwards resigned, and a new trustee raised an action against him for these expenses, alleging that he had acted fraudulently and in collusion with the bankrupt, in getting up the petition for discharge: Held that the former judgment had not the effect of barring the trust-estate from seeking relief against the ex-trustee, personally, if sufficient grounds existed for subjecting him.

(3.) Where a record was closed, and it appeared necessary for the due administration of justice between the parties, that a farther detail and investigation should be made on one branch of the cause—Remit made to the Lord Ordinary to open up the record in regard thereto, and to receive a more

**BANKRUPTCY (Continued).**

special and articulate condescendence of the facts in proof of certain collusion alleged.

(4.) Where a trustee erroneously paid sums which were not due, sides debiting him with these sums, the penal interest of 20 per cent them, was claimed from him—Held, that unless he made the *pays mala fide*, he was not liable in such interest. *Maben*, June 3, 1 1087.

14. In a competition for the office of interim-factor, and trustee, one competitors, in putting a value, upon oath, on a collateral obligation, ratory to voting, under § 24 of the Bankrupt Act, put a mere im and elusory value, which he knew to be false; he alleged that this was consistent with the practice of others, in like circumstances;—Held: practice, if it existed, was no justification of so gross an abuse, and competitor who had so acted could not be confirmed as trustee in qustration, even although he possessed a preponderance of votes, it after deducting all those on which the false value had been put. June 10, 1837, p. 1107.

15. The trustee on a sequestrated estate held also a commission of factio a heritable creditor, with full power to uplift and discharge the debt him; the trustee made up titles as such to the heritable property, sold drew the price; in the dispositions to the purchasers he acknowledged prices to have been paid him as factor for the heritable creditor: in th of the estate he charged himself with these prices, but of the ~~ent~~ entered them on the credit side as paid to the heritable creditor; b ever, did not as factor execute any discharge in favour of the estate, his accounts with the creditor, he stated a certain sum as retained by answer the expenses of sale; this sum he applied to his own uses, and the expenses in his accounts with the estate, which were subsequently ed and passed by the commissioners; having become bankrupt and r —Held, in a competition between the new trustee and the heritable for an outstanding balance of the prices of the properties, that for retained by the former trustee to answer expenses the estate was a able, and that it must be held as in their hands for the satisfaction of penses chargeable against the heritable creditor. *Gibson*, Nov. 24, 1 143.

16. A bankrupt and his creditors having agreed to a composition by priv tract, and one of the creditors having become cautioner in the comp and granted composition bills, the bankrupt granted to this creditor a nation of his whole effects, with the view of the creditor operating p to himself, over and above his proportion of the composition sum; that such assignation was illegal, and verdict given accordingly. *Re* July 13, 1837, p. 1200.

See *Annuity*.

**BASTARD.**

- 1.—(1.) Evidence in an action of filiation which held insufficient to warrant pursuer's oath in supplement.

(2.) In such action, the pursuer's sister held not admissible as a except for the purpose of corroborating the testimony of other witne defect of other evidence.

(3.) Circumstances in which additional proof refused to be allowed. Jan. 28, 1837, p. 117.

See *Proof II. 2. (2.)*

**BILL-CHAMBER.**

Held, by the whole Court, that "the Act of Sederunt, 6th March does not apply to extracts of decrees for expenses in the Bill Ch Ross, June 30, 1837, p. 1239.

See *Process VI. 3.—Cautioner. 7.*

**BILL OF EXCEPTION:** See *Queries as to form of Bills of Exception, and Answers by Lord Chief Justice Tindal.* Appendix, No. III. p. 1312.—*Proof IV. 9, (1.)—Process III.*

**BILL OF EXCHANGE.**

1. A charge was given to the acceptors of a bill of exchange, which had not been acquired by the chargers until after the term of payment, and after the bill was noted for non-payment: in a suspension, the acceptors alleged, that they were not debtors in the bill, and that the chargers were duly made aware of that fact; they recovered documentary evidence, under a diligence, which afforded presumptions, but not conclusive proof, of these averments: Held that, in the circumstances, they were entitled to a proof prout de jure, in respect of the general rule to allow investigation by parole evidence, where there was reason to suspect unfair dealing as to bills of exchange. *Macdonald*, Dec. 23, 1836, p. 303.

2.—(1.) Parties with whom a bill (repeatedly renewed) was discounted, allowed it to lie over for some months after it became due, without any communication had with the acceptors; at the request of the drawer, who truly had no claim of debt against the acceptors, they delivered up to him the bill; about fifteen months thereafter they recovered possession of it by having recourse to judicial measures, and sued the acceptors for payment of the contents;—Held that the acceptors were not relieved by what had occurred of their liability as such.

(2.) In an action for payment, by the onerous holders of a bill accepted by the executors of a party deceased, as such, no defence that they have no executry funds. *Eaton*, May 25, 1837, p. 1012.

3. Held that the indorser of a bill of exchange, who does not offer payment thereof to the holder of the bill, has no right to control the holder in the use of diligence against other parties to the bill. *Kerr*, May 30, 1837, p. 1041.

4. In a bill of suspension of a charge on an acceptance, it was averred that the signature was either a forgery, or, if genuine, had been obtained by gross fraud, but no genuine subscription was produced for comparison—Bill (which the Lord Ordinary had refused) passed on caution. *Rannie*, May 31, 1837, p. 1049.

5. A party, who was trustee for G. P., granted a promissory-note, bearing to be “for value in trust-account,” but without specifying the trust, and there having been ex post facto added “for Mr P.”—Circumstances in which held that such alteration did not import a vitiation of the bill. *Commercial Bank*, June 28, 1837, p. 1202.

6. The drawer of a bill of exchange raised action for payment of the contents against an indorsee who had recovered the amount, on the ground of want of onerosity, the statements in the record referring solely to that allegation; on a reference to oath the indorsee deponed to circumstances tending to show his want of bona fides, but not showing want of onerosity;—Held that, whatever might have been the case in another shape of the record, the pursuer having failed to prove the allegation on which the action was rested, the defender fell to be assolizied. *Brown*, June 29, 1837, p. 1230.

See *Foreign*, 3.—*Oath on Reference*—*Young*, June 27, 1837, p. 1202—*Ross*, June 29, 1837, p. 1219.

**BURGH.**

1. The magistrates of a royal burgh, besides their ordinary burgh-court, were in use to hold another weekly court for the decision of cases under 40s. in value, originally constituted by an Act of Council in 1772, and in which a summary form of procedure was established; after the passing of the Act of Sederunt 1825, prescribing a certain form of process for the Scottish-burgh-courts, this court was continued under the old regulations; in 1828, the magistrates by an Act of Council extended its jurisdiction to cases of £5 value:

**BURGH (Continued).**

Held, in a reduction of a decree in this court for a debt of £5, <sup>1</sup>/<sub>2</sub> incompetent. *Mabon*, Nov. 16, 1836, p. 19.

2. A town-clerk having been appointed for five years, and the council at the end of that period having elected another person, found, in a *supra* interdict, that he was not summarily removable, and the council forbidden from carrying the new appointment into effect, without prejudice to the declarator the council might be advised to institute for having it found that the office came to an end by the lapse of the stipulated period. *Farish*, 1836, p. 107.

3. Questions,

(1.) Whether, at a meeting to which the whole magistrates had been duly summoned, a minority can competently elect a *procurator* interim, in the place of a party deceased, under the powers of *Will. IV. c. 76, § 25*.

(2.) Whether, in the event of a combination existing among members of the council, to absent themselves for the purpose of defeating an election, it becomes competent to the minority to elect.

(3.) Where the complement of the council was twenty-one; and one died; and ten were absent; and the provost, who had a casting vote as a deliberative vote, concurred with the ten members present, intimated that his casting vote was given as well as his deliberative vote. Whether this state of the vote, which would have formed an actual majority, even if all the absent members had been present, and dissented, considered less efficacious in consequence of their being merely absent. *July 6, 1837, p. 1250*.

See *Church, 3.—Citation—Trust—Title to Pursue, 4, 8.—Repairs* **BURIALS (REGISTER OF).** See *Proof IV., 5 (5).*

**CARRIER.**

A party in Newcastle ordered a puncheon of spirits from a merchant in Edinburgh, who shipped the puncheon on board a steamer plying between Glasgow and Newcastle, and obtained a bill of lading which he transmitted to the purchaser along with an account charging him with price, freight, and duties. The seller, at the same time, drew a bill for the amount, which the purchaser accepted; the puncheon was secured on the deck; during the voyage a storm arose, and the puncheon was thrown overboard, along with a whole of the cargo in the hold, for the purpose of lightening the vessel. The seller immediately afterwards sent another puncheon of spirits to the purchaser at Newcastle, intimating that no farther price was to be charged in so far as the second puncheon exceeded the first in value, which was a small amount; the seller then raised an action against the purchaser's vessel for the value of the first puncheon, alleging it to have been lost by improper stowage, at a trial before a jury,—Direction by the Lord Judge, that the jury should not find the shipowners liable for the loss of the puncheon to the pursuers, because, if, on the one hand, it was a fault of the shipowners, they were liable to the purchaser at Newcastle, whose risk the puncheon was, from the date of shipment; and on the other hand, it was lost by a peril of the sea, the shipowners were not liable for its value to any party whatever. *Dunlop, March 21, 1837, p. 1250*.

See *Proof II. 1.*

**CAUTIONER.**

- 1.—(1.) On the same day on which a bond for £2000, with a discharge, was granted, a party executed a letter of obligation, addressed to the creditor, whereby he guaranteed payment of the bond; the creditor succeeded on the narrative of the bond having been granted, but the

\* See this direction affirmed. *Title to Pursue, 8.*



**CAUTIONER (Continued).**

not make any reference, in gremio, to the letter :—Held that, in these circumstances, the septennial prescription of 1695, c. 5, did not apply to the letter, though it was *pars ejusdem negotii* with the bond, because that statute is limited to cautionary obligations which are contained in the same writing with the principal obligation.

(2.) Question whether, if the bond had referred in gremio to the letter, as well as the letter to the bond, the statute would have applied. Tait, Dec. 8, 1836, p. 221.

2. Where a cautionary obligation bound three parties, not jointly and severally, but each *pro rata* only,—Held competent to raise action against two of the co-obligants, for payment of their respective shares, without calling the representatives of the third, who was deceased. M'Arthur, Dec. 15, 1836, p. 270.

3. A party having come under a cautionary obligation, which in its terms and substance bore express reference to certain stipulations contained in a previous minute of agreement between the principal debtor and the creditor—Held to be relieved of the obligation in consequence of the stipulations having been, without his knowledge, contravened through the act of the creditor. Walker, Feb. 10, 1837, p. 526.

4.—(1.) Where the curator bonis of an absent party made an illegal agreement with the person who was heir-presumptive of the absent party, which was to the prejudice of the judicial cautioner of the curator, and this agreement was acted on for a term of years—Held that the cautioner was thereby liberated, in any question with that person.

(2.) Circumstances in which this rule was applied. Lawson, May 17, 1837, p. 930.

5. Where a debtor assigned a life-policy in security of certain advances, and his friend granted a relative guarantee for payment of the premiums, and annual interest on the advances—Held that the sum uplifted by the creditor out of the policy, after the debtor's death, must be imputed, after satisfying the principal of the advances, in extinction of an arrear of interest due on them, and not in payment of any other debt due by the deceased to the creditor. Sandeman, Jan. 26, 1837, p. 416.

6. A party caused a summons to be executed, and inhibition to be used on the dependence ; a preliminary defence was stated that the execution of the summons was irregular, and, after considerable discussion, that defence was sustained, and the party was subjected in expenses ; the party had intimated by letter to the messenger as soon as the objection was taken to his execution, and the messenger had answered, maintaining his execution to be unobjectionable ; the party had also, in the middle of the discussion, intimated directly to the cautioners of the messenger, who took no notice of it :—Held that both the messenger and his cautioners were liable to relieve the party of the expenses of the discussion, and of the expense of the inhibition on the dependence. Collier, Dec. 6, 1836, p. 195.

7. Warrant granted to the clerks to the bills to deliver up to a suspender the bond of caution in the depending process of suspension at his instance, in respect of his producing a new bond of caution, which was reported by the clerks to the bills to be signed by sufficient obligants. Bett, Dec. 24, 1836, p. 313.

See *Bankruptcy*, 3, 16.

**CESSIO.**

1. Where a debtor, who was under horning on a bill of exchange, and against whom a sheriff small-debt decree had been taken out, raised a process of cessio, during the vacation of the Court of Session, and made intimation in terms of the statute 6 and 7 Will. IV. c. 56—Warrant granted by the Lord Ordinary on the Bills (after intimating the application) for his personal protection until the third sederunt-day of the ensuing session, but such war-



**Cessio (Continued).**

- rant not to issue till a bond of caution to attend all diets of lodged with the clerk in terms of section 15 of said statute. Term afterwards prorogated by the Court. *Sawers*, Nov. 15, 1836.
2. A party raised a summons of cessio and published the requisition in the Edinburgh Gazette, and sent circulars through the post-office to all creditors, besides executing edictal citation against such creditors forth of Scotland: he produced the requisite evidence of this, a petition for personal protection, which he presented within two days of raising his summons: the Court ordered intimation in the minutes also to a creditor named in the petition who had given him a charging, and thereafter, although no opposition was made, and ~~cost~~ amount of the whole debts, was offered; their Lordships superadded, in the mean time, in respect of a doubt as to their jurisdiction, a petition presented before the statutory period of 30 days had expired; and because that question was now pending in a citation, on minutes ordered for the whole Court. *Hamilton*, Dec. 10, 1836, p. 190.
3. An unopposed cessio, which was raised under 6 and 7 Will. IV. c. 56, enrolled and pleaded in the Inner House, after the expiration of the period of intimation; the pursuer was personally present in Court; held, and, in the circumstances, expedient, to administer the oath to him without making any remit to the sheriff under the twelfth section of the statute. *Hackston*, Jan. 24, 1837, p. 411.
4. A petition for interim protection was presented by a party within two days after raising a process of cessio under 6 and 7 Will. IV. c. 56; ordered by the Court, in respect that this did not prejudice the rights of the party, and, in particular, did not affect the question whether the petition could competently be decided on the merits, before the expiration of the induciae allowed by the statute for bringing the defenders in into Court. *Hamilton*, Feb. 16, 1837, p. 570.
5. Where a creditor, defender in a process of cessio, raised under 6 and 7 Will. IV. c. 56, gives in a list of persons whom he alleges to be the pursuer, and who have not received letters of intimation through the post-office, nor been cited.—Held that the pursuer is bound, before the Court, to cite them, and that the notice in the Gazette does not dispense with the necessity of this, but that the creditor-defender will be liable for the expense occasioned by this objection, if the parties in the list are not the pursuer. *Renny*, March 11, 1837, p. 852.
6. When a process of cessio is raised under 6 and 7 Will. IV. c. 56, and the statutory induciae expire during vacation—Question whether it is for the Lord Ordinary on the Bills to hear the cause on the merits. *Forsyth*, May 16, 1837, p. 927.
7. A farm-servant committed a severe personal assault on his fellow-servant for which he was both punished with imprisonment in the criminal court, and subjected in damages in the civil court, for the civil debt, he was imprisoned of above six months, in addition to his penal imprisonment. He was an unmarried man.—Circumstances in which held that he was entitled to the benefit of a decree of cessio, except on condition of his paying to his fellow-servant 2s. per week, out of his wages, amounted to 5s. per week, in money, besides bed and board; but that obligation to such period as he should be himself in the receipt of his wages. *Kerr*, May, 16, 1837, p. 928.
8. In a process of cessio, raised in the Court of Session, under 6 and 7 Will. IV. c. 56, an examination of the pursuer took place under a writ of Habeas Corpus ad Satisfaciendum; when the cause was resumed by the Inner House, a question was raised between the parties, whether the pursuer or defenders should, in the first instance, discharge the expense of printing, 1st, The pursuer's state-

**CESSIO (Continued).**

2d, The pursuer's deposition before the Sheriff. The Court considered the state of affairs to be in the place of the old condescendence, and directed the pursuer to be at the expense of printing it, at least in the first instance. The defenders offered to bear one-half of the expense of printing the pursuer's examination; but the Court directed them to bear the whole expense, in the meantime. Taylor, June 17, 1837, p. 1157.

9.—(1.) An application for cessio was presented to a Sheriff under the recent statute, the name of a certain creditor, who was residing furth of Scotland, not being inserted in the petition,—the Court refused to allow a supplementary action for rectifying the omission, and affirmed the Sheriff's judgment dismissing the petition.

(2.) Question, whether an application for cessio be competent in the Sheriff Court, where there are foreign creditors? Fraser, June 30, 1837, p. 1244.

10. Held that the creditor of the pursuer of a cessio, who has been duly cited as such, is not admissible as a witness in support of the opposition to the cessio (though he has made no appearance as an opposing party), in respect that he is a party, and has an interest in the issue of the process. Kennedy, July 11, 1837, p. 1294.

See Taylor, Feb. 4, 1837, p. 486.

Yeatts, Feb. 16, 1837, p. 571.

Taylor, March 7, 1837, p. 753. July 6, 1837, p. 1254.

Forsyth, May 18, 1837, p. 950.

**CHANCERY.**

On the demise of the Director of Chancery, the Court made an interim appointment of a Director, in order to prevent any public inconvenience during the interval, prior to the completion of a permanent appointment; and their Lordships directed the interim appointment to be recorded in the books of sederunt. Dundas, Jan 20, 1837, p. 398.

**CHURCH.**

1. Held, as the sequel of the case reported ante, XIV. p. 509, that the minister of one of the Parliamentary Churches, who, in ignorance of his right to become a contributor to the Ministers' Widows' Fund, had allowed several years to elapse without claiming such right, was liable as a contributor, as at and from the date of his induction, and that, at the rate fixed by the statute for those who have not duly declared their selection of one of the rates prescribed by the statute; and that he was chargeable with interest on the arrears of such rate, all in terms of the statute. Gordon, Nov. 16, 1836, p. 15.

2. Circumstances in which the Court refused to award any augmentation to the minister of a parish, having a stipend of 16 chalders. Minister of Edrom, Dec. 20, 1836, p. 301.

3. A parish contained a royal burgh and a land-ward district; two ministers officiated in the parish; in 1817, the town-council, who were patrons, applied to the Presbytery to revive and institute a third charge within the parish, which had formerly been established by authority of the church-courts; the Presbytery did so, "on condition that the council bind themselves to make up the stipend of the third charge to £200 per annum:" the council agreed to this, and, as patrons, granted repeated presentations to the third charge, and, on the death of one of the ministers holding that charge, they paid £100 as Ann, to the widow, and £100 to the Ministers' Widows' Fund, as a half-year's vacant stipend; the stipend was payable out of the ordinary funds of the burgh; on a subsequent vacancy, the council refused to pay any thing in name of vacant stipend to the Ministers' Widows' Fund:—Held that the endowment of the third pastoral charge was of a permanent nature; that the charge was a benefice in the sense of the statutes relative to the Ministers' Widows' Fund; and that the vacant stipend, which was for half-a-year, being

**CHURCH (Continued).**

£100, was due to the Fund. *Magistrates and Council of Stirling*, 1837, p. 657.

4. Circumstances in which the Court refused to award any portion of the second minister of a collegiate charge. *Brewster*, May 26, 1837, p. 991.
5. The church judicatories of a Dissenting body having pronounced a declaration of the minister of a church in communion out of connexion — Circumstances in which the Court awarded a conjoint possession of the church by alternate diets to the minister, on the one hand, and the judicatories should appoint, on the other, pending a decision whether the minister's incumbency under his agreement with the parish of the church, and his right of possession, had been brought to an end by that sentence. *Galbraith*, March 10, 1837, p. 808.
6. When a manse, though "capable of being repaired, requires very extensive repairs to render it at all habitable, it is not incompetent to consider what may be necessary to be done, whether by repairs or alterations, to render the manse sufficient and suitable to the circumstances of the benefice, and a competent residence for the Minister of the parish. *Michael*, May 23, 1837, p. 1020.
7. Held, notwithstanding certain allegations of a contrary custom of the parish, that the principle of assessment for rebuilding a parish church, as fixed in the case of *Peterhead*, applied to a parish containing a large tract composed of three or four hundred inhabited houses, which were the greater part, on small fees, but had never been erected into a parish. *Boydell*, June 15, 1837, p. 1148.

See *Poor* 2, (2).—*Trust*, 8.

**CITATION.**

An action was raised before a burgh-court, against a lawyer, who had his writing-office within the burgh, but whose dwelling-house, as of the summons, was without the burgh: the action was accessory to an already depending in the burgh-court, and bore to be raised for the purpose of being conjoined with it. A statute was, soon after, passed, enlarging the jurisdiction of the burgh, so as to include the dwelling-place of the lawyer. Thereafter, he was cited at his dwelling-place, in common form: He was liable to the jurisdiction of the magistrates, and that he was declared. *Hunter*, March 1, 1837, p. 693.

See *Heir and Executor*, 1, (2).

**CLAUSE.** See *Fic and Liferent*, 2, 3.

**CLERK OF SESSION.** See *Public Officer*, 3.—*Process* X, 23.—*A. S.*, 1837, p. 1317.

**COMPANY.** See *Partnership*.

**COMPENSATION.**

1. A country practitioner was employed to conduct law proceedings for a party resident in Edinburgh, and he communicated with the parish burgh solicitor:—In an action by the solicitor against the country practitioner for payment of an account due to him in reference to other business, pleaded compensation, in respect of the account incurred to himself, that there were no *termini habiles* for the plea of compensation as in *Taylor*, Dec. 11, 1836, p. 263.
2. Plea of compensation, depending on special circumstances, repelled. *Feb.* 16, 1837, p. 586.
3. Circumstances in which a set-off, in name of compensation, was disallowed, excepting to a small extent, as being uninstructed by the admission of the party, and no other evidence being produced. *Sibbald*, Feb. 17, 1837, p. 1020.

See *Bankruptcy*, 12.—*Partnership*, 1.—*Executor*.

**COMPETITION.** See *Foreign*, 4.—*Arrestment*, 1.—*Aliment*, 1.

**CONDITIO SINE LIBERIS.** See *Testament*, 3, (3).

**CONFIRMATION.**

1.—1. The creditor of a defunct having obtained decree of constitution, cognitionis causa, raised an edict in the Commissary Court, on February 12th; it was published at the market-cross and parish church, respectively, on 14th and 16th February; notice of the application was published in the Gazette of February 21st; decree, decerning the party executor-creditor, was pronounced on February 26th; the oath, emitted by the creditor, related to the amount of estate left by the defunct, and given up in inventory, and it did not relate to the verity of the debt; sentence of confirmation as executor was pronounced on March 8th: Held that the confirmation was regularly expedite, and was not objectionable, either

(1.) In respect of the oath not having deposed to the verity of the debt, as that is not required by 4 Geo. IV. c. 98; or

(2.) In respect of the lateness of the notice in the Gazette, as the advertisement was duly given, in terms of that statute, and the explanatory A. S. Nov. 12, 1825, § 19, as to the Commissary Court.

2. In granting commission to take the oath of a party applying for confirmation, and who resides in a different commissariat from that in which confirmation is applied for: Held no irregularity to appoint a party to be commissioner who was not commissary clerk, or commissary clerk-depute, of the district in which the oath was to be taken. Greig, March 1, 1837, p. 697.

2. A party died intestate, leaving four next of kin; the creditors of one of the next of kin used arrestments in the hands of a debtor to the deceased, as being now debtor to his (the arrester's) debtor; two of the other next of kin afterwards expedite a confirmation, specially including the whole debt due by the arrestee to the deceased; the arrestee then paid the debt to the confirmed executors, and obtained a discharge from them: Held (by a majority), that the arrestee was still liable to the arrester, in respect that, by the statute 4 Geo. IV. c. 98, the moveable estate of the deceased vested ipso jure in the surviving next of kin, to the effect of being either assignable or arrestable, though no confirmation had been expedite at the date of such assignation or arrestment. Frith, March 3, 1837, p. 729.

See *Arrestment*, 1.

**CONFUSIO.**

The ten-pound land of C. was composed of the 10 merk land of C., and the 5 merk land of C., of old extent; the lands lay contiguous, and had been possessed as one undistinguished property for about two centuries: in 1637 a decree of valuation of the 10 merk land of C. had been obtained before the High Court; in a question in 1837 how far that decree was available in a process of locality, where the 10 merk land could not be separately identified,—Held, that, as the blending of the lands had taken place without blame being imputable to any party, the benefit of the decree was not lost; and that, as nothing appeared to take off the presumption, arising from the old extent, that the 10 merk land was two-thirds of the ten pound land, the proprietor of the ten pound land of C. could only be localled on, to the amount of one-third of his land as unvalued, the remaining two-thirds being covered by the decree of valuation. Johnston, June 13, 1837, p. 1125.

See *Entail*, 8.

**CONSIGNATION.** See *Process*, VII.

**CONSOLIDATION.** See *Entail*, 13, (3).

**CONTRACT.**

1. Circumstances in which the rule was applied, that, after a party takes back his carriage from the yard where it has been repaired, and uses it for a considerable time, without objection, he is barred from afterwards refusing to pay the coach-builder's account in respect of alleged insufficiency in the repairs. Clerk, Dec. 13, 1836, p. 253.

2. Certain proprietors having undertaken the formation of a turnpike road through a district in which their lands lay, and having communicated the

## CONTRACT (Continued).

scheme to a non-resident proprietor of an entailed estate, who had the general approval, and signed the first of a series of bonds granted and borrowed to complete the undertaking, but died before the date of the deed.—Circumstances which, in a question with the other proprietors, do not establish against him an obligation for the whole undertaking, as against his representatives beyond the extent of his share of the bond which he subscribed. *Earl of Traquair*, Feb. 2, 1837, p. 475.

See *Obligation*—*Poor*, 3.—*Master and Servant*.

## CORPORATION.

- 1.—(1.) Adherence, on remit, to the judgment (*ante*, XIII. 9), of the Faculty of Physicians and Surgeons of Glasgow to be a corporation.
- (2.) The adjunction of a penalty for contravention of corporate regulations does not preclude the corporation from the benefit of an interdict.
- (3.) Expenses in House of Lords awarded to the respondent and authority to determine the same. *University of Glasgow*, March 3, 1836.
2. Circumstances which held not to justify an award of £50 of damages with expenses of process, against a party who had exercised the right of a tailor in violation of the exclusive privileges of a corporation, and in violation of an interdict. *Murison*, Dec. 2, 1836, p. 179.

COUNCILLOR. See *Burgh*, 3.

## CURATOR BONIS.

- 1.—(1.) Competent for the Lord Ordinary on the Bills, in vacation, to make an interim appointment of a curator bonis to a fatuous party.
- (2.) A party became fatuous who was the partner of a trading company, part of the company stock was heritage, which was feudally vested in individual partners; the curator of the fatuous party took his ward of copartnery, and it became necessary, in order to have the value of the stock paid up, that a conveyance of the heritage, so far as vested in the ward, and also of his share in the moveable stock of the company, should be made; in these circumstances the Court granted authority to the curator to execute the requisite conveyances. *Ellis*, Dec. 14, 1836, p. 262.
2. A fatuous person, whose family resided in America, was possessor of a property which was partly situated there, and partly consisted of money in the charge of a curator bonis in this country; the family sent a mandate to the curator to transmit the funds in his hands, after which there would be no fund left within Scotland for the provision of the fatuous person; the Court granted authority to transmit the funds, and for recall of the curator by the Court. *Dalrymple*, March 9, 1837, p. 769.
3. Circumstances in which the Court granted authority to the curator of a fatuous person, to grant a lease of a farm for the period of 19 years. *July 6, 1837*, p. 1254.

See *Cautions*, 4.—*Factor Loco Tutoris*—*Lease*, 10.—*Bissets*, Nov. 15, 1837.

## DEATHBED DEED.

In an action to have a deed reduced on the head of deathbed, terms of previous settlements which held to show that, at the date of the deed, they were to be held as not subsisting, and as insufficient to support the claim of the heir insisting in the reduction. *Clyne*, May 12, 1837.

DECLINATURE OF JUDGE. See *Process III.* 8, (2.)

DECREE BY DEFAULT. See *Process X.* 9.

DESTINATION. See *Entail*, 3. 9.—*Succession*, 2.

## DILIGENCE.

1. The individual partners of a company with a descriptive denomination, a cash credit bond to a bank, containing a clause of registration, by which they bound themselves nominatim, the company, and all future partners, the drafts to be made by the manager; a party, who subsequently became a partner, was charged individually by an assignee of the bank, for

**DILIGENCE (Continued).**

- a balance due on the credit, the letters of horning narrating the terms of the bond, and directing the messenger to charge the individuals therein named, and any other partners of the company,—Held that the charge was competent, though the partner was not named in the letters. Maclean, Dec. 9, 1836, p. 236.
  - 2. A party executing diligence on the regular decree of a competent court cannot be sued for damages, although the decree should be ultimately found to be erroneous, and although steps had been taken at the time of using the diligence for bringing it under reduction. Aitkin, Feb. 25, 1837, p. 683.
- See A. S. June 27, 1837, p. 1317.—*Bankruptcy*, 6.—*Inhibition*—*Meditatione Fugæ Warrant*—*Personal Objection*—*Poinning*.

**ENTAIL.**

- 1.—(1.) A party disposed his lands in liferent to a lady, and in fee to the second son to be procreated of her body, and his issue, whom failing, other heirs; he died two years before the lady's second son was born; the fetters were effectually imposed upon the lady, and the heirs of entail: Held that there was no peculiarity in the case to exempt it from the general rule that the fetters of an entail which are laid upon heirs, do not bind the institute.
- (2.) Held by the Lord Ordinary, and acquiesced in, that the institute under an entail, in pursuing a declarator of freedom from the fetters of the entail, should call the whole heirs of entail as parties. Logan, Dec. 20, 1836, p. 291.
- 2. In a deed of entail certain acts were expressly prohibited, and, inter alia, selling or alienation of the estate; the irritant and resolute clause commenced with a general declaration—"in case the heirs of tailzie shall contravene, or fail in performing any part of the premises"—then went on to specify the prohibited acts—"particularly by neglecting to assume," &c., "or by possessing," &c., and concluded with a repetition of the previous general declaration; in the special enumeration the prohibition against alienation was omitted;—Held, notwithstanding, that the heirs of entail were not entitled to sell and that the prohibition so omitted was protected by the general declaration. Horne, Jan. 17, 1837, p. 372.
- 3. A party executed an entail, and granted procuratory to resign the estate for new infeftment, "to myself, and the heirs-male to be procreate of my body, of my present marriage, and the heirs whatsoever of the bodies of the said heirs-male; whom failing, to the heirs-male to be procreated of my body in any subsequent marriage, and the heirs whatsoever of the bodies of the said heirs-male; whom failing, to E. M., my only daughter, and the heirs-male of her body of her present marriage with C. L., and the heirs whatsoever of the body of the said heirs-male; whom failing, to the heirs-male of the said E. M. in any subsequent marriage, and the heirs whatsoever of the bodies of the said heirs-male; whom failing, to the heirs-female of the said E. M. of her present marriage:" E. M. took the estate, and was succeeded by a son and grandson, descending of the marriage with C. L.; the grandson died, leaving daughters:—Held, that these ladies were called to the succession before the younger brother of their father. Lockhart, Jan. 19, 1837, p. 376.
- 4. In making a remit under 6 and 7 Will. IV. c. 42, to persons of skill to report on the value of the lands to be exchambed—Held unnecessary to resort to the intervention of a Lord Ordinary; and a remit made, at once, to inspectors, to report directly to the Court. Boswell, Feb. 7, 1837, p. 490.
- 5. The prohibitory clause in an entail executed in 1664, was thus expressed: "It shall noways be lawful to any of the heirs of taillie and provision above specified, to sell, dispoone, or wadset the lands above written or any part thereof, or any annual rents, or yearly duties to be uplifted furth of the samen, or to set takis for longer space than their own lifetimes, or to contract debt for which the samen may be apprised or adjudged, or to do any other

## ENTAIL (Continued).

- fact or deed, in prejudice of the said tailzie and of the persons and their forebears:—Held, that this clause contained an inhibition against frustrating the succession. *Rowe*, Feb. 8, 1837, p. 42.
6. An application to the Court under the 6th and 7th W. IV. c. 42, rity to sell entailed lands for the purpose of paying the entailor's debt, had been intimated in the newspapers, as provided by the statute, farther appointed the petition to be intimated in the minute-books of the Court for eight days, and granted warrant for serving it on the entailor, not being a descendant of the petitioner's body. *Torrill*, 1837, p. 506.
7. Where a petition for carrying into effect a private act of Parliament to an entail, has been intimated under the notices required by the Court will not allow its prayer to be altered without ordering a new intimation, in terms of the act. *Lockhart*, Feb. 9, 1837, p. 498.
- 8.—(1.) A deed of entail reserved power to an heir in possession to dispose of provision in favour of younger children; a bond was granted to the heir, together with a disposition of a corresponding annual rent of the estate, and also a disposition of the lands themselves in security; the children made their right real by infeftment; the bond and deed were afterwards acquired by the next heir in possession, who borrowed the money, and disposed of it in security; the disponee took infeftment under the deed; the heir's embarrassments subsequently led to the sequestration of the rents of his estates and the appointment of a judicial factor; both in regard to the principal sum, and in regard to the interest, the factor had taken place, and that the creditor holding the right of the money was entitled to a preference on the rents of the estate for the interest of the sum lent, in competition with the creditors of the entailor's estate.
- (2.) Terms of a clause in an entail, relative to the obligation of the heir in possession to keep down the annual interest accruing on bonds secured on the estate, which held not to affect the exclusion of the principle of the *Welsh*, Feb. 11, 1837, p. 537.
9. An entailor settled his estate on his son, and the heirs of his son's certain order; whom failing, on his daughter and the heirs of her certain order; whom failing, on his own nearest heirs of the blood, and their heirs whomsoever; the son died without issue, and a grandson of the entailor, who had a son and daughter—Held that, although the entail was liable to be defeated so soon as the succession should open to the heirs of the entailor, it was a good entail until that contingency should actually happen, and was not in the meantime defeasible at the will of the heir in possession. *Mure*, Feb. 16, 1837, p. 581.
- 10.—(1.) A deed of entail contained procuratory to resign, for the heirs of tailzie, "under the conditions, provisions, declarations, reservations following," viz. a provision excluding heirs-portioners, a declaration on the heirs to bear the family name and arms (which injunction coupled with a resolutive clause applicable to it alone), a prohibition against altering the succession; a declaration that the whole heirs should hold under no title except the entail; and a clause containing prohibition against effecting sales, or contracting debts, or doing any other deed, civil or criminal, whereby the lands might be evicted; this clause was limited by an instant clause, declaring that if any heir or heirs should do the contrary of the provision above set forth, or shall do any deed, or indirectly, whereby the order of succession above specified may be in any way altered, innovated, or changed, then, and in any of the said cases, every such act and deed should be null and void: a resolutive clause, which was directed against "the person so contravening in any of the particulars above specified:—Held that, as there was a series of



ENTAIL (Continued).

provisions preceding the irritant clause, and as entails ought to be strictly construed, the term "provision," in the irritant clause, could apply to only one of the preceding provisions; that it was uncertain to which one of them it did apply; and that the several prohibitions against sales and against debts, not being duly fenced, the entail was ineffectual.

(2.) Although all the prohibitions were complete—Decree pronounced (in respect of a defect in the irritant clause), declaring that the heir in possession might sell the lands or borrow on them, or gratuitously alienate them, without thereby incurring any species of liability to the substitute heirs. Speid, Feb. 21, 1837, p. 618.

11. Held that no improvement-expenditure by an heir of entail is chargeable under 10 G. III., c. 51, against the succeeding heirs, if the expenditure was made while the entail remained unrecorded. Paget, Feb. 24, 1837, p. 667.

12. Certain substitute-heirs of entail, in India, executed a power of attorney, for giving their consent to a bill for selling part of the entailed estate; they authorized their mandatary "to appear before the Lords' committees, to whom the bill may be referred, and also before the committee of the House of Commons, &c., and then and there to signify and give the consent:" the power of attorney did not reach this country until after the bill had passed into an act, containing a clause that none of its provisions should take effect until the consent of the heirs "to this act" shall be declared "before the Court of Session" by a deed executed, or to be executed:—Held that the consent authorized by the power of attorney, being in a different form from that required by the act, the requirements of the act were not satisfied, and that the Court could not interpose their authority until consents were obtained in precise conformity with the act. Milliken Napier, March 4, 1837, p. 745.

13.—(1.) The resolute clause in an entail declared that heirs contravening "shall, for themselves, ipso facto, forfeit," &c.; and it was made lawful for the next heir, "albeit descended of the contravener's own body, to purge and obtain declarators upon the contravention:" the son of the heir in possession raised a declarator of irritancy, libelling (inter alia) upon an act of contravention, committed by making up titles in fee-simple, in place of making them up under the entail:—Held, that the statute 1685, c. 22, has not declared that such a contravention shall forfeit the contravener's descendants, as well as himself, without reference to the terms of each particular entail, as to the effect of contraventions; that, in this instance, such contravention would not forfeit the pursuer's right; and that he accordingly had a good title to pursue.

(2.) Terms of a clause in a bond of tailzie, under which, held, that the entailer had effectually bound himself and his heirs to possess the lands under no title but the entail.

(3.) An ancestor of the entailer, being infest in the dominium directum of lands held of the Crown, onerously acquired the dominium utile of these lands in 1708, under a conveyance containing a procuratory of resignation ad remanentiam, and a precept of sasine, neither of which he executed; his descendants renewed the infestment under the Crown, and continued to enjoy full possession, and to exercise all acts of property in the lands for more than 40 years, but without executing the procuratory or precept: in 1765, the entailer, who was already infest under the Crown, took infestment under the above precept, and afterwards executed an entail, in the form of a procuratory of resignation:—Held

(1.) That consolidation of the dominium utile with the dominium directum had taken place prior to the execution of the precept of sasine in 1765, and that that was an unmeaning act of the entailer, which did not split these two estates; and,

(2.) That the act of a substitute-heir in making up a title in fee-



ENTAIL (Continued).

simple to the dominium utile of the lands, and selling thereby of contravention, inferring forfeiture of the estate.

(4.) Circumstances in which various sales of portions of the estate were found to have been made.

(5.) Decree pronounced in an action directed solely against possession, declaring that he had forfeited the entailed estate; that was now, and in all time coming, void and extinct; that the lands, rents, had devolved on and accreeed to the next heir from and of citation in the declarator, free and disburdened of every act done granted in contravention of the entail, as fully as if the contravention had been in possession; but reserving all questions with regard to the effect of heritable securities granted to creditors by the contravention. March 2, 1837, p. 711.

14.—(1.) An entailor disposed his lands to himself in liferent, and to his fee, whom failing, to a series of substitute heirs of entail, including descendants of his body, but also collateral relations; the strict deed showed that the entailor considered the institute to be such the term "heirs of entail;" the irritant and resolutive clauses provided "the heirs descending of my body, or any of the other heirs of tail mentioned shall contravene, &c., the person or persons so contravening shall forfeit, &c.:"—Held, by a majority of the Whole Court, that they did not apply to the institute, although he was, in one sense, an "heir of the body" of the entailor, because, both in respect of the strictness applicable to entails, and also in respect of the sense in which the words were actually used in the deed, they applied to no heirs but heirs of entail; and such words could not be extended to include the institute, clearly it might appear that the entailor had supposed them to be included him.

(2.) Question,

(1.) On the assumption that the prohibition against altering of succession was not imposed on the institute, but that it was duly fenced, against sales or debts, were imposed on him, is it for a creditor to adjudge the fee of the entailed estate in payment of debt? or

(2.) Failing this, is it competent to adjudge the debtor's altering the order of succession, and thereby set aside the entail. March 11, 1837, p. 837.

15.—(1.) A substitute-heir, under a recorded entail, made up a title simple as heir of line to the entailor, and was infeft: during a period of years this infeftment remained on the record, after which it was the instance of the next substitute-heir, who also insisted in a declaration of irritancy against the first-mentioned heir: the first-mentioned heir resumed the name and arms of the entailor, and made up a complete title under the entail; he also lodged a minute in process offering to find ample and sufficient caution and security, to the effect of protecting his estate against his debts or deeds, contracted or executed prior to the completion of his feudal title under the entail:—Held, that the title which had been committed was purgeable; and interlocutor of assolvendo in the defender, in hoc statu, from the conclusion of the action, and finding that the defender, should have right at any time to show, by declarator, or other competent process, that the necessity for the continuance of caution no longer existed.

(2.) A substitute-heir under an entail which was recorded, but which had been feudalised, served himself heir of line to the entailor, and was infeft-simple, the next substitute reduced the infeftment as in contravention of the entail.

**ENTAIL (Continued).**

the entail; the first heir then took up the unexecuted procuratory of resignation, in the deed of entail, by service as heir of entail and provision; he expedite a charter of resignation, and was infest under all the fetters of the entail:—Held that the entailed estate was liable for the debts and deeds of the first heir, contracted or done prior to his completing a feudal title under the entail; but was not liable for subsequent debts or deeds. *Abernethy*, June 20, 1837, p. 1167.

See *Homologation—Outlawry—Factor Loco Tutoris*, 1.—*Process X.* 6.—*Trust*, 14.

**ERASURE.** See *Writ*.

**ERRATA.** See p. 1318.

**EXCAMBION.** See *Lease*, 2.

**EXCLUSIVE PRIVILEGE.**

Circumstances which held not to justify an award of £50 of damages, alongst with expenses of process, against a party who had exercised the trade of a tailor in violation of the exclusive privileges of a corporation, and in contravention of an interdict. *Murison*, Dec. 2, 1836, p. 179.

See *Corporation*.

**EXECUTOR.**

In a competition among the creditors of a party deceased,—held that the executor nominate, who was himself a creditor, not having been cited, or otherwise interpellated by legal diligence on the part of any of the creditors, within six months from the party's death, and not until he had himself expedite confirmation as executor, was entitled to a preference over the executry funds for such debts as he could instruct to have been justly owing to himself by the defunct, and to impute or retain in payment thereof, any part of the funds actually in his hands prior to diligence being used, or a judicial claim made at the instance of the other creditors, in so far as he could not be shown to have renounced such legal preference by acts or omissions of his own. *Macleod*, May 30, 1837, p. 1043.

See *Bill of Exchange*, 2, (2.)—*Confirmation*, 2.—*Succession*, 1.—*Settlement*, 1.

**EXECUTOR-CREDITOR.** See *Arrestment*, 1.—*Confirmation*, 1.—*Foreign*, 4.—*Heir and Executor*.

**EXPENSES.**

1. The pursuer of an action of damages for wrongous apprehension, held, in the circumstances of the case not entitled to expenses, though he had obtained a verdict for one shilling damages. *Inch*, Nov. 24, 1836, p. 126.

2.—(1.) Defenders in a cause, who were professional men, having been examined by the pursuer as havers—held not entitled, pendente processu, to claim expenses for time and trouble in searching out documents, &c., but their claim reserved till the issue of the cause.

(2.) Opinion intimated that the case would have been different had the claim been for travelling expenses. *M'Gill*, Dec. 2, 1836, p. 178.

3. A party against whom decree passed in the sheriff court, raised an action of relief, and wrote to the defender in that action, that he did not mean to take the original process to advocation, unless the defender intimated his wish that it should be done; the defender intimated no such wish; the party, nevertheless, took the original process to advocation, and, being unsuccessful, was subjected in expenses,—Held, that the defender in the action of relief, was not liable for the expenses of the advocation, though liable in relief quoad ultra. *Mack*, Dec. 16, 1836, p. 272.

4. Competent to award the expenses of the inferior court to the respondent in an advocation, though he has not only brought no counter-advocation, but has lodged no note of additional pleas, in the advocation brought by his opponent. *Gammell*, Dec. 9, 1836, p. 233.

5. A pursuer refused a sum which was tendered, in name of damages, before he raised his action, and which was again tendered in the defences; a record was made up, and issues were prepared, after which the pursuer accepted the sum.

## EXPENSES (Continued).

that had been offered;—Held that the defender was entitled to in respect that the whole litigation would have been saved, if it had been timeously accepted by the pursuer. A. B., Dec. 23, 1836, p. 693.

6. Circumstances in which, held to be proved that a coach-parcel, a process and title-deeds, was duly delivered at the office of one of the parties in the process; and, having been mislaid for several years owing to the negligence of that agent, or some party for whom he was responsible, he was liable for the expenses of certain processes thereby occasioned. W. v. W., March 1, 1837, p. 693.

7. Circumstances in which the House of Lords ordered the expenses of the parties, each of whom had been served heir to a person deceased out of the estate of the deceased, and at the same time made a rule for the propinquity of the parties respectively to the deceased. W. v. W., July 7, 1837, p. 754.

8. Held, by the whole Court, that "the Act of Sederunt, 6th May 1836, does not apply to extracts of decrees for expenses in the Bill of Exchange." Ross, June 30, 1837, p. 1238.

See Minto, June 8, 1837, p. 1094.—Gifford, July 6, 1837, p. 1254.

See Agent and Client, 4.—Arbitration, 1.—Bankruptcy, 3.—Case of Corporation—Husband and Wife, 4.—Reparation, 1.—Factor Loco Tutoris, 4, (2).—Process, III. 10. X. 21.

EXTRINSIC OR INTRINSIC. See Oath on Reference, 2.—Proof III.

FACILITY AND CONVENIENCE. See Minor.

## FACTOR LOCO TUTORIS.

1. A girl of five years of age was presumptive heiress of entail worth £2000 per annum, in which the heir in possession was a widow sixty-seven years; the pupil was wholly destitute;—the Court gave power to her factor loco tutoris, to conclude an agreement with an insurance office, whereby, in consideration of an annuity of £200 per annum (for her suitable maintenance and education) during the joint lives of herself and the heir in possession, security was to be granted over the entailed estate, for an annuity of £238, 7s. payable to the pupil for the pupil's lifetime, after her accession to the estate. Miller, Nov. 14, 1836, p. 147.

2. Authority granted to the factor loco tutoris of a pupil to make up titles to heritage, in respect that both the pupil's superior and the superior required this to be done. Dykes, Nov. 29, 1836, p. 156.

3. A factor loco tutoris having been appointed by the Court to a pupil, on application of the mother, without intimation being made to the pupil's agnates;—The appointment recalled, as originally granted without the part of the Court. Lownds, Dec. 10, 1836, p. 244.

4.—(1). A factor loco tutoris invested funds in heritable bonds, took to himself "as factor loco tutoris, or to his successors in office, or to their assignees;" infirmament passed in favour of him "as factor loco tutoris, or to his successors in office, or to their assignees;" he died, and the minor petitioned for an appointment of a new factor, with power to uplift the funds so invested, and to grant the necessary conveyances, of the securities, "and, if necessary for that purpose, a renewal in his name, as factor loco tutoris, of the investitures on which the securities were held;"—Held, that the factor should be appointed with powers only, leaving him to make up his titles as he should be bound to do.

(2.) Expenses of opposing the prayer for unusual powers all paid out of the funds of the minors.

(3.) Under a petition to appoint A. B. as factor, "or any other person your Lordships may think proper;" appointment made of a different person without ordering fresh intimation of the petition. Hay, March 1, 1837, p. 850.

See Judicial Factor, 2.

5. Circumstances in which authority was granted to a factor loco

**FACTOR LOCO TUTORIS (Continued).**

borrow £100, and grant security for the same, over the heritable subjects under his management as factor loco tutoris, and to apply the amount in payment of advances which he had necessarily incurred for the maintenance of the minors. Agnew, June 8, 1837, p. 1094.

6. Where a pupil, resident in England, was possessed of a heritable estate in Scotland, and all the next of kin were resident abroad; the Court, in the circumstances and on the application of his mother and the trustees and guardians under an English settlement of his deceased father, appointed a factor loco tutoris, after the usual intimation on the walls and in the minute-book.—Wight, June 27, 1837, p. 1197.

7. Circumstances in which authority to a factrix loco tutoris to grant a feu-right refused. Thomson, March 10, 1837, p. 807.

8. Circumstances in which the Court granted authority to a factor loco tutoris to complete the pupil's title as heir to an entailed estate, and to certain superiorities, in which the pupil's interest required him to be in a condition to give immediate entry to the vassals. M'Dougall, July 7, 1837, p. 1255.

See *Curator bonis*.

**FACULTY.** See *Settlement*, 2.

**FATUOUS PARTY.** See *Curator Bonis*—*Title to Pursue*, 6.—*Trust*, 9.

**FEE AND LIFERENT.**

1. Where the liferenter of certain bank stock died before the period at which a dividend became payable—Held that his creditors could not attach the dividend by their diligence, though its amount had been declared, and the term of payment fixed by the bank, in the ordinary course of the bank management, prior to the liferenter's decease. Thomson, Nov. 18, 1836, p. 32.

2. A testator left one son and two daughters; the son was insolvent, and the testator conveyed his whole estate, heritable and moveable, to trustees, directing them to pay an alimentary annuity to the son; the conveyance contained a clause "excepting always the liferent use and possession of the house in M., &c., now occupied by myself, and which I hereby give and bequeath to my said son, in liferent, during all the days of his life, if he choose to fix his permanent residence at M., he being always bound to pay my said trustees the sum of £20 of yearly rent therefor; as also excepting the household furniture, &c., which are hereby given and bequeathed to my said son, in liferent, so long as he shall continue to reside in the said house at M., and which shall thereafter, or upon my said son dying without lawful issue of his body, then belong to my daughters, Mrs S. and Mrs K. equally between them in fee:" the children of either of these daughters, predeceasing the son, were to take their mother's share: the son had no issue up to the period when one of his creditors used diligence for attaching the furniture; a bill of suspension and interdict was presented by the daughters;—Bill passed, in respect that the fee of the furniture was not in the son, but in the trustees. M'Millan, May 13, 1837, p. 916.

3.—(1.) A testator conveyed his whole estate, heritable and moveable, to trustees, who were directed to pay over the free annual proceeds of it to his three unmarried sisters, and the survivor of them; and "after the death of the said three sisters, and the survivor of them, and, of course, of the termination of their respective liferents, I hereby direct my said trustees to make payment to my six nephews and nieces after named, or to the children of such of them as may have deceased before that time, of the several sums of money hereinafter specified; viz. to A. W. the sum of £1500 sterling, &c.; which six legacies shall bear interest from the first term, after the termination of the liferent hereby provided to my three sisters, and the survivor of them;" A. W. survived the testator, and two of the sisters, but predeceased the third sister, and left no issue:—Held that the legacy of £1500 had vested in him on the death of the testator, and was effectually assignable by him, during his life, or attachable by his executor-creditor, after his death.—Observed by the Lord Ordinary, that, "when a legacy is left to one person in liferent, and another

# **FEE AND LIFE RENT (Continued).**

In fee, the subsistence of the life rent does not prevent the fee from passing to the death of the testator; and the rule appears to be the same where the fee is conveyed by the testator to trustees, with directions to pay to one person during his life, and the capital to another, at the death. At least, this is the rule when there is a destination of the fee to an individual simply, and no ulterior substitutions which require to be kept up for the benefit of those substitutes."

(2.) A testator had three unmarried sisters who survived his three married sisters who predeceased him, leaving issue; he directed (under a settlement of his whole estate containing powers of sale) that the annual proceeds to the three unmarried sisters, and the survivor of them after the death of my said three sisters, and the survivor of the trustees were directed to pay certain legacies, and, "after the payment of said several legacies" they were directed "to pay over the whole of my estate" to three nephews specified; by a subsequent codicil, as to the residue, was recalled, and "in lieu and place of the said I direct the said residue to be paid over by my said trustees to the said three unmarried sisters, accordingly, who survived the testator, vested right in one-sixth of the residue, along with the three sons of the three married sisters deceased; and that they had effectually taken these shares by their respective settlements. *Maxwell, May 25, 18*

*See Reputed Ownership.*

**FIDUCIARY DUTIES.** See *Poor, I, (4).*

**FILIATION.** See *Bastard.*

**FISHING.** See *Property, I.—Salmon Fishing.*

## **FOREIGN.**

1. A Scotsman died resident in India, after having executed, whilst in Scotland, a settlement in the English form; he left some heritable estate in Scotland the settlement did not effectually convey, and a much larger movable estate which was effectually conveyed by it; Held, that reference was to be made to the law of England to determine whether the settlor intended to put the heir-at-law to his election, and to deprive him of his benefit under the will if he took up the Scottish heritage as heir-at-law, also as to the import and effect of the will in other respects; and the court was pronounced in terms of the opinion of English counsel. *Campbell, 1836, p. 310.*

2. A foreign decree, founded on for execution in this country, affords no prima facie evidence of the truth and justice of the claim of the pursuer, and is to be impugned on cause shown by the defender. *Southgate, Feb. 1837, p. 507.*

3.—(1.) In a suspension by a Scottish Banking Company of a charter of a bill drawn by them on an English Bank in favour of a party.—Circumstances in which, in conformity to the law of England, and on remit to English counsel, the Scottish company found in favour of the contents of the bill to the onerous holders.

(2.) On such remit being made, parties not allowed to submit evidence either oral or written, to the counsel. *Aberdeen Banking Company, 1837, p. 1052.*

4. A party domiciled in England died there intestate; a banking company in Scotland then owed him a certain balance which by desire of his relatives was transmitted to England to be paid to his legal representatives; a creditor of the deceased having obtained letters of administration, and payment of the money in question from the party to whom it had been transmitted; thereafter a Scotch creditor obtained decree-dative in execution of his claim against the said banking company.

**FOREIGN (Continued).**

and raised action against the bank for second payment of the money :—Held that the bank was not bound to pay a second time to the Scotch creditor, the prior payment having been valid as made in England, the proper forum of distribution, regularly and in bona fide. *Hutchison*, June 9, 1837, p. 1100.

See *Process IV.—Marriage*, 1.—*Jurisdiction*, 4.—*Cessio*, 9, (2.)

**FORFEITURE.** See *Outlawry—Entail*, 13, (5), 15.

**FRAUD.**

In a reduction of a bond, on the ground, inter alia, of the bond having been impetrated from one of the granters while he was in a state of blindness, and without it having been read over to him, averments as to the alleged impetration which held not such as to infer reduction. *Ker*, May 23, 1837, p. 983.

See *Agent and Principal*, 1.

**FUGITATION.** See *Outlawry*.

**GENERAL CHARGE.** See *Passive Titles*.

**GUARANTEE.** See *Cautioner*.

**HARBOUR.** See *Poor*, 2, (1).

**HEIR AND EXECUTOR.**

(1.) The purchaser of a parcel of lands granted a personal bond for part of the price, and at a subsequent period his heir granted a bond of corroboration to the heir of the seller :—Held competent for executors creditors of the seller to insist in a reduction of the bond of corroboration in so far as it was erroneously granted to the heir.

(2.) Circumstances in which held not to be a sufficient objection on the part of the purchaser's representative that in this action and a relative multiple-poining, representatives of the seller who were abroad were only cited edictally. *Thomson*, June 14, 1837, p. 1133.

**HEIRS-PORCIONERS.**

Where a heritable subject was the property of four heirs pro indiviso, and three of them raised, against the fourth, a summons of declarator that the subject was incapable of division, and that it was necessary and proper to sell it and divide the price, the Court, although no opposition was made, directed a proof to be taken as to the necessity or propriety of the sale ; and, after a proof, that the subject was incapable of division, the Court found and declared that it must be sold for division of the price ; and remitted to the Lord Ordinary to allow a proof of the value of the subject, and to proceed as should be just. *Bryden*, Feb. 4, 1837, p. 486.

See *Entail*, 9.

**HOMOLOGATION.**

Circumstances in which the plea was repelled, that a deed of entail had been homologated by the heir-at-law. *Macrae*, Nov. 22, 1836, p. 54.

See *Accounting*, 1.—*Acquiescence—Contract*, 1.—*Lease*, 6.—*Teinds*, 1.—*Partnership*, 4.—*Right in Security*, 1.—*Process I.*, 2.

**HORNING.** See *Bankruptcy*, 6.—*Partnership*, 3.—*Outlawry—Master and Servant*, 2.

**HUSBAND AND WIFE.**

1. A military officer, by his marriage-contract, bound himself to provide his wife, in the event of his predecease, with an annuity, payable to the widows of officers from a certain fund to which he was a subscriber, which annuity was, by the regulations of the fund, subject to reduction by the directors on a falling off of funds, and to suspension on the second marriage of the widow :—

(1.) Terms which held to import that the widow was not entitled to have made up to her by her husband's representatives, a deficiency arising from reduction by the directors, but was entitled to have so made up to her its failure consequent on a second marriage.

(2.) Question, whether extrajudicial correspondence could be referred to in explanation of the terms of a marriage-contract. *Forlong*, Nov. 24, 1836, p. 126.

2. Terms and provisions of a postnuptial contract and subsequent deed of set-

**HUSBAND AND WIFE (Continued).**

tlement by the husband with consent of the wife, which held not a power of revocation by the husband on the death of the wife, that certain legacies contained in the deeds had become ineffectual by her predecease. *Anderson, Jan. 27, 1837, p. 435.*

3. A woman, having obtained decree of divorce against her husband, a conclusion for suitable aliment: she had a bond of annuity for £40, but she alleged this to be inadequate, as he possessed considerable property; he averred that he was in a state of utter destitution, and she failed to prove the subject:—Held, in respect of her so declining, there were no grounds established, *hoc statu*, for awarding further aliment. *Craigie, March 11, 1837, p. 836.*

4. A surviving husband found not entitled to state as a debt against the estate of his deceased wife, the expenses incurred by him in resisting certain reduction of deeds by his deceased wife, raised after her death; he was partially successful in the litigation; but found entitled to the expenses incurred in opposing a process for having her cognate. *Currie, May 31, 1837, p. 1047.*

5. A trust having been constituted by a woman before her marriage of a marriage-contract, whereby the *jus mariti* was excluded, in relation to her own heritable property, and for her behoof exclusively, no rights being created by the trust in favour of third parties, and it being irrevocable,—Held that such trust was not revocable during the life of the grantor, with consent of her husband; but that it might be revoked on the death of the husband, the cause being then removed. *Anderson, June 2, 1837, p. 1073.*

6. Held that goods furnished to the wife of a party who was absent from the country, the wife being in charge of her husband's business during his absence, were to be considered as furnished to the party himself. *James, June 15, 1837, p. 1151.*

See *Marriage—Marriage-Contract—Oath on Reference, 1.—Arrears*

**HYPOTHEC, LANDLORD'S.** See *Lease.*

**HYPOTHEC, LAW-AGENT'S.** See *Right in Security, 2.*

**INFAMIA JURIS.** See *Proof IV. 2, (2).*

**INHIBITION.**

1. A party raised an action concluding to have the defender (who resided in the country) ordained to make up titles to two heritable subjects and convey the same, and also for expenses of process; he used inhibition on the dependence, and covered all the heritage of the defender; immediate notice of the diligence was made to the defender's agents; no appearance was made to the action, and, some months after decree was pronounced, the defender having sold some of his own heritage, incurred an expense of about £100, in consequence of the purchaser having made a search of the records and discovered the inhibition; the defender had never before the inhibition restricted to the two subjects which he was bound to do by the pursuer, but this was immediately done on his application in a subsequent action at the defender's instance, that he had no damages against the pursuer for the use of the diligence, in respect of the inhibition laid on in common form, and was restricted as soon as the defender was made aware of it to be so. *Macleod, Dec. 13, 1836, p. 248.*

2. A petition for recall of inhibition used on the dependence of an action refused of consent, a simultaneous arrangement being entered into between the parties for a discharge of the inhibition, while the other party was in the country for a certain sum; a judgment on the merits was thereafter pronounced by the Lord Ordinary in favour of the party using the diligence, against the other party; a reclaiming note was presented; about six months subsequent to the charge above-mentioned, new letters of inhibition were raised on the dependence,—Held that the use of the last diligence was a departure from the usual course of law, and was not to be sustained.



**INHIBITION (Continued).**

the good faith of the previous transaction, and also that there was no change of circumstances to justify the use thereof; and the same accordingly recalled. Earl of Caithness, March 4, 1837, p. 749.

**INSURANCE.**

Circumstances in which, verdict found that a policy of life-insurance was obtained by the misrepresentation or by the undue concealment of material facts, by the party insured, or those acting on her behalf. Borthwick, July 21, 1837, p. 1306.

See *Cautioner*, 5.—*Factor loco tutoris*, 1.—*Process III.*, 8, (1).

**INTEREST.**

In an accounting between over-paying and under-paying heritors, under an interim locality,—Held, that the over-paying heritors were entitled to interest on their over-payments from the heritors under-paying. Buchanan and Others, Nov. 15, 1836, p. 7.

See *Bankruptcy*, 13, (4.)—*Cautioner*, 5.—*Church*, 1.—*Right in Security*, 1, 2.—*Entail*, 8, (2.)

**INTEREST (of witness.)** See *Proof II.*, 5., *IV.*, 5, (3.)

**INTERIM POSSESSION.** See *Church*, 5.—*Bankruptcy*, 13, (4.)

**INTESTATE SUCCESSION.** See *Succession*, 1.

**IRRITANCY.** See *Entail*.

**ISSUE.** See *Process III.*

**JOINT STOCK COMPANY.** See *Partnership*.

**JOINT PROPERTY.** See *Heirs-Portioners*.

**JUDICIAL ADMISSION.** See *Compensation*, 3.—*Proof, III.*

**JUDICIAL EXAMINATION.** See *Bankruptcy*, 8, 10.—*Marriage*, 2, (2.)—*Process X.*, 15, (2.)

**JUDICIAL FACTOR.**

1. A judicial factor having been appointed "with the usual powers," the Court refused to authorize and ordain him, on the application of parties interested, to make appearance in a depending process against the estate, in respect it was already competent to him to do so, if he should deem it expedient; reserving to him to apply to the Court for an enlargement of his powers, if he should find it necessary and be so advised. Mackintosh's Trustees, Dec. 18, 1836, p. 255.

2. A petition prayed the Court to appoint a party, as judicial factor on a trust-estate, or (in common form) "to do otherwise in the premises as to your Lordships shall seem proper;" appearance was made to oppose the appointment, and to suggest another nominee;—Held competent for the Court, with consent of both parties, to appoint a third person to the office, without requiring any new or amended petition to be presented, or any farther intimation being made. Wilson, Jan. 26, 1837, p. 421. See *Factor Loco Tutoris*, 4, (3.)

3. Circumstances in which power given to a judicial factor on a sequestrated trust-estate, to enter and receive vassals, and to grant charters, precepts of clare constat, and all other writs and deeds necessary for that purpose. Milne, June 10, 1837, p. 1104.

**JUDICIAL REMIT.** See *Proof*.

**JUDICIAL SALE.** See *Heirs-Portioners*.

**JURISDICTION.**

1. Circumstances in which the Court held a bill of suspension of diligence for levying an assessment of statute-labour conversion-money an incompetent proceeding; and accordingly refused the bill. Ewing, Jan. 26, 1837, p. 419.

2. A party was convicted under 9 Geo. IV. c. 39, of taking salmon in close-time, and the Justices fined him in £3, besides £1, 3s. of expenses; the sentence ordained "execution to pass hereon by pointing in terms of said act, and by imprisonment in the jail of A. for the period of two months, unless said sums be sooner paid:"—Held that, although the question was attended



## JURISDICTION (Continued).

with extreme difficulty, the party was entitled, after imprisonment, to the benefit of the Act of Grace. Robertson, Feb. 16, 1837, p. 572.

3. An action was raised before a burgh-court, against a law-agent, who had a writing-office within the burgh, but whose dwelling-house, at the time of the summons, was without the burgh: the action was accessory to a writ of *habeas corpus* ready depending in the burgh-court, and bore to be raised for the purpose of being conjoined with it: a statute was, soon after, passed, enlarging the jurisdiction of the burgh, so as to include the dwelling-house of the law-agent; thereafter, he was cited at his dwelling-place, in common form: He was hable to the jurisdiction of the magistrates, and that he was so held by Hunter, March 1, 1837, p. 603.

4. A party, domiciled in England, contracted a maritime debt, to the amount of £14, for ship-furnishings made in Leith by a ship-chandler (the ship-chandler used arrestments in the hands of a debtor residing in Edinburgh) to found jurisdiction, and raised an action for payment of the sum before the Court of Session:—Question, whether such action, the sum being £25, was competent in that Court, or ought to have been brought, in the instance, before the Sheriff (of Edinburgh) in respect of the provisions of Stat. 1 W. IV. c. 69, § 21 and 22, although the debtor resided in Scotland. Morrison, July 11, 1837, p. 1293.

See *Burgh*, 1—*Process* X., 30, (2.)

JURY TRIAL. See *Process*, 111.—*Nuisance*, 2, 3.—*Public Officer*, 2, 3, 4, 5, 6.

JUSTICE OF PEACE. See *Reparation*, 6.—*School*—*Small Debt Act*—1830, (2, 4.)

KIRK SESSION. See *Trust*, 8.

LANDLORD AND TENANT. See *Lease*.

## LEASE.

1. Circumstances in which held, that, certain furniture brought into a house by the tenant, who was tortuously withholding it against the landlord, and pending legal proceedings to recover it, was not subject to the landlord's hypothec, though no intimation was made to him, by the landlord, of the furniture, pending the claim. Jaffray, Nov. 18, 1836, p. 43.

- 2.—(1.) Circumstances in which held, that, notwithstanding a certain lease of possession, and also of rent, during the currency of a lease for years, the lease had not been renounced, but still subsisted.

(2.) Circumstances in which held, that sufficient real evidence of a contract of excambion between a landlord and tenant relative to a considerable portion of certain subjects, which were held under a lease for years, so that the tenant enjoyed a right of lease in the portion at the excambion, which was good against a purchaser of the landlord's interest. Kennedy, Nov. 22, 1836, p. 102.

3. Terms of a clause in articles of lease drawn up by the landlord, under which it was held that a tenant was entitled to the value of improvements of a permanent nature on the farm, dwelling house, &c. as instructed by a valuation made at his entry, and another valuation to be made by the articles of lease, at his removal. Gamme, 1836, p. 233.

- 4.—(1.) A lease of a pottery, and certain premises including a park, &c. was granted, for twenty one years, "with the privilege to the tenant to dig for clay and sagger clay within the said park or enclosure, for the purpose of the foresaid pottery."—Held that the tenant had no right to dig for clay for making bricks excepting so far as required for the purpose of the pottery.

(2.) Circumstances in which, where the tenant of a pottery had manufactured a quantity of the clay into bricks, and, on the expiration of the lease, the value of the bricks, had been allowed to remove them—held

**LEASE (Continued).**

liable to his landlord in the value of the clay from which the bricks were manufactured. *Gordon*, Feb. 14, 1837, p. 549.

5. The tenant of a farm under a lease for 21 years, became entitled, by the terms of his lease, to claim deduction of rent on account of the landlord's resuming possession of a considerable part of the farm, at an early period of the lease, and also to make a claim on account of meliorations made by him (the tenant): he continued to pay the full original rent without deduction, during the whole lease, and, at leaving the farm, granted a bill for the balance of the last year's rent on that footing; he made no claim for about three years afterwards, at which date his whole claim and interest amounted to nearly £900:—Held, in the special circumstances, that, though there was strong ground for supposing that his claim had been satisfied, during the currency of the lease, as the landlord alleged, yet, as there was no legal evidence of this, it must be sustained. *Hallyburton*, March 7, 1837, p. 750.
6. A landlord let premises to a tenant for nineteen years, "to be used for the purpose of bleaching, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing, or for agriculture:" the tenant let the premises at an advance of rent, to sub-tenants: in an action against the landlord, the tenant, and the sub-tenants, for interdict, alleging that the operations of the sub-tenants amounted to nuisance, the landlord lodged separate defences, stating that the operations of the sub-tenants did no injury to the water, or, at all events, if any injury occasionally happened, it arose from the fault of the sub-tenants, for which he was not responsible; the tenant also lodged separate defences, stating that if any nuisance was committed, it was without authority from him: an issue was taken for the landlord and tenant, separate from that for the sub-tenants, viz. "Whether the landlord or tenant, by themselves or another, or others authorized by them, did wrongfully pollute and spoil the water," &c.: at the trial the Judge directed the jury, that, even if nuisance was proved against the sub-tenants, still as there was nothing but the lease to connect the landlord and the tenant therewith, there was no ground in law for holding that they, or either of them, had authorized, or were answerable for that nuisance; a verdict was found for the defenders: Held, by a majority, under a bill of exceptions, that the charge was erroneous; and that, besides the act of granting the lease, the tenor of the landlord's defences, alleging the water to have sustained no injury, was a ground in law for holding him to have authorized the nuisance, if there was a nuisance; and that, in the circumstances, the case of the tenant could not be separated from that of the landlord, and that a new trial should be granted as to both. *Dunn*, March 11, 1837, p. 853.
7. Under a lease of premises situated on a stream, declaring that they were to be used "for the purpose of bleaching, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing," if the tenant establish a dyework which creates a nuisance to the injury of the proprietors or tenants of inferior proprietors, such operations held (by the Judge presiding at a jury trial) not to be authorized by the lease, so as to render the landlord responsible for the damage thereby occasioned. *Collins*, April 14–19, 1837, p. 895.
8. A proprietor granted a lease of a mill and mill-lands to a tenant, his heirs and assignees, for a period of 99 years; the lease empowered the tenant "to erect dams for collecting the water" in certain lands, "he always paying damages to the tenants and possessors of the adjacent lands occasioned thereby:" the tenant erected a dam of great extent, and afterwards assigned away the lease; some time after the new tenant was in possession, the embankment of the dam gave way, and the water rushing out, occasioned extensive injury to some inferior property; the parties injured raised an action of damages against the tenant, and also against the representative of the grantor

incoming tenant at Whitsunday, and retains possession of the farm till the crop is reaped, so that his right is current to many important effects at Whitsunday. St p. 1059.

10. The curator bonis on the estate of a fatuous party, ob men of skill, bearing that under certain current leases as stipulated, and also specifying what was the fair rent; the report stated that in one of the leases a four-shift rotation would be more beneficial to the estate than a five-shift rotation, and the curator petitioned for authority to reduce the rents, for each lease, to the sum specified in the report, and to convert one of the farms to a five-shift rotation, or to accept leases: after special service on the presumptive heir, a curator of the fatuous party, besides the usual intimation of the petition. Macgregor, June 7, 1837, p. 1092.

11. Circumstances in which the Court granted authority to a fatuous person, to grant a lease of a farm for the period of years. Hunter, Nov. 26, 1837, p. 1254.

See *Meditatione Fugæ Warrant*.—Nuisance, 2, 3.—*Pre-nial*.

#### LEGACY.

Where a father was indebted in the sum of £1000 to his creditor, and left a legacy of £1000, which was only to be paid in the event of a certain claim then pending—Held, that the legacy being to impute in satisfaction of the debt, but was meant to be of success, over and above the debt. Hunter, Nov. 26, 1837, p. 1254.

See *Fee and Liferent*, 3.—*Settlement—Testament—Procurator*, 2.

#### LIEN.

Certain goods having been shipped in a carrying vessel, their arrival at the port of destination, in the warehouse agent—Circumstances in which held, in a question with the agent had no right of lien over the goods for the general balance of the shippers had intended to consign them, but which was interrupted, in consequence of which no delivery was ever received. Hunter, Nov. 26, 1837, p. 1254.

[ANSE. See *Church*, 6.

**MARRIAGE.**

1. In a declarator of legitimacy by a child born of a connexion in Scotland, against the representatives of her father deceased, who subsequently contracted a regular marriage in England, and after having had children by this marriage, became domiciled, and died in Scotland, his wife continuing to live in England;—Held,

(1st,) That the English marriage was no bar to an action proceeding on the allegation of a marriage effectually, though irregularly, constituted by the law of Scotland, and might be put an end to by proof of such Scotch marriage;

(2d,) That it was not incumbent on the pursuer to call the English wife as a party to the process;

(3d,) That, in the circumstances of the case, the pursuer had failed to establish a marriage between her parents. *Wright*, March 7, 1837, p. 767.

2.—(1.) In a declarator of marriage, certain facts and circumstances being set forth as implying a course of courtship with a view to marriage, and as equivalent to a promise of marriage, and subsequent copula being averred: a proof pro ut de jure allowed to both parties before answer as to the relevancy of the pursuer's averments.

(2.) In such action, the Lord Ordinary, in pronouncing an interlocutor on the relevancy, had inter alia allowed the defender to be judicially examined: this interlocutor being recalled in general terms—Held that it was still open to allow the judicial examination. *Harvie*, May 20, 1837, p. 964.

3.—(1.) In an action for declarator of marriage with an alternative conclusion for damages as for seduction—Proof which held insufficient to support such alternative conclusion.

(2.) Observed that, to support such conclusion, the summons ought to contain a particular statement as to seductive arts having been used. *Stewart*, June 27, 1837, p. 1198.

See *Husband and Wife—Marriage-Contract*.

**MARRIAGE-CONTRACT.**

1. A father, infeft in certain lands, became a party to the marriage-contract of his son, J. B. jun. and disposed these lands to him under various real burdens; the son also undertook several personal obligations; the contract contained this clause:—"If there be a son or sons, or son and daughter, or sons and daughters of this marriage, and alive at the dissolution thereof, in that event the said J. B. junior, obliges him and his aforesaid to give and dispose to that son, or these sons, the just and equal half of the said lands of Benthall, to take effect immediately after his own decease, and to do no deed in hurt or prejudice of this obligation, only he is to have liberty to divide the same amongst the children of this marriage, if more than one son, as he shall think fit, or his children deserve:" this obligation was not recited in the sasine of J. B. junior; he contracted debts to a greater amount apparently than the value of the estate, and granted real securities over it, after which he conveyed it in trust, with powers of sale, for the purpose of satisfying his debts, "so far as the price of the property will go:" the trustees sold the lands, and afterwards J. B. junior, predeceased his wife, leaving two sons, who raised a reduction of the heritable securities, and of the sale of the estate, contending that their right to one half of the lands, under the contract of marriage, could not be defeated by any act of their father, his creditors, or his trustees, and insisting in ulterior conclusions of personal liability against the trustees:—Held, that the pursuers were entitled to challenge any bonds or other deeds executed gratuitously or fraudulently by their father in prejudice of the obligation in the marriage-contract, but not to compete with the onerous creditors of their father, or to challenge his onerous deeds. *Browning*, May 25, 1837, p. 999.

**MARRIAGE-CONTRACT (Continued).**

2. Terms of an antenuptial contract which held to import that the husband conveyed to the husband as tocher, but sub modo, was vested in the representatives of the predeceasing wife. *Cameron, June 28, 1837, p. 611. See Husband and Wife, 1, (2.) 2, 5.—Prescription (Long) 2—The*

**MASTER AND SERVANT.**

1.—(1.) The proprietor of two spinning mills hired his workers for a year; in the middle of a term he threatened a female worker, who had been employed at one of the mills, to go and work at that which was a half mile more distant from her home; the kind of work and wages at both mills were the same, and the proprietor offered to establish practice of transferring workers from one mill to the other at the proprietor's discretion:—Held, that the worker's objections to such change were neither imaginary nor capricious, and that she was bound to submit to it; and worker assuaged accordingly from the proprietor, to have her compelled to serve out the year, as she had bound herself to him.

(2.) Question whether the master's application was, in the circumstances, conceived in competent terms. *Anderson, Jan. 24, 1837, p. 611.*

2. An apprentice and his cautioner presented a bill of suspension of execution on the registered indenture of apprenticeship, alleging, that the apprentice had left his master, it was only in consequence of having outrageously assaulted him, and having failed to instruct him, as bound by the contract of indenture to do: the master denied these allegations:—Bill passed, without caution or execution, respect that, while the parties were directly at variance on the case, the apprentice had already found caution for the due fulfilment of the contract of indenture, by means of the cautioner who signed the bill, and was now a party in the suspension. *Munro, July 7, 1837, p. 611. See Bankruptcy 13 (1)—Process, X. 20.*

**MEDITIONE FUGIE WARRANT.**

(1.) In an action of damages for wrongful imprisonment by an estate against the trustee thereof under a voluntary trust of lands, and agents employed by him, where it appeared, inter alia, that the trustee applied for warrant to incarcerate the pursuer as in mortgage, and found security not only for certain arrears and current rents, but also for prospective rents under a lease having fifteen years to run—Held the caution was irregular.

(2.) In such action—Verdict for the pursuer, with £200 damages; the principal defender, the jury finding for the other two defenders. *March 17, 1837, p. 882.*

**MESSENGER-AT-ARMS.** See *Cautioner, 6—Proof, IV. 2, (4.)*

**MINISTERS' WIDOWS' FUND.** See *Church, 1, 3.*

**MINOR.**

In an action to reduce certain bonds and a bill of exchange, on the ground of fraud and circumvention, and minority and lesion—Verdict in favour of the pursuer on the second of those grounds. *Dempster, Dec. 30 and 31, 1837, p. 364.*

See *Factor Loco Tutoris—Curator Bonus—Prescription (Long), Pursu, 1.*

**MORA.** See *Prescription (Quinquennial).*

**MULTIPLEPOINDING.** See *Process, VII.*

**NOBILE OFFICIUM.** See *Chancery—A. S. June 27, 1837, p. 1317.*

**NUISANCE.**

1. Held that the erection of a great slaughter-house in the suburban neighbourhood of a city would be a nuisance, notwithstanding that the owner used very great precautions for preventing any thing offensive

## NUISANCE (Continued).

sight, smell, or cleanliness: and that the experiment, whether the slaughter-house could be erected and conducted without committing a nuisance, ought not to be permitted, in respect that such experiment could not be thoroughly made, without great, and perhaps irreparable, injury, to neighbouring property. Swinton, March 9, 1837, p. 775.

2.—(1.) An inferior heritor complained of a dye-work on the grounds of a superior heritor, as creating a nuisance to the stream, which flowed through both their properties, and he raised an action of interdict; a jury trial followed, at which a verdict was found for the superior heritor, and a bill of exceptions to the charge of the presiding Judge was presented:—Held, that there are primary and secondary uses of a running stream; that its use in supporting animal life in man and beast is primary, and should not be sacrificed to its use for manufactures, which is secondary only; and, in respect that the Judge, in charging the jury, had not duly attended to this distinction, and had otherwise given too large and indefinite latitude to the right of a superior heritor to pollute a stream for manufacturing purposes—bill of exceptions sustained against the charge, and new trial allowed.

(2.) Terms of the direction to the jury which was, on these grounds, held exceptionable.

(3.) Circumstances in which, held, that “if the water was still fitted for all common uses, and all the uses to which it had hitherto been applied, the pursuer was not entitled, in order to put down the works of the defenders, to suggest some peculiar use not actually existing, such as that of bleaching and finishing, for which alone the said water might be unfitted; and, therefore, that on this ground of unfitness for bleaching and finishing, considered by itself, the pursuer was not entitled to a verdict.” Dann, March 11, 1837, p. 853.

3.—(1.) In action concluding solely for damages, and under an issue whether certain operations of the defenders have been “to the nuisance of the pursuer, and to his loss, injury, and damage,” unless he prove “damage,” he is not entitled to a verdict.

(2.) Rule for determining questions of nuisance in respect of operations by a superior heritor on a stream, complained of by parties below, entitled to the use of the stream. Collins, April 14–19, 1837, p. 895.

See *Lease*, 6, 7.

## OATH ON REFERENCE.

1. Circumstances in which a lady, claiming £1000 from her late father's trustees, as a debt due by her father under a verbal promise (whereon her marriage had followed), was allowed to found, as a circumstance of evidence, upon an oath of reference which had been emitted by her father, in an action at her husband's instance against him and his trustees, for payment of the said sum of £1000. Hunter, Nov. 26, 1836, p. 159.

2.—(1.) The acceptor of a bill of exchange referred to the oath of an indorsee whether he had paid value or not to the indorser: the indorsee deponed that he had paid value, and that he did so “partly in money, partly in professional services, and partly” in agreeing to grant a license to the indorser, for using a certain patent-manufacture invented by the indorsee:—Held that the oath was negative of the reference, and that no part of this statement was extrinsic, because “the point referred, being, value or not? it was of no consequence whether the value was of one kind or another; for example, whether it was given in money, in goods, or in services.”

(2.) Observed, that if the suspender wished to have a fuller explanation as to the services rendered, it was his business to have examined the charger more minutely than he did. Young, Feb. 24, 1837, p. 664.

## OBLIGATION.

Obligation in which the co-obligants were held liable singuli in solidum. Darlington, Dec. 6, 1836, p. 187.

See *Contract—Prescription (Long)*, 2.

## OUTLAWRY.

Criminal letters, containing a charge of murder, were raised against who was infest, in fee-simple, in a land estate; before citation, he a disposition of the estate, *ex facie absolute*, in favour of a friend who a trustee for his behoof, and who was immediately infest; the party was afterwards "decerned and adjudged to be an outlaw and fug his Majesty's laws," and ordained to be put to the horn (all in con by sentence of the Court of Justiciary, "for his contempt and in not appearing this day and place, in the hour of cause, to have the law for the crime of murder, as mentioned in the said criminal this sentence was followed by denunciation at the horn, as a rebely duly recorded: the party lived abroad for many years, and died in the interval, by a formal deed, he directed his trustee to extoch entail in favour of his (the party's) only son, whom failing, his only and he farther directed his estate to be burdened with a provision in favour of the daughter: the trustee executed the requisite deed, ed infestment on them in the party's life, and, after his death, appl Court in his own name, and obtained a warrant to record the ent was done: the son of the outlaw raised a reduction of the whole deeds, especially the entail and the application to the Court to be Held, by the whole Court unanimously, that the deeds were anchs at his instance, and that the entail was duly recorded; a majest Judges being of opinion,

(1.) That "the consequences of a denunciation on a horning a ferent from those of fugitation in the criminal Court, or in any re severe, with the exception of the distinctions introduced by exp or, in one or two instances, rendered necessary, either from the forms of procedure in the civil and the criminal Courts, or from obbl of expediency and justice;"

(2.) That the fee of the heritage remained in the outlaw: and,

(3.) That "the outlaw retained every power of disposing of his which could be exercised without prejudice to the rights of those w have an interest in his single or liferent escheat:"—

And the remaining four Judges, holding, on the one hand, that th fee of the heritage remained in the outlaw, yet, as he was "civ and "had lost the law of the land," and "could claim no privilege under it," he was not in a capacity to perform the acta legitima making a deed of entail, and therefore any such deed, executed by outlawry, would be unavailing; but, holding (along with several of Judges), on the other hand, that in respect of the *ex facie absolute* tion and infestment, prior to outlawry, the subsequent deed of ent *ex facie absolute* dispoice was valid, at least against this pursuer, challengeable, so far as regarded the form of the title, and it not be vant reason of reduction that the deed was conformable to the wish outlaw.

Question raised, and opposite opinions expressed, whether, if th had possessed no power of disposing the fee of his heritage, the en have been effectually made by a party who was truly his trustee, under directions received from him during his outlawry. *Macrae*, 1836, p. 51.

PACTUM ILLICITUM. See *Bankruptcy*, 16.

PARISH REGISTER OF BURIALS. See *Proof*, II. 5 (5.)

PARTITION. See *Heirs-Portioners*.

PARTNERSHIP.

1. A tradesman disposed certain premises and machinery absolutely to a virtual partner of a company, under a back-bond declaring the conve be in security of advances made and to be made by the dispoice; were made by the company to the tradesman, for repayment of



**PARTNERSHIP (Continued).**

- partner sold the subjects; a creditor of the tradesman having used arrestments in the hands of the partner, individually, and of the company:—Held, in an action of forthcoming, that the arrestees were entitled to retain the price of the property sold, in liquidation of advances made by the company. *Wood*, Nov. 15, 1836, p. 12.
2. Objection to the instance in an action, repelled, that the summons was raised in name of a company firm, without mention of the individual partners. *Thomson*, Nov. 30, 1836, p. 173.
3. The individual partners of a company with a descriptive denomination, granted a cash credit bond to a bank, containing a clause of registration, whereby they bound themselves nominatim, the company, and all future partners, for the drafts to be made by the manager; a party, who subsequently became a partner, was charged individually by an assignee of the bank, for payment of a balance due on the credit, the letters of horning narrating the terms of the bond, and directing the messenger to charge the individuals therein named, and any other partners of the company,—Held that the charge was competent, though the partner was not named in the letters. *Maclean*, Dec. 9, 1836, p. 236.
4. In a question between a joint-stock company, constituted by Act of Parliament, and two shareholders, certain stipulations entered into prior to the passing of the act, and subsequently recognised by the parties as existing,—Held to be binding and effectual, though not embodied in the act. *Wishaw, and Coltness Railway Company*, March 1, 1837, p. 703.
- 5.—(1.) In an action by the directors of a joint stock company against the other partners for relief of advances made and engagements contracted for behoof of the company—Circumstances in which the following defences were repelled:—
- (1st,) That the partners were only liable inter se to the amount of the shares severally subscribed by them;
- (2d,) That the directors had no right to begin business or power to bind the partners till the whole capital had been subscribed for and secured;
- (3d,) That their power to borrow money was expressly limited by a certain clause of the contract of copartnership, the provision in which they had violated. *Macalister*, June 2, 1837, p. 1061.
6. Special case involving a question whether certain funds belonged to the estate of a company, or to the private estate of an individual member of the company. *Allan*, June 2, 1837, p. 1058.
- See *Curator Bonis*, 1 (2)—*Poor*, 1.

**PASSIVE TITLES.**

Where the next of kin of a deceased resided partly within the kingdom and partly without, a creditor of the deceased raised letters of general charge, and a summons of constitution, which were signeted and executed on the same day, against those of the next of kin who were without the kingdom; after the lapse of 20 days, the charge and the summons were both executed on the same day against those within the kingdom; the summons was not called in Court until after the induciæ of the charge and of the summons had expired against all the next of kin,—Held that this form of procedure was regular, and objection repelled that the summons had been executed against part of the next of kin, before the charge had been given to the rest. *Lyell*, Nov. 18, 1836, p. 41.

**PATENT, (INFRINGEMENT OF).** See *Process*, X. 33.

**PAYMENT.** See *Agent and Principal*, 1.—*Lease*, 5.

**PERSONAL OBJECTION.**

Circumstances in which the Court held, that a party who unduly impetrated from one of the creditors of an insolvent, an assignation to his debt, was barred from founding on that assignation in applying for an interdict of a poinding



**PERSONAL OBJECTION (Continued).**

of effects of the insolvent, at the instance of that creditor. *Railway* 1837, p. 487.

See *Acquiescence—Bankruptcy*, 14—*Contract*, 1—*Prescription Quin* nial.

PROTECTION. See *Cessio Bonorum*, 1, 4.

**PLEDGE.**

A, deposited certain sealed packets, the property of his debtor, B, in custody of C, who made them the subject of a multiplepoinding; another creditor of B, claimed and used arrestments in the hands of C, in a competition between A's executor-creditor and D, that D could competently attach the packets subject to the right of pledge or retention in A, for satisfying the debt due to him by B. *Bridges*, Nov. 15, 1837.

**POINDING.**

A charge of horning was given in March, 1833—Held competent thereon in April, 1836, without giving any new charge. *Kerr*, 1837, p. 1041.

See *Prescription Quinquennial*.

POLICE ASSESSMENT. See *Title to Pursue*, 4, 8.

POLICY OF INSURANCE. See *Insurance—Cautioner*, 5—*Factor Loss To Poor*.

1. A society, consisting of the members of the bakers' trade in a burgh, established chiefly for providing for the support of poor members who were entitled to certain specified rates of allowance, having a mill for grinding flour to themselves and the public, at which their members bound to grind all their grain, and the profits of which, in the first place, appropriated to the support of the poor members, plus being declared applicable "to the use of the society"—Held to be "a purely charitable institution, the funds of which were in no respect contribution for the poor" of the burgh under an assessment for the burgh, but that they were only assessable "in so far as there were rents accruing from the mill, or other property or trade belonging to the burgh, over and above the usual allowances granted to poor and aged men, divisible among the members, or applicable to the purposes of the society generally." Question, whether an assessment may validly be imposed on the burgh or company as such, or only upon individual persons. *Bakers of Paisley*, Dec. 6, 1836, p. 200.

2.—(1.) The grantees of a public harbour not liable in poor rates on the profits thereof, customary or statutory, in so far as they were applied to the maintaining and improving the harbour.

(2.) A duty on goods imported for the support of the clergy not subject to assessment.

(3.) The rents of buildings erected by money borrowed under authority, which rents were appropriated by the statute exclusively to the purposes of the harbour, not liable to be rated, but a rate submitted on an estimated rent of the soil distinct from the buildings.

(4.) Feudal duties not a subject of assessment. *Heritors and Kirk-South Leith*, Nov. 12 1833, p. 204.

3. Certain lands having been disjoined by Act of Parliament from a parsonage, and having been annexed to the royalty of the city, and to the city burdens, and, inter alia, to assessment for the poor therein—Instances in which held that the owners and occupiers of such lands, and buildings thereon, were not relieved from their previous liability for contributions for the poor of their original parish, but that the magistrates and council of the city were bound to relieve these parties of the whole of their contributions from the common good of the city. *Burns*, May 17, 1837, p. 1041.

**POOR'S ROLL.**

A party petitioned for the benefit of the poor's roll, in order to lodge

**POOR'S ROLL (Continued).**

a multiplepoinding where there were above 100 competing claimants; he had not made intimation "to the adverse party," in terms of A. S. June 16, 1819, prior to emitting his declaration before the minister and elders, having been prevented from doing so, by the expense it would occasion: the Court, in the circumstances, ordained intimation of the petition on the walls and in the minute-book, and notice to the raiser of the multiplepoinding. Grassie, Nov. 24, 1836, p. 116.

**POSSESSION.** See *Interim Possession—Property*, 1, 3, 4.

**PRESCRIPTION TRIENNIAL.**

Circumstances in which the Court sustained the plea of triennial prescription, and found an oath of party, and relative state of debt, negative of the reference. Fyfe, June 27, 1837, p. 1188.

—— (QUINQUENNIAL).

The sheep belonging to an outgoing tenant, were acquired by the incoming tenant for a price which was applied partly in paying the rent due to the landlord, who had used sequestration, and partly in paying a debt due to the outgoing tenant's poinding creditor; the proceedings under which this transaction was completed, were partly judicial, and partly extrajudicial; for seventeen years the outgoing tenant acquiesced in the transaction; thereafter, a creditor of his arrested in the hands of the incoming tenant, and attempted to set aside the proceedings, and make the incoming tenant pay the price of the sheep over again to him: Held that the quinquennial prescription applied, and that the arrester, being in no better situation than the common debtor, was barred from challenging the proceedings, in respect of the mora which had occurred. Adie, May 31, 1837, p. 1045.

—— SEPTENNIAL. See *Cautioner*, 1.

—— (VICENNIAL).

(1.) Found that the act 1617, c. 13, establishes an absolute protection of retours against challenge by parties alleging themselves to be the true heirs after the lapse of twenty years.

(2.) Circumstances ineffectual to prevent the currency of the prescription. Neilson, Jan. 17, 1837, p. 365.

—— (LONG).

1. A decree of certification and reduction, contra non producta, was pronounced in 1786, rescinding a disposition and sasine of certain lands, which was followed by a decree of reduction-improbation of the same titles, in 1788, pronounced after the production had been satisfied; both decrees were taken, in absence, against an undefended pupil; after more than 40 years had elapsed, during which time the pursuers of these decrees, and their onerous disponees, possessed the lands, the representatives of the pupil, now deceased, raised a reduction of the decrees, and of all the subsequent conveyances of the lands: the defenders produced the decrees, and pleaded that they formed a title to exclude: Held, by the whole Court,

(1.) That as the decrees affected the titles of a heritable estate, minorities were to be deducted in computing the years of prescription against the pursuers; and,

(2.) That if, after deducting minorities, the long prescription had not run upon the decrees in absence, these decrees did not technically form a title to exclude; but Observed that nevertheless, this did "not necessarily imply the instant recal of the decrees, or place the defenders exactly in the same situation as if they had never been pronounced;" but that the lapse of time, combined with other circumstances, might form a plea of personal exception against the pursuers, or might "have a most important effect in determining that general question of which the pursuers necessarily undertook to make out the affirmative, viz. whether, in the whole circumstances, the decree ought or ought not to be reduced;" and that "the lapse of time might affect the question of onus probandi, in regard to the facts, on the ascertainment of which,

## PRESCRIPTION (LONG) (Continued).

the ultimate reduction of the decrees might depend." *Sinclair*, 1837, p. 786.

2. Under a post-nuptial contract in 1754, the husband "bound himself to convey and settle the fee of the lands of Kirkcaldie to and in favour of male to be procreated betwixt him and his present spouse; whom the heir-male to be procreate of his body, in any subsequent marriage failing, to the heir-female to be procreate of this or any other male eldest always succeeding without division;" the contract contained no mention of the lands, and no procuratory or precept; the husband was seised in the lands, in fee-simple; he died in 1776, leaving one son and two daughters; the son immediately executed a trust-disposition of the lands, in full powers of sale, chiefly for the purpose of paying his father's debts, and an obligation to re-convey "to him, his heirs or assignees," the lands sold (or the balance of price if the lands were sold), after the debts were fulfilled; the trustees, as empowered by the trust-deed, conveyed the lands to the son as nearest and lawful heir to his father: they then retained the lands for 10 years, after which, their whole advances being paid, they re-disposed the lands to the son, with a procuratory of resignation remanentiam, for consolidating their right of property, with the right of reversion remaining in the son, and extinguishing the trust, which was accordingly; the son died, without a settlement, in 1834:—Held, that the right of the son, under the obligation in the marriage-contract, was unlimited with his right as nearest and lawful heir of his father to the old investiture of the lands, his possession under the latter character infer the prescription of that obligation; and that the obligation being in force, the eldest sister's representative had now right to the whole; the exclusion of the younger sister. *Ogilvy*, May 26, 1837, p. 107.

See *Property*, 1.

**PRESUMED DONATION.** See *Legacy*.

——— INTENTION. See *Legacy*.

——— PAYMENT. See *Agent and Principal*, 1.—*Lease*, 3.

——— REVOCATION. See *Testament*, 1.

**PRINCIPAL and AGENT.** See *Agent and Principal*.

**PRISONER.** See *Jurisdiction*, 2.—*Cessio*, 7.

**PROCESS.—1. SUMMONS.**

- 1.—(1.) A summons of damages was raised against magistrates of a burgh on account of alleged misconduct in regard to legal procedure of a criminal nature; the summons did not contain the words "maliciously and without probable cause," and the magistrates claimed the protection of the (43 Geo. III. c. 141; 9 Geo. IV. c. 29; and 11 Geo. IV. and 1 V. c. 37) limiting their liability to twopence of damages:—Held that the summons was not entitled under such a summons to take an issue containing the words "maliciously and without probable cause."

(2.) Terms of a summons to which this rule was applied.

(3.) Question, whether, if a summons contains an allegation of malice as cannot be true without the existence of malice and the want of probable cause, but does not contain these precise words themselves, an issue of malice is objectionable as disconform to the summons, if such issue contain the words. *Anderson*, Feb. 3, 1837, p. 481.

2. The second year of the reign of Geo. IV. ended on Jan. 28, 1822: A summons for payment of an account, raised in name of Geo. IV., bore in the margin to be "given under our signet, at Edinburgh, the 27th day of January, in the second year of our reign, 1823;" it also bore this marking, "Jan. 1823," in the handwriting of the under-keeper of the signet; a note, dated "twenty-seventh day of January, eighteen hundred and twenty-three years," was indorsed on the summons, citing the defender to the

PROCESS.—I. SUMMONS (Continued).

ty-fifth day of February next to come:" peremptory defences were lodged denying the debt, and not objecting to the regularity of the summons; and various procedure followed, at long intervals, during a space of above 10 years, after which the defender objected that the summons was a nullity, in respect of a fundamental error in the date of signeting, as the year of the King's reign was stated to be the "second," whereas the year of grace was stated to be 1823:—Held that, if a summons bore one distinct date, in reference to the King's reign, or the year of grace, an error in the other date did not necessarily amount to a nullity, though it might occasion ambiguity, and found a dilatory plea, if timefully stated; that, in the whole circumstances, the defender had recognised the summons as bearing the date of Jan. 27, 1823, as its true date, and that he was now barred from recurring to any objection in reference to the date. Henry, Feb. 25, 1837, p. 676.

3. A party raised a reduction of a sale and feudal investiture of lands, libelling the title of heir of entail under a certain deed; the action concluded for declarator that the lands still formed part of a trust-estate, left by the maker of the entail, under a separate deed of trust, and also for accounting to the trust-estate; an objection being taken to the title, the pursuer proposed to insist, not as heir of entail, but as beneficiary under the trust-deed, and alleged that enough appeared ex facie of the summons to show that the heir of entail was also the beneficiary under the trust-deed: action dismissed, in respect there was no sufficient title libelled, and motion refused for leave to amend the libel. Ross, March 9, 1837, p. 780.

4.—(1.) In an action of damages before an inferior court for assault and judicial slander, in which the slander was not libelled as a separate and substantive ground of damage, but only as an aggravation of the assault,—Held, in an advocacy, that such mode of libelling the slander was not competent.

(2.) In such action the judicial slander was libelled as having taken place in an action depending before the Magistrates of Glasgow, when the action appeared to have been before the Magistrates of Gorbals, and the libel was not amended to suit the state of the fact,—Observed that this was an additional reason for holding the charge of slander to be incompetent. Thom, June 9, 1837, p. 1098.

See *Bill of Exchange*, 6.—*Partnership*, 2.—A. S. June 27, 1837, p. 1317.

II. CLOSING AND OPENING RECORD.

1. Circumstances in which the Court refused to allow a record to be opened up, and a plea in law to be added, which had been incidentally adverted to by one of the Judges at an advising in the Inner-House. Thomson, Nov. 18, 1836, p. 82.

2. In an action of declarator and legitimacy, the record had been closed, a proof led, and an interlocutor in favour of the defenders pronounced by the Lord Ordinary; the pursuer having reclaimed, tendered at the advising, as additional documentary evidence, certain letters which had been all along in her possession, but which she stated to have been carelessly put up with other papers, and only recently brought under the notice of her agent;—The Court refused to allow production of the letters. Wright, Dec. 10, 1836, p. 242.

3. In an action of reduction where the Lord Ordinary had found that an alternative conclusion for relief could not be maintained, because there was no plea in law applicable to it, the Court recalled this finding, and remitted to his Lordship, with power to receive a new plea, although the record was closed. Scott, May 13, 1837, p. 924.

4. Circumstances in which the Court recalled the interlocutor of a Lord Ordinary, making avizandum with a process, preparatory to closing the record; and remitted to his Lordship to allow a farther revision of papers, and to grant any diligence which might be necessary for that object. Campbell, Feb. 25, 1837, p. 679.

See *Act of Grace*, 1, (2.)—*Bankruptcy*, 13, (3.)

## PROCESS III. JURY TRIAL.

1. A cause was set down for trial by a special jury, but a sufficient number of special jurors failed to attend on the day appointed, there being only three, however, in attendance; the defenders, who had applied for a jury, insisted that the trial should be delayed, while the pursuers sat in terms of the 55 Gen. III. c. 42, § 28—held,

(1.) That the Court had no power to grant a tales.

(2.) That the pursuers were not entitled to expenses. *Mull Spence*, Nov. 17, 1836, p. 30.

2. In the reduction of a settlement, two issues went before the jury, 1st, Whether the deed was not the deed of the deceased? and, 2d, Whether the fact and the deed was fraudulently impetrated to his lesion? the jury returned a verdict on both issues:—Opinion intimated, that there was no material difference between the issues, and that if the evidence would have warranted a verdict on the second issue, supposing the deceased to be merely factive, it warranted such a verdict a fortiori if it showed him to have been of such incapacity as to justify a verdict on the first issue also. *Geour*, Dec. 13, 1836, p. 245.

- 3.—(1.) Where certain facts of importance were admitted on the one side, and proved by evidence in process, but certain other facts were denied by the Court, looking to the nature of the matters in dispute between the parties, it appointed such farther proof as might be offered on either side to be taken.

(2.) Question, whether, since the union of the Jury Court with the Court of Session, it be competent to reclaim against an interlocutor of the Court of Ordinary, remitting a cause for trial by jury. *Buchanan*, Dec. 17, 1836.

4. On a motion for a new trial, on the ground of the jury having been improperly sworn, and having misconducted themselves, proof allowed of the facts by witnesses other than the jurymen, but the proof held not to be sufficient. *McWur*, Dec. 20, 1836, p. 299.

- 5.—(1.) A merchant made advances on a shipment of coffee to the owners of the coffee, and some years afterwards, alleging that the coffee had been sold at Malta, and that the proceeds did not reimburse him for his advances, he raised an action for the balance against the owners; the owners, alleging that he was consignee and commission-agent in regard to the coffee, and that in his duty as such, he raised an action against him for the difference between the amount of his advances and the value of the coffee as shipped; the Court pronounced conjoining the actions, and a separate issue was made in each, whether the defender in each action respectively, was liable; by agreement of parties, and with the sanction of the Court, the two cases were tried as one cause, before the same jury, the plaintiff's counsel being conducted, and the evidence being adduced, in reference to the agreement: the merchant, in leading his evidence, tendered a document purporting to be dated at "Malta, 22d August, 1826," and to be an account of the sales and charges and nett proceeds of coffee, sold on his account, and at the end of it the signature of a third party, confessedly not the merchant, but which third party, residing abroad, had refused to be examined as a witness: the owners objected to the admission of the document, but the presiding Judge admitted it, and directed the jury to rely on it as evidence of the sales therein set forth: the jury returned a verdict, in each action, finding for the merchant and against the owners who presented a bill of exception—Held,

(1.) That the document was inadmissible, in respect, inter alia, that it was not proved to relate to the coffee in question; that it was not proved who the third party was who signed it, or how he was connected with the transaction; and that it was not proved how, when, or by whom the particulars of the document were filled up;

(2.) That, as the reception of the document was important

PROCESS.—III. JURY TRIAL (Continued).

ence to both verdicts ; and also, as the two actions had been blended by the form of trial ; both verdicts must be set aside.

(2.) Observed, that, if the presiding Judge, during the progress of the trial, allows an inadmissible document to be received and read in the meantime, reserving its effect when he should come to charge the jury, it is very doubtful whether a subsequent charge, directing the jury to discard it absolutely from their minds, would have the effect of saving the trial from being vitiated by its having once been laid before the jury. *Muir*, Feb. 11, 1837, p. 540.

6. Circumstances in which the Court dismissed an action of damages, under A. S. 29th November, 1825, § 47, in respect that it had not been insisted in for above 12 months after the issues were adjusted, and no satisfactory explanation of the delay was given. *Calder*, Feb. 16, 1837, p. 570.
7. Held, that in the causes which are enumerated as appropriate to jury trial, by 59 Geo. III. c. 35, and the other statutes regulating such mode of trial, where the action concludes for damages only, the Court have no power to take proof by commission, on remit, or in presentia, but must remit all such cases to be tried by jury. *Kerr*, March 10, 1837, p. 784.
- 8.—(1.) In a reduction by an insurance office of a submission and decret-arbitral, whereby it was found that certain insured machinery destroyed by fire had not been over-valued, it was averred, as one of the reasons of reduction, that the insurance was fraudulently effected by the defender with the intention of destroying the property by fire and obtaining an exorbitant sum from the office ; a corresponding issue was granted, “ Whether the insurance was effected by the defender on a fraudulent over-valuation of the machinery with the intention of destroying the same by fire ? ” and a verdict was returned, finding on this issue that the insurance was effected on a fraudulent over-valuation of the machinery, but not with the intention of destroying the same by fire—Held that this was in substance a verdict for the defender, and that the pursuers had failed to establish their reason of reduction.  
(2.) Where, from connexion with one of the parties, so many Judges of one Division of the Court successively declined, that a quorum could not be had, the declinatures were overruled. *Hercules Insurance Company*, March 10, 1837, p. 800.
9. A verdict will not be set aside as against evidence, when there has been contrary evidence, although the Court may be disposed to differ from the jury as to the effect thereof. *M’Whir*, March 11, 1837, p. 873.
10. In the reduction of a service, the deposition of an aged witness was taken to lie in retentis, both parties attending, and the witness being cross-examined ; after a judgment by the Court of Session on the proof, including this deposition, the cause was taken to appeal, the judgment was recalled, and a remit was made directing a trial of the propinquity of the competitors ; the witness was still alive, and his faculties were entire, but he was unable, through age and infirmity, to attend at the trial ;—Held that the deposition could not be laid before the jury, in respect that a new examination of the witness, with a view to the jury trial, should have taken place on commission, and under written interrogatories, as prescribed by A. S. 29th November, 1825, § 28. *Watson*, March 7, 1837, p. 783.
11. It is not admissible for an opening counsel to make a statement to the jury, of a fact which he could not be allowed to prove, in respect of its not being in the record. *Falconer*, March 23, 1837, p. 891.
12. In an application for a new trial on the grounds of the verdict being contrary to law and to evidence, and of excess of damages—Circumstances in which the Court refused the application, and allowed the pursuer his expenses, but subject to modification, though he had conducted his pleading properly throughout. *Hallam*, May 18, 1837, p. 950.
13. No reclaiming note being presented within 10 days after an interlocutor of

PROCESS.—III. JURY TRIAL (Continued).

the Lord Ordinary settling an issue—an alteration in the issue of inserting a sum of interest in addition to a principal sum therein (the alleged error not being a clerical mistake), held to be incorrect without consent of parties, although the issue had not been signed by Williamson's Executors, June 27, 1837, p. 1201.

14. In a question as to the marches of a farm in the island of Jura pursuer had given notice of trial at Inverary, the Court on the application changed the place of trial to Glasgow. Campbell, Jan. p. 1272.

See *Queries as to form of Bills of Exception; and Answers by Justice Tindal; Appendix, No. III., p. 1312.—Process I. (2).—Proof, IV. 9, (1).—Reparation—Stewart, Dec. 8, 1836, Sheriff, Nov. 24, 1836, p. 115.*

IV. JUDGMENTS, INTERIM-DECREES, &c.

In a cause before the Court of Session, a lady, the wife of an Englishman, found entitled to legitim, her right thereto not having been expressed in her marriage-contract, which was framed in England; the decree having been affirmed on appeal, and an interlocutor pronouncing the judgment of the House of Lords, the lady and her husband applied for decree for an interim payment; this application was opposed by the husband, who had resisted her claim of legitim, on the ground of the defect in the proceedings in the Court of Chancery, instituted with a view to the contract, and have a clause inserted excluding the lady from the decree. The Court granted interim decree. Chaudes, Nov. 19, 1836, p. 48.

See *Foreign, 2.*

V. RECLAIMING NOTE.

1. Held unnecessary, in respect of A. S. 11th July, 1828, § 77, a copy of the summons in a process of multiplepoinding, to a reclaimer presented by one of the claimants. A B, Feb. 2, 1837, p. 168.
2. Terms of the prayer of a reclaiming note in an advocation, which applied to the expenses of the Court of Session, and not of the inferior Court, Nov. 24, 1836, p. 117.

See A. S., June 27, 1837, p. 1317.—*Process III., 3, (2.) 13.—Bankruptcy, 5, (3.)—Goodhall, Nov. 12, 1836, p. 1.*

VI. ADVOCATION.

1. Terms of the prayer of a reclaiming note in an advocation, which applied to the expenses of the Court of Session, and not of the inferior Court, Nov. 24, 1836, p. 117.
2. The defender in a summary process declined the jurisdiction of the Court, and presented a bill of advocation, which was passed: the respondent presented a petition to the Inner-House for warrant to set aside the bill, on the ground that the bill was not presented on the reasons summarily on the passed bill, but, after some discussion, the petition was refused.—Opinion of the whole judges intimated by the Lord President to have been that the prayer of the petition could not be granted consistently with the existing forms of process. White, 1836, p. 312.
- 3.—(1.) A bill of advocation of the final judgment of a sheriff was presented on the 13th August; a certificate, that the letters were not expedited, was obtained on the 3d September:—Held that the letters of advocation, subsequently presented, were irregular, being without a warrant, as the bill had fallen; action therefore dismissed.

(2.) Terms of a certificate of non-expede letters, which were presented to identify the individual bill of advocation at which the letters were to strike, notwithstanding an allegation that it described it differently.

(3.) Question, whether the mere lapse of 10 days, after the presentation of a bill of advocation, without expediting the letters, caused the bill to



**PROCESS.—VI. ADVOCATION (Continued).**

whether the 10 days are reckoned from the date when the bill is "issued, or in a state to be issued, by the clerk to the bills to the complainer's agent;" or whether the bill does not fall till a certificate be obtained from the signet office that the letters have not been expedite. Scott, May 26, 1837, p. 1035.

4. Where a sheriff's interlocutor allows a proof merely scripto vel juramento, an advocacy under 6 Geo. IV. c. 120, § 40, is incompetent. Hamilton, June 10, 1837, p. 1105.

5. A party having applied by petition to a sheriff to decern and ordain certain other parties to do a certain act, and the sheriff, after answers had been given in to the petition, but without making up a record, having pronounced an interlocutor containing findings whereby a foundation was laid for determining on the prayer for decerniture, and the petitioner having immediately brought an advocacy of this judgment;—Held that such advocacy was incompetent, the judgment not exhausting the prayer of the petition. Cameron, June 29, 1837, p. 1220.

See *Expenses*, 4.

**VII. MULTIPLEPOINDING.**

Circumstances in which a petition, by a claimant on a riding interest in a multiplepoinding, to have the fund in medio consigned, and the raisers interdicted from withdrawing it from the jurisdiction of the Court, refused. British Linen Company, Dec. 24, 1836, p. 356.

See *V.*, 1.

**VIII. RANKING AND SALE.**

After great avizandum has been made with the process of sale, in a ranking and sale, and a memorial and abstract have been prepared—Question whether it be regular or competent to remit the process of sale to the Lord Ordinary, before whom the ranking remains, in order to determine if certain lands are included in the summons of ranking and sale, and if so, should be struck out of it; or whether this should be done by an incidental petition to have them struck out of the summons. Mackenzie, Dec. 10, 1836, p. 241.

See *Agent and Client*, 2.—*Bankruptcy*, 4.—*Lease*, 9.

**IX. SUSPENSION.**

1. Bill of suspension refused as informal, there being no conclusion for suspension of the charge. Maclaren, Nov. 19, 1836, p. 51.

2. A bill of suspension having been objected to as informal, on the ground of there being no conclusion for suspension; and the suspender having applied to the Lord Ordinary on the bills, to allow an amendment supplying this defect: Held, that such amendment was incompetent. Davidson, Dec. 8, 1836, p. 226.

3. In a bill of suspension of a charge on an acceptance, it was averred that the signature was either a forgery, or, if genuine, had been obtained by gross fraud, but no genuine subscription was produced for comparison—Bill (which the Lord Ordinary had refused) passed on caution. Rannie, May 31, 1837, p. 1049.

4. Warrant granted to the clerks to the bills to deliver up to a suspender the bond of caution in the depending process of suspension at his instance, in respect of his producing a new bond of caution, which was reported by the clerks to the bills to be signed by sufficient obligants. Bett, Dec. 24, 1836, p. 313.

5. A bill of suspension was presented containing no formal conclusion for suspension of the charge, but merely a prayer for letters of suspension in common form; the bill though objected to as incompetent, was passed, and letters expedite which contained a regular conclusion to have the charge suspended; the competency of the letters, as disconform to their warrant, was objected to; it having appeared that in practice a considerable discrepancy in the style of bills of suspension prevailed;—The objection repelled, in respect of the discrepancy in the practice; but observed, that in correct style a bill should contain a distinct conclusion, drawn from the narrative and grounds of sus-



2. Circumstances in which in an action of divorce the following interlocutor:—"Remit to the Sheriff's commission proof on the part of the defender, and the conjunct to both parties; and in respect of the special circumstance on the poor's roll, and having executed a disposition in favour of the defender or her agent, recommend to the Sheriff to make an order by which the proof may be taken at the expense of bringing any witnesses from a distance; be reported by the third sederunt day in January next rant for letters of diligence against witnesses and havers. 1836, p. 235.
3. In an action of declarator and legitimacy, the record haled, and an interlocutor in favour of the defenders pro Ordinary; the pursuer having reclaimed, tendered at additional documentary evidence, certain letters which had possession, but which she stated to have been careless papers, and only recently brought under the notice of her refused to allow production of the letters. Wright, Dec.
4. Where a cautionary obligation bound three parties, not but each pro rata, only,—Held competent to raise actio co-obligants, for payment of their respective shares, with representatives of the third, who was deceased. M'Arthur 270.
5. Three declarators were conjoined, and a unanimous judgment, which disposed of the whole merits of one of the Lord President, in granting a petition for leave to appeal, without leave, where the whole merits were exhausted, although a remit was made to the Lord with the other two declarators in the conjoined process 1837, p. 417.
6. In an application for carrying through an excambion of 6 and 7 W. IV. c. 42—Observed by the Court, at order was unnecessary to order service upon any of the heirs were sufficiently certiorated of the application, under the required by the statute. Go well, Jan. 27, 1837, p. 42.
7. Mutual actions of count and back were raised when

PROCESS.—X. MISCELLANEOUS (Continued).

8. A party having brought an action of count and reckoning and payment, the defender in which raised an action of relief against certain other parties,—Held incompetent to conjoin the two processes. Gray, Feb. 7, 1837, p. 494.
9. An action of removing, under A. S. December 14, 1756, was raised in the Sheriff-Court of Fife; after defences and replies were lodged, the Sheriff, on 3d March, “appointed the defender against the 10th March current to give in a condescendence,” &c.: the 10th of March was a Court-day, and, the cause being in the roll, the Sheriff “having heard parties’ procurators, in respect the defender has failed to obtemper the order in the preceding interlocutor of 3d March current, held him as confessed, and decerned against him in terms of the libel:” the defender raised a reduction, in respect the decree was pronounced before any default was committed:—Held, after an enquiry into the practice of the Sheriff-courts, which was not uniform, that no default was incurred until after the expiry of the 10th day of March, against which the condescendence was ordered; and that the decree must be reduced, although pronounced according to the practice of the Sheriff-Court of Fife.  
(2.) The first reason of reduction libelled was that “the decree was disconform to the warrants upon which the same proceeded:” in the record, the tenor of the interlocutors was stated, and the above plea was included in the pleas in law; held, that it was competent so to state them under a libel thus framed, in respect the decree of 10th March referred in gremio to the tenor of the interlocutor of 3d March, as one of its chief warrants, and was disconform to the tenor thereof. Hog, Feb. 11, 1837, p. 532.
10. In an action against certain trustees to reduce, inter alia, a conveyance of the trust-property in favour of one of the trustees who had re-sold it to a third party, a plea, inter alia, was stated in defence, to the effect that the action was barred by the disposition to the third party, which was not brought under reduction, and that the disponee ought to have been called as a defender; another plea being, that the pursuers were not entitled to reduce the deeds called for except to the effect of entering into an accounting with the defenders—Held, after a discussion on the defences, that it was unnecessary *hoc statu* to dispose of the first defence in question, and that, in reference to the other, the defenders were not bound to lodge a state of their accounts before condescending. Philp, Feb. 18, 1837, p. 617.
11. The factor on a trust-estate rendered to the trustees an account of charge and discharge, showing a certain balance in his favour, but never gave in a complete state of his intromissions; thereafter a creditor of the factor used arrestments in the hands of the trustees of the sums due to him, and brought an action of furthcoming;—Held, in an advocacy, that there were no *termini habiles* for giving decree in the process of furthcoming for the balance appearing on the account or to any other amount, until a complete state of the factor’s intromissions should be made up; and that the duty of exhibiting such a state was legally incumbent on the creditor. Cunninghame, Feb. 28, 1837, p. 687.
12. The pursuers of an action, which had fallen asleep, raised a summons of wakening and transference, which was called so late in the Winter Session as to make it impossible, in the regular course, for the process to be proceeded in, till the ensuing Session; a petition was presented immediately after the calling, for warrant to enrol the process of wakening in the regulation roll, and obtain decree of transference, and in the principal cause for warrant to the Lord Ordinary to pronounce decree of constitution in terms of the libel:—Held that such application was incompetent, notwithstanding certain grounds which were alleged to render the necessary delay very prejudicial to the pursuers. Lords Commissioners of the Treasury, March 1, 1837, p. 701.
- 13.—(1.) It is competent for the sheriffs authorized to take proofs in consistorial cases, or for the Lords Ordinary to appoint the proof to be taken in the country in any case they shall think proper.

anem, by the proprietor of a newspaper, against a clerk's employment, concluding for immediate restitution of the accounts, as uplifted by the clerk without authority ;—He competent proceeding, in respect that the matters in parties formed a proper subject for an ordinary action of Macellan, May 19, 1837, p. 956.

17. In a reduction of a bond, on the ground, inter alia, been impetrated from one of the granters while he was absent, and without it having been read over to him, averring impetration which held not such as to infer reduction. p. 983.
18. Reduction an incompetent mode of reviewing interloper court disposing of the cause and allowing expenses, that been modified and decerned for, and the decree not law Broom, May 23, 1837, p. 977.
19. Opinion by a majority of the whole Court that a reduction the pursuer of an action before the Justices of the Peace extracted judgment in his favour, though not to the extent desired himself entitled, and of all the previous proceedings, a conclusion for the full amount which he claimed, was in the plea was not excluded by the production having been done by the pursuer himself), and judgment on a decree by the Lord Ordinary without the objection having been made, May 20, 1837, p. 958.
20. A master presented a petition to the Justices of the Peace his servant's desertion, and craving warrant to apprehend him, and, on proof of the desertion, craving warrant to find caution to return to his service; the servant was after some procedure, warrant of imprisonment was granted the master, by minute lodged in process, abandoned the warrant of imprisonment; the servant raised a reduction of the decree. Held, that, as the decree could be put to execution without the reduction was a competent form of review though no exception. Jack, March 11, 1837, p. 833.
21. In a reduction of certain decrees for expenses, which were for moderate sums, and for which the parties had been bound to pay, the reduction was competent. Held, that, as the decree could be put to execution without the reduction was a competent form of review though no exception. Jack, March 11, 1837, p. 833.

PROCESS.—X. MISCELLANEOUS (Continued).

and decree of removing thereby obtained, upon which a charge of removing was given—Bill of suspension passed, on juratory caution, as prayed for. Dick, Dec. 14, 1836, p. 256.

23. Circumstances in which the Court found, that a petition by the Lord Advocate (stating that a depute-clerk of Session had collected fees, without authority, and contrary to express statute, and praying the Court to find that he was not entitled to appropriate the fees, and to ordain him to account for, and consign them, subject to the directions of the Court; and also praying the Court to regulate the business of the office in which this levying of fees had occurred, so as to carry out the enactments of 1 Will. IV. c. 69, § 13, and place the business of the office on a proper footing), was informal and incompetent, in so far as it was of the nature of a petition and complaint; and was unnecessary, in so far as it was a mere information to the Court, in respect that a memorial had been previously laid before the Court by the Lord Advocate, on which the Court were to proceed forthwith in carrying out the enactments of the statute. Murray (Lord Advocate), June 22, 1837, p. 1184.
24. The drawer of a bill of exchange raised action for payment of the contents against an indorsee who had recovered the amount, on the ground of want of onerosity, the statements in the record referring solely to that allegation; on a reference to oath the indorsee deponed to circumstances tending to show his want of bona fides, but not showing want of onerosity;—Held that, whatever might have been the case in another shape of the record, the pursuer having failed to prove the allegation on which the action was rested, the defender fell to be assoilzied. Brown, June 29, 1837, p. 1230.
25. Witnesses to the laws and practice of sailing, such as captains in the navy, &c., allowed to be in Court while evidence was leading of the facts as to the bearing of which they were to speak, but not during the speeches of counsel. Potts, March 15, 1837, p. 879.
26. A party petitioned for the benefit of the poor's roll, in order to lodge a claim in a multiplepinding where there were above 100 competing claimants; he had not made intimation "to the adverse party," in terms of A. S. June 16, 1819, prior to emitting his declaration before the minister and elders, having been prevented from doing so, by the expense it would occasion: the Court, in the circumstances, ordained intimation of the petition on the walls and in the minute-book, and notice to the raiser of the multiplepinding. Grassie, Nov. 24, 1836, p. 116.
- 27.—(1.) Where certain facts of importance were admitted on the record or proved by evidence in process, but certain other facts were disputed, the Court, looking to the nature of the matters in dispute between the parties, appointed such farther proof as might be offered on either side to be taken by commission.  
(2.) Question, whether, since the union of the Jury Court with the Court of Session, it be competent to reclaim against an interlocutor of the Lord Ordinary, remitting a cause for trial by jury. Buchanan, Dec. 17, 1836, p. 286.
28. Where a remit had been made by a sheriff to a person of skill, in which the parties acquiesced, though without expressly consenting, and afterwards had the referee examined as to the meaning of his report;—Held that they were precluded from afterwards entering upon a proof of the facts which were the subject of the remit. Wilson, Feb. 10, 1837, p. 523.
29. Where a party to a process executes a private trust disposition for behoof of creditors, held unnecessary to delay the advising of the process until intimation should be made to the trustee. Hunter, March 1, 1837, p. 693.
- 30.—(1.) Circumstances in which questions of law decided before sending a jury cause to trial.  
(2.) In an action of damages for wrongous imprisonment, on the ground of the alleged illegality of certain proceedings under the Combination Act, which

incarcerated, not in virtue of the original conviction of Justice from the Justice of Peace clerk containing lead, June 10, 1837, p. 1113.

31. In an action originally before an inferior Court for of certain goods, on the allegation that they were of of the quality of the goods having been taken and c was still in the inferior Court, and the goods having ally sold;—Held that in considering the proof, the r to be taken into account, and that no investigat competently gone into. *Ferguson*, June 30, 1837, 1
32. Where only one creditor raised a summons of adj creditors lodged defences:—Held that a record shou mon form, before pronouncing any decree of adjudica grounds for allowing a summary decree, reserving ob in any second or posterior adjudication, did not appl spoon, July 11, 1837, p. 1268.
33. A patentee raised an action of damages on account o of patent; after a condescendence and answers we an order of inspection of the defender's works, by pe der alleged that his manufacture involved a secret pr would be lost, if inspection was allowed:—Held, 'I be allowed, or else any patent might be infringed w pronounced for giving inspection of the works and i ties, to certain viewers, at the sight of the Sheriff works in actual operation, so as to enable the view the approaching trial; the viewers being warned no formation which they might acquire through that it purpose of so giving evidence. *Russell*, July 11, 18 See *Act of Grace*, 1—*Bankruptcy*, 1, 5, 13, (2.) (3). —*Bill Chamber*—*Cautioner*, 7—*Entail*, 1, (2.) A. S., p. 1317—*Factor loco tutoris*, 3, 4, (3.)— *Factor*, 2—*Marriage*, 1, 2, (2.)—*Nuisance*, 3 3, 6—*Title to Pursue*, 3—*Jurisdiction*.

**PROOF.—I. WRITTEN.**

Where a contract is proved scripto, held (at a Jun and is in reference to the interests of a third

PROOF.—II. PAROLE (Continued).

garding the footing on which the parties stood in relation to each other; and having held personal conversation with the pursuer's sister in reference to some of the disputed facts; and having repeatedly sanctioned the pursuer's communicating with her parents, respecting the nature of their mutual intercourse, while he enjoined the strictest secrecy as to all others.

(2.) Circumstances in which an objection to a witness, on the head of agency, was repelled by the Lord Ordinary, and the interlocutor was acquiesced in.

(3.) The pursuer of a declarator of marriage got up from her agent at his office, the papers forming the evidence of her claim; the defender was waiting for her in the street, near the office, and he got these papers from her, on giving her a note containing the conditions on which he so obtained them: in a subsequent declarator, the pursuer alleged, with some probability, that this note was one of those documents destroyed by the defender; the parties were at issue as to the conditions specified in the note: in the new declarator, the pursuer employed a different agent;—Held competent, in the circumstances, for the pursuer to ask her former agent "on what ground, or for what purpose, she requested him to give up the documents to her." *Craigie*, Jan. 18, 1837, p. 379.

2.—(1.) In an action of proving the tenor of a will, a witness was examined in Jamaica, having previously made affidavit as to the subject-matter of his examination—Held that this was no objection to the admissibility of his evidence.

(2.) Question, whether in such action the natural brother of a legatee under the will, not a party to the cause, is an admissible witness? *Forrester*, Feb. 28, 1837, p. 690.

3. Witnesses to the laws and practice of sailing, such as captains in the navy, &c., allowed to be in Court while evidence was leading of the facts as to the bearing of which they were to speak, but not during the speeches of counsel. *Potts*, March 15, 1837, p. 879.

4. In a question as to the delivery of a coach-parcel, pending between the coach-proprietor, and the party to whom the parcel was addressed, held that the evidence of the coach-porter, who was charged with the delivery of the parcel, was not inadmissible on the ground of interest, though the coach-proprietor had not discharged him of liability in case the parcel was not duly delivered by him; and, therefore, after the porter's death, evidence allowed to be adduced by the coach-proprietor of what the porter had stated on the subject. *Hunter*, March 1, 1837, p. 693.

5. Held that a creditor of the pursuer of a cessio, who has been duly cited as such, is not admissible as a witness in support of the opposition to the cessio (though he has made no appearance as an opposing party), in respect that he is a party, and has an interest in the issue of the process. *Kennedy*, July 11, 1837, p. 1294.

See *Bastard—Proof*, IV. 2, (2, 3.)

PROOF.—III. CONFESSION OR ADMISSION OF PARTY.

In an action for payment of the balance of a debt originally constituted by bill which had been delivered up, the debtor having judicially admitted circumstances sufficient to establish that the balance had not been paid—Held that such admission could not be effectually qualified by the statement of counter-claims of which no other evidence was produced. *Murray*, June 14, 1837, p. 1141.

See *Bankruptcy*, 8.—*Compensation*, 3.—*Judicial Examination*.

PROOF.—IV. MISCELLANEOUS.

1. In an action against the underwriters of a policy of insurance for loss sustained at sea on the goods insured, where the defence was, that the pursuers had misrepresented the class of the vessel, a record having been closed and an issue prepared,—Diligence at the instance of the defenders refused to recover correspondence between the pursuers and the shippers of the goods, posterior

messenger, signed the execution of intimation of his deprivation of his office, allowed to be called as a witness in execution; but observed that his evidence required to be proved. Aitchison, Dec. 28, 1836, p. 360.

3. Where a remit had been made by a sheriff to a party, parties acquiesced, though without expressly consent the referee examined as to the meaning of his report precluded from afterwards entering upon a proof of the subject of the remit. Wilson, Feb. 10, 1837, p. 528.

4. Circumstances in which, held to be proved that a process and title-deeds, was duly delivered at the end of the process; and, having been mislaid for several years, the agent, or some party for whom he was liable for the expense of certain processes thereon, was liable for the expense of certain processes thereon. March 1, 1837, p. 793.

5.—(1.) A party, in regular form, expedite a general service was unopposed; the service was afterwards brought by a competitor who had expedite a general service some time before was sent to a jury to try the party's propinquity tendered the deposition of a witness who had been dead and was now dead; the competitor objected to its being admitted, that the deposition was emitted post litem motam, the service being previously expedite; and also in respect that under an ex parte proceeding; the presiding judge refused to admit, under a bill of exceptions, that the deposition was admitted, in respect that the service, at which it had been expedite the witness had died before the jury trial.

(2.) Terms of a remit from the House of Lords, held, not to affect the general rule, that, in defending a claim, it is competent to found on the deposition of any witness named at the service, who has since died.

(3.) Where, according to the pedigree of the claimant is the executor of the deceased—Held (under a bill of exceptions given at the trial) that she is inadmissible to prove interest. Observed that such relationship affected the

PROOF.—IV. MISCELLANEOUS (Continued).

through age and infirmity, to attend at the trial ;—Held that the deposition could not be laid before the jury, in respect that a new examination of the witness, with a view to the jury trial, should have taken place on commission, and under written interrogatories, as prescribed by A. S. 29th November, 1825, § 28.

(5.) An extract from a register of burials of an entry made in 1800, which stated “ eighty years ” as the age of a person then buried, was founded on in a reduction of a service ; that age was a circumstance vitally affecting the service ; the defender offered to prove that the register was loosely and inaccurately kept, particularly in and about the year 1800, and that the person who then kept the register was since dead ; the presiding judge refused to admit the evidence, Observing that it was at best immaterial, as the extract was not good evidence of the age, but merely of the burial of the party ; and his Lordship repeated that observation in charging the jury :—Held, under a bill of exceptions, that the evidence ought to have gone to the jury, as it could not be known what effect the extract had on their minds, or how far that effect was successfully counteracted by the observations of the judge. *Watson*, March 7, 1837, p. 783.

6. What weight to be given to the evidence of men of skill in a question as to the boundary of a river and an estuary. *M’Whir*, March 11, 1837, p. 873.

7.—(1.) It is competent for the sheriffs authorized to take proofs in consistorial cases, or for the Lords Ordinary to appoint the proof to be taken in the country in any case they shall think proper.

(2.) Circumstances in which the Lord Ordinary allowed a consistorial proof to proceed in the country. *Jamieson*, March 10, 1837, p. 805.

8.—(1.) In a reduction of the verdict of a Jury, obtained in a competition of brieves, as erroneous and contrary to the evidence, the Court, reviewing the whole evidence led before the inquest, found that the verdict could not be maintained.

(2.) In such reduction no particular effect is to be given to the verdict of the inquest, but the Court have the power of reviewing the case on the merits of the evidence on both sides, and decided accordingly. *Gifford*, Feb. 17, 1839, p. 592.

9. In a reduction of a deed on the ground that the instrumentary witnesses neither saw the granter subscribe, nor heard him acknowledge his subscription, one of the instrumentary witnesses, A, swore that the granter had not subscribed when he (A) signed, and that he neither saw the granter subscribe nor heard him acknowledge his subscription ; the other instrumentary witness was tendered, but held inadmissible ; there was other evidence before the jury, intended to support the alleged ground of reduction ; the jury found for the pursuer, and a bill of exceptions was taken, in respect that the presiding judge “ did direct the jury, in point of law, that if they believed the witness A, in point of fact, though a suspicious witness to the execution of the deed, they ought to find a verdict for the pursuer : ”—Held,

(1.) That the Court must take the tenor of the direction, precisely as stated in the bill of exceptions.

(2.) That the direction, there stated, imported that it was the duty of the jury to find a verdict for the pursuer, if they believed the witness A, even though they disregarded all the other evidence in the case.

(3.) That this direction was not well founded in the law of Scotland, it being a general rule that a pursuer cannot prove his case by a single witness, and there being nothing in the nature of this action to raise an exception to that general rule. Observed, that, where an exception is taken against one portion of a charge, it is important that every other part of the charge (though not excepted against) should be given in the bill of exceptions, so far as necessary to bring before the Court the true import of the portion excepted against, such as it was actually given to the jury. *Cleland*, July 6, 1837, p. 1246.



(2.) In a *supplicatio* reduction or a decree of suspension, a messenger, signed the execution of intimation of sist, but deprived of his office, allowed to be called as a witness execution; but observed that his evidence required to be cleared. Aitchison, Dec. 28, 1836, p. 360.

3. Where a remit had been made by a sheriff to a person parties acquiesced, though without expressly consenting the referee examined as to the meaning of his report;—precluded from afterwards entering upon a proof of the subject of the remit. Wilson, Feb. 10, 1837, p. 523.

4. Circumstances in which, held to be proved that a copy of a process and title-deeds, was duly delivered at the office in the process; and, having been mislaid for several years, the agent of that agent, or some party for whom he was responsible, was liable for the expense of certain processes thereby. March 1, 1837, p. 793.

5.—(1.) A party, in regular form, expedite a general service was unopposed; the service was afterwards brought on by a competitor who had expedite a general service some time before; the issue was sent to a jury to try the party's propinquity; the competitor tendered the deposition of a witness who had been examined and was now dead; the competitor objected to its admission, that the deposition was emitted post litem motam, his deposition being previously expedite; and also in respect that it was taken under an ex parte proceeding; the presiding judge rejected the deposition. Held, under a bill of exceptions, that the deposition ought to be admitted, in respect that the service, at which it had been emitted, the witness had died before the jury trial.

(2.) Terms of a remit from the House of Lords, and held, not to affect the general rule, that, in defending a party, it is competent to found on the deposition of any examined at the service, who has since died.

(3.) Where, according to the pedigree of the claimant is the executor of the deceased—Held (under a bill of exceptions) that she is inadmissible as a witness. Observed that such relationships affected the...

**PROOF.—IV. MISCELLANEOUS (Continued).**

through age and infirmity, to attend at the trial ;—Held that the deposition could not be laid before the jury, in respect that a new examination of the witness, with a view to the jury trial, should have taken place on commission, and under written interrogatories, as prescribed by A. S. 29th November, 1825, § 28.

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(2.) In such reduction no particular effect is to be given to the verdict of the inquest, but the Court have the power of reviewing the case on the merits of the evidence on both sides, and decided accordingly. *Gifford*, Feb. 17, 1839, p. 592.

9. In a reduction of a deed on the ground that the instrumentary witnesses neither saw the granter subscribe, nor heard him acknowledge his subscription, one of the instrumentary witnesses, A, swore that the granter had not subscribed when he (A) signed, and that he neither saw the granter subscribe nor heard him acknowledge his subscription ; the other instrumentary witness was tendered, but held inadmissible ; there was other evidence before the jury, intended to support the alleged ground of reduction ; the jury found for the pursuer, and a bill of exceptions was taken, in respect that the presiding judge “ did direct the jury, in point of law, that if they believed the witness A, in point of fact, though a suspicious witness to the execution of the deed, they ought to find a verdict for the pursuer : ”—Held,

(1.) That the Court must take the tenor of the direction, precisely as stated in the bill of exceptions.

(2.) That the direction, there stated, imported that it was the duty of the jury to find a verdict for the pursuer, if they believed the witness A, even though they disregarded all the other evidence in the case.

(3.) That this direction was not well founded in the law of Scotland, it being a general rule that a pursuer cannot prove his case by a single witness, and there being nothing in the nature of this action to raise an exception to that general rule. Observed, that, where an exception is taken against one portion of a charge, it is important that every other part of the charge (though not excepted against) should be given in the bill of exceptions, so far as necessary to bring before the Court the true import of the portion excepted against, such as it was actually given to the jury. *Cleland*, July 6, 1837, p. 1246.

# PROOF.—IV. MISCELLANEOUS (Continued).

10. A patentee raised an action of damages on account of an alleged infringement of patent; after a condescendence and answers were lodged, for an order of inspection of the defender's works, by persons of the defender alleged that his manufacture involved a secret process, the which would be lost, if inspection was allowed:—Held, That inspection must be allowed, or else any patent might be infringed with impunity, and order pronounced for giving inspection of the works and machinery to both parties, to certain viewers, at the sight of the Sheriff, and for the works in actual operation, so as to enable the viewers to give evidence at the approaching trial: the viewers being warned not to use any information which they might acquire through that inspection, except for the purpose of so giving evidence. Russell, July 11, 1837, p. 1270.

See *Agent and Principal*, 1.—*Arbitration*, 3.—*Bill of Exchange*, 1, 2, 3.—*Oath on Reference*—*Process* II. 2, III. 3 (1.), 4, 5, VI. 4, X. 2, 13, 32.—*Trust*, 10.

## PROPERTY.

1. A loch was surrounded by the lands of two co-terminous proprietors; the title of one proprietor contained the lands "with woods, fishing, and pertinents;" the disposition in favour of the other only contained "with woods, commonities, &c., and hail other pertinents;" and his charter of confirmation specially reserved to him (the superior) and his assigns certain services, "with hunting, hawking, fishing, fowling, &c. went;" promiscuous possession of the right of fishing in the loch, and boats on it, was enjoyed by both proprietors:—Held that the first was not entitled to obtain from the sheriff an interdict against fishing by the second, in respect that he had produced no exclusive title to fishing; that he had not had exclusive possession; and that, as the question regarded trout-fishing, which naturally belonged to the proprietor of the river, the possession of the second proprietor was referable to a title, notwithstanding the limited reservation of a personal nature, in the superior. Macdonald, Dec. 14, 1836, p. 259.

2. Circumstances in which the Court held that certain lands in Orkney were not held by feudal tenure. Rendall, Dec. 15, 1836, p. 265.

3. The proprietor of an estate on the sea-coast, was infeft in the lands, parts, pendicles, and pertinents, he raised a declarator of his sole and exclusive right to the whole shell-sand, wreck, or seaware on the above lands, and concluded for interdict prohibiting certain parties from taking away any part thereof; he averred that he and his predecessors had constant, peaceable, and uninterrupted possession and use of the shell-sand, past the memory of man, which was never interfered with, until late years; the defenders pleaded, that, in respect his titles did not express grant of the shore, nor describe his lands as bounded by the sea, he had not condescended upon any title in virtue of which to prescribe possession to the sea-shore, or to the shell-sand, &c. as accessorial right: Held that the plea should be repelled, and the pursuer's title sustained. Macalister, Feb. 7, 1837, p. 490.

4.—(1.) Circumstances in which the rule was applied, that a party, having a bounding-title, cannot, by possession, acquire the property of adjoining lands, the face of his title.

(2.) Observed, that, if one of the boundaries, in a bounding-title, be an unappropriated sea-shore, a party might, as there was no intervening party, have extended his boundary towards the sea, without violation of any one's title. Suttie, May 26, 1837, p. 1037.

See *Entail*, 15, (2.)—*Heirs-Portioners*—*Lease*, 6, 7, 8—*Nuisance*—

PROVISION TO WIVES AND CHILDREN.

1. Terms of a marriage-contract in regard to provisions to the children of the marriage, which, held not to exclude a power of distribution by the father; and circumstances in which a preference in favour of certain of the children was sustained. Ponton, Feb. 14, 1837, p. 554.
- 2.—(1.) Where a father, by his settlement, did not make his younger children creditors of his, for their provisions, but legatees merely,—Held that the children were not within the remedy of the statute 1661, c. 24.  
(2.) Where provisions in favour of younger children were not payable, either as to principal or interest, until after the father's death, and were revocable at his pleasure,—Held that the children were merely legatees, and not creditors of their father; and that there was nothing in the structure of the settlement to prevent the ordinary rules of construction, on this point, from applying. Waugh, July 7, 1837, p. 1256.

See *Aliment*, 2, 3.—*Entail*, 8.—*Marriage Contract*, 1.—*Settlement*, 2.—*Testament*.

PUBLIC OFFICER.

1. A town-clerk having been appointed for five years, and the council at the end of that period having elected another person, found, in a suspension and interdict, that he was not summarily removable, and the council interdicted from carrying the new appointment into effect, without prejudice to any declarator the council might be advised to institute for having it found that the office came to an end by the lapse of the stipulated period. Farish, Nov. 22, 1836, p. 107.
2. In an application at the instance of a town-clerk, acting as clerk of the police court, to have a party who had been appointed to the latter office by the Police Commissioners for the town, interdicted from discharging its duties,—Circumstances in which interdict granted, and bill of suspension passed to try the question as to the right of appointment. Anderson, March 11, 1837, p. 875.
3. Question whether a depute-clerk of Session, whose assistant clerk has died without being replaced, and who has performed the duties of the assistant clerk, is entitled, without the interposition of the authority of the Court, and notwithstanding the provisions of 50 Geo. III. c. 112, § 16, to levy and appropriate those fees, which his assistant, if surviving, would have levied. Murray (Lord Advocate), June 22, 1837, p. 1184.

See *Burgh*, 3—*Reparation*, 2—A. S. March 11, 1837, p. 1317.

PUBLIC RECORD. See *Proof IV.*, 5, (5.)—*Entail*, 15, (2.)

PUPIL. See *Factor Loco Tutoris*—*Minor*—*Prescription (Long)* 1—*Title to Pursue*, 1—*Tutor*.

RANKING AND SALE. See *Process VIII.*

REAL INJURY. See *Cessio* 7—*Reparation*, 5.

RECEIPT. See *Writ*.

RECORD, OR REGISTER OF BURIALS. See *Proof IV.*, 5, (5.)

REDUCTION-IMPROBATION. See *Prescription (Long)* 1.

RELATIONSHIP. See *Proof, II.*—*IV.*, 5, (3.)

RELIEF.

A party caused a summons to be executed, and inhibition to be used on the dependence; a preliminary defence was stated that the execution of the summons was irregular, and, after considerable discussion, that defence was sustained, and the party was subjected in expenses; the party had intimated by letter to the messenger as soon as the objection was taken to his execution, and the messenger had answered, maintaining his execution to be unobjectionable; the party had also, in the middle of the discussion, intimated directly to the cautioners of the messenger, who took no notice of it:—Held that both the messenger and his cautioners were liable to relieve the party of the expenses of the discussion, and of the expense of the inhibition on the dependence. Collier, Dec. 6, 1836, p. 195.

See *Expenses*, 3—*Partnership*, 5—*Superior and Vassal*, 2.

REMOVING. See *Act of Grace*, 2, (3.)

REPARATION.

1. A dispute, about a frivolous subject, arose between two referees, one of them, who was a man in a low rank of life, got into a passion, and alleged that the other was a partial judge or a partial fellow, and alleged that he had acted as a partial judge; that referee raised an action of damages for the statements were made "falsely, wickedly, maliciously, and caltly" that they had been widely propagated through the country; and the referee and feelings were deeply injured; and concluding for £100; and solatium; no proof of propagation of the statements was adduced; injury was proved to have resulted from the use of the words:—In the circumstances, that the defender ought to be absolved, and not found entitled to expenses. Grant, Feb. 15, 1837, p. 558.
2. An act of Parliament was passed for carrying into effect certain improvements in the city of Edinburgh, and, inter alia, for levelling a street within the line thereof; by an operation on this street the pavement was raised in front of one of the shops:—Held that a claim for damages at the instance of the proprietor of the shop was competent against the Commissioners of the act, although there was no provision in it for compensation in such cases:—The alleged damage was consequential on the operation authorized by the act. Strachan, Feb. 21, 1837, p. 687.
3. A party executing diligence on the regular decree of a competent court, not be sued for damages, although the decree should be ultimately found erroneous, and although steps had been taken at the time of the execution for bringing it under reduction. Aldin, Feb. 25, 1837, p. 688.
4. In an action of damages against a country practitioner for posting a libelous notice to a client of the firm of which he was a partner, and making certain statements regarding a business transaction of the firm, by the defender to be calumnious, and having refused him personal satisfaction therefor—Verdict for the pursuer with £500 damages. Russell, 1837, p. 684.
5. Circumstances in which a sum of £20 was awarded in name of solatium for a personal assault, committed under the influence of provocation. Falconer, March 23, 1837, p. 891.
6. In an action of damages for wrongful imprisonment, on the ground of the alleged illegality of certain proceedings under the Combination Act, which had been previously the subject of a bill of suspension and liberation of the pursuer before the Court of Justiciary,—Held,
  - (1.) That it was not relevant to infer damages that the petition was presented to the Justices, under which the proceedings originated, referred only to the Act of Parliament authorizing the complaint;
  - (2.) That it was not relevant to infer damages that neither the petition nor the warrant bore any date, the warrant being signed following thereon having a date affixed to it;
  - (3.) That it was relevant to infer damages against those responsible therefor that the pursuer was apprehended and brought before the Justices in virtue of a warrant granted by only one Justice;
  - (4.) That it was relevant to infer such damages that the pursuer was incarcerated, not in virtue of the original conviction, but of a letter from the Justice of Peace-clerk containing a copy thereof.
 Lead, June 10, 1837, p. 1112.
7. Question as to the liability of the owners of a vessel beyond the cargo through collision with it. Potts, March 15, 1837, p. 879.

See *Cession*, 7.—*Entail*, 10. (2.)—*Expenses*, 1.—*Inhibition*, 1.—*Standalone Fugate Warrant*—*Road Trustees*.

REPRESENTATION. See *Passive Title*.

**REPUTED OWNERSHIP.**

The liferenter of furniture does not, by possession of it in virtue of his liferent, subject it to the diligence of his creditors, on the ground of reputed ownership.—Question whether a creditor, whose debt was contracted before the debtor's possession of the moveables began, can found on the reputed ownership of these moveables, as a ground for attaching them, although he had not contracted on the faith of such ownership. *M'Millan*, May 13, 1837, p. 916.

**RES JUDICATA.** See *Bankruptcy*, 13, (2.)—*Process*, X., 30, (2. 1.)—*Reparation*, 6.

**RETENTION.** See *Executor—Arrestment*, 6—*Lien—Partnership*, 1.

**RETOUR.** See *Prescription Vicennial—Service*.

**REVOCATION.** See *Husband and Wife*, 2.

**RIGHT IN SECURITY.**

1. A heritable bond stipulated that the rate of interest for the first five years should not exceed 4 per cent; the full legal rate was exigible after that period: the creditor lived for several years after the lapse of that period, and after his death a question arose between his representatives and the debtor, whether the interest had been continued at the rate of 4 per cent: Held, in the circumstances, that the debtor was not liable for more than 4 per cent, in respect, inter alia, that the creditor had, without objection, received an account, and a balance from the debtor, on the footing that the interest continued at that rate, and also that the market rate of interest during the years in dispute, did not exceed 4 per cent. *Stocks*, June 9, 1837, p. 1095.

2. In a ranking and sale a competition arose between the third and last heritable creditor, and a party who both claimed a hypothec over the titles, as law-agent of the debtor, and had also paid certain interests on the two prior heritable debts, and been assigned by the prior creditors to their rights; that party had acted as law-agent of the postponed heritable creditor, in making his loan, and also as agent of the debtor, borrowing the loan:—Held that, in the special circumstances, the law-agent was barred from competing with the heritable creditor, in respect, inter alia, that the law-agent had been aware, at the time when the loan was made, that no mere stranger would have lent money on the lands after the former two securities; that it was by means of the agent's personal acquaintance with the creditor that the creditor was induced to enter into the loan; that almost the whole loan was applied in retiring obligations in which the agent was bound jointly with the debtor who borrowed the money, or in paying debt due by the borrower to the agent; and that, at the date of the loan, the agent had been paying, for several years, the annual interests on prior heritable debt, and had also a considerable business-account due to himself by the borrower, whose title-deeds were in his hands, neither of which facts was communicated by him to the lender. *Wilson*, June 29, 1837, p. 1211.

3. A creditor (A.) whose right was secured by disposition and sasine, conveyed this security to B. who was infest; in this conveyance and in the sasine, several erasures occurred; in a competition on the rents of the estate affected by the security, another creditor (C.) whose right was posterior to that of A. objected to the right of B. on account of the erasures, and otherwise, but did not impeach the real security of A.;—Held, that it was *jus tertii* to C. to take such objections, while the right of A. was unimpeachable, and, therefore, B. preferred in the competition, without deciding as to the effect of the erasures. *Proctor*, June 29, 1837, p. 1219.

See *Entail*, 8.—*Cautioner*, 1, 5.—*Partnership*, 1.—*Trust*, 4.

**RIVER.** See *Nuisance*, 1, 3.—*Proof IV.*, 6.—*Salmon-Fishings*.

**ROAD, ROAD-TRUSTEES, &c.**

1. In an action of damages by the tacksmen of a toll-bar, against the road-trustees, for wrongfully shutting up one of four roads, after letting the toll-duties thereon to him,—Verdict for the pursuer, and damages assessed at £30. *Murray*, March 21, 1837, p. 890.

## ROAD, ROAD-TRUSTEES, &amp;c. (Continued).

2. Certain road-trustees directed an operation to be made, in the which a large heap of stones was laid down partly on the footpath and on the carriage road, where they were left all night, without any notice being taken to warn travellers; a gig was overturned by these stones in the dark, and a person driving it was seriously injured, and his son was killed. Held that the road trustees were liable in damages, though they all claimed that they had no personal knowledge of the obstruction, and had employed a tractor who was habited and reputed competent for the operation, and had been specially charged to be careful; and pleaded that they were not liable for the culpable negligence of his servants.

(2.) In assessing the sums due, £500 awarded on account of the injury to the son, a boy of ten years of age; and £300 on account of the injury sustained by the father. Findlater, July 18, 1837, p. 1304.

See *Contract*, 2.—*Jurisdiction*, 1.

ROUP. See *Sale*, 3.—*Sarine*, 1.

## SALE.

1. Trustees were directed, after the lapse of a specified period, to sell certain lands to sale, and to bind the representatives of the trust in a warrandice; the sale did not take place at the time appointed, delay having been interposed chiefly at the instance of one of the trustees; in an action to have this trustee ordained to concur in a sale, the Court found that the trustees were bound to proceed immediately to expose the lands in terms of the trust-deed; thereafter articles of roup were approved of by the Court, containing a clause of warrandice in terms thereof; objections having been made by intending purchasers to the sufficiency of the title to the lands, and not without foundation,—Held, that the lands must be exposed to sale on the conditions as to warrandice in the articles of roup, and that it was competent in the circumstances to take measures, by declarator or otherwise, removing the objections to the title. Darling, Feb. 24, 1837, p. 671.

2. A party in Liverpool received an order from a merchant in Glasgow to chase for him a certain quantity of oil of a particular description; he made a purchase of oil accordingly, and advised his correspondent that he secured for him the quantity required, but thereafter in executing it he limited this quantity to a half, as appearing in the invoice transmitted to Glasgow; the merchant having declined the purchase altogether;—Held, that the circumstances which held insufficient to bind him to take the reduced quantity. Richardson, May 18, 1837, p. 952.

3. An auctioneer was employed by a party to sell his furniture under an agreement that it should be sold at the sight of the party and the price of the articles forthwith handed over to him; the sale took place according to the course of which a creditor of the party used arrestments in the hands of the auctioneer; at this juncture part of the prices of the articles sold by the auctioneer was handed over to the party's clerk, part (to the extent of £20) was in the hands of the auctioneer, and part had not been received from the purchaser; the auctioneer thereafter presented a petition to the sheriff praying to be appointed party prohibited from delivering the furniture of which the prices had not been paid, or receiving the money, and for warrant to the clerk of Court to take possession of the effects, deliver the same, and receive the prices;—Held, in an advocacy, that the auctioneer was not entitled to insist for such prohibition and warrant. Adam, June 29, 1837, p. 1223.

See *Lease*, 9.—*Trust*, 11.

## SALMON-FISHING.

Verdict finding that certain parties had wrongfully fished for salmon in the Frith of Cromarty, with stake-nets, &c., in respect that the position of the nets was in a situation prohibited by statute. Mackenzie, March 25, 1837, p. 891.



**SASINE.**

1. Three parcels of land, the property of one party, which had long been let under separate leases, were sold by public roup, in separate lots, to the same purchaser; they were conveyed to the purchaser in one disposition, which described them seriatim by distinctive names and boundaries, declaring the whole to be held feu, for payment of 3s. yearly of feu-duty, and doubling the same on the entry of heirs:—Held that, as they were naturally contiguous, and had always been held by one tenure, under one superior, and by one vassal, they formed but one feudal tenement, and that infestment of the whole parcels of land might effectually be taken by delivery of earth and stone upon any one of them.

(2). Terms of a clause in an instrument of sasine, which referred to a disposition, containing, first, three parcels of land held feu, and second, a burgage subject, under which clause it was held, that the infestment in the lands “first above disposed,” being given on the ground of the lands “first above described,” was infestment in the whole lands held feu; these being the lands first disposed or described, in contradistinction to the subject held burgage which was last disposed; and that the infestment was not restricted to the first of the three parcels of contiguous land, held feu, and forming one feudal tenement. Grant, Feb. 16, 1837, p. 563.

**SCHOOL.**

Where the heritors of a parish had raised the maximum salary and divided it among three masters—Circumstances in which held that the justices of peace had not exceeded their powers, under the Schoolmasters' Act, in granting the accommodations of schoolhouse, &c., to the successor of the original parochial schoolmaster, notwithstanding the provision in § 11, that in such case the heritors are “exempted from the obligation of providing schoolhouses, &c. for the teachers among whom the salary is to be divided in the manner foresaid;” and Observed that this exemption only applies to the case of the teachers other than the successor of the original or proper parochial schoolmaster. Heritors and Magistrates of Annan, Feb. 21, 1837, p. 645.

See *Trust*, 8.

**SEA-SHORE.** See *Property*, 3, 4, (2).

**SEDUCTION.** See *Marriage*, 3.

**SEQUESTRATION.** See *Bankruptcy*.

**SEMI-PLENA PROBATIO.** See *Bastard*.

**SERVICE.**

(1.) In a reduction of the verdict of a Jury, obtained in a competition of brieves, as erroneous and contrary to the evidence, the Court, reviewing the whole evidence led before the inquest, found that the verdict could not be maintained.

(2.) In such reduction no particular effect is to be given to the verdict of the inquest, but the Court have the power of reviewing the case on the merits of the evidence on both sides, and deciding accordingly. Gifford, Feb. 17, 1837, p. 592.

See *Proof IV.*, 5.—*Prescription Vicennial*.

**SESSION, (CLERK OF).** See *Public Officer*, 3.

**SETTLEMENT.**

1.—(1.) A holograph will, after leaving certain special legacies, contained the following clauses:—“Any money left after paying all expenses, I wish may be laid out on charities. I leave and bequeath to A. B. £200, with power to see this will executed:”—Held, that the provision in favour of charities was not void through uncertainty, the term “charities” being sufficiently expressive of the objects of her bounty, and it being held that a power of selecting and distributing among them was conferred upon A. B. according to the true intent and meaning of the will.

(2.) A direction being given, that certain plate and furniture, &c., “be



## SETTLEMENT (Continued).

divided equally," without specifying among whom—Held, in the instances, by the Lord Ordinary, and acquiesced in, that the division be equally among the next of kin of the deceased. *Dundas, Jan. 1* p. 427.

- 2.—(1.) A testatrix made a provision in her settlement "for payment daughter, in liferent, for her liferent use alienably, and to her children such proportions as she may appoint, and failing thereof, equally among them as shall survive me, share and share alike, in fee, the sum of 6s. 8d.;" nine children survived their grandmother, the testatrix, but these predeceased their mother, without issue; their mother, in exercise of the faculty, executed a deed of distribution, allotting the sum of various proportions, among six of the surviving children, and the balance due to the seventh;—Held,

(1.) That immediately on the death of the testatrix, a *jus quæritur* in each of the nine children then alive, to some share of the sum, their mother could not deprive them.

(2.) That the omission to allot any share on account of the two who predeceased their mother, and which would have fallen to their representatives, rendered the deed of appointment disconform to the will of the testatrix.

(3.) That the deed of appointment being thus disconform, must be set aside.—Observed that it was competent to any one of all the children to object that the deed of appointment was invalid, although the will was tested, not on the failure to allot a share to the child objecting, but to one of the other children.—Question, whether the allotment of a share to any of the children would have been equally fatal to the appointment, with the total failure to allot any share at all. *Watt, 17, 1837, p. 586.*

See *Entail*, 3—*Fee and Liferent*, 2, 3—*Foreign*, 1—*Writ—Testamentary—Trust*.

SHERIFF-COURT (Reclaiming Petition). See *Process X.*, 22.

SHIP. See *Carrier—Reparation*, 7.

## SLANDER.

- 1.—(1.) A party having lodged a claim for enrolment as a voter, was returned irrelevant matter accusing of "culpable and wilful mis-statement giving evidence at the previous registration," two persons who thereupon severally brought actions of damages against the party.—Held, that a case of privileged slander, in which the pursuer must prove malice.

(2.) Verdict for the defender. *Gray, July 12, 1837, p. 1496.*

See *Reparation*, 1.

## SMALL DEBT ACT.

- 1.—(1.) The creditor in an account indorsed it over to a party, who sued for and recovered the contents in a Justice of Peace Small Debt in a reduction of the Justices' decree, on an averment that the Justice "maliciously committed the most apparent iniquity," defence sustains the facts alleged were not such as to infer malice or oppression on the part of the Justices, without which being established, the decree could not be opened up.

(2.) Opinion intimated, that, under the 6 Geo. IV. c. 48, a legatee, holding a bona fide assignation to a debt, was entitled to follow up the claim in the Justice of Peace Court and follow up the claim. *1* 26, 1837, p. 422.

STAMP. See *Act of Grace*, 2 (1)—*Writ*, 2 (2).

STIPEND. See *Church—Confusion—Interest—Superior and Vassal*, 2.

SUBMISSION. See *Arbitration*.

## SUCCESSION.

1. A testator who had no heir or next of kin, conveyed his whole estate, both real and moveable, to trustees who were also named executors; per

**SUCCESSION (Continued).**

given to sell "all or any part" of the heritage, which power the trustees were required to exercise; the purposes of the trust were to be declared in a separate writing, and that writing specified a variety of legacies to be paid; the debts and legacies more than exhausted the moveables left by the testator; after selling the heritage, and paying all debts and legacies, a considerable residue remained unappropriated—Held by the Lord Ordinary, and acquiesced in, that this residue, consisting of the proceeds of the heritage, could not be intromitted with by the trustees, qua executors, but only as trust-disponees, and that they had no claim on any part of it qua executors, under 1617, c. 14; but that the Lords Commissioners of the Treasury, being now in right of the crown, as ultimus hæres, ought to be preferred. *Finnie*, Nov. 30, 1836, p. 165.

2. A party in an entail of his lands destined them to the "eldest son" of his first, second, and third daughters seriatim, in the order of their seniority; then to the "second son" of each seriatim, and then to the "heirs male" of his "first, second, and third daughters in the same order of succession,"—Held, that, under the last destination, after the first and second sons of the three daughters had failed, the heir-male of the eldest, though a fourth son, took before any heir-male of the second daughter posterior to her second son.

(2.) Observed that, under destinations similar to the first two, the party entitled to the character of first or second son, is the person holding that character when the succession opens to that branch of the destination, though not possessed of it at the date of the granter's death. *Shepherd*, Dec. 1, 1836, p. 173.

See *Entail*, 3—*Expenses*, 7—*Fee and Liferent*, 1, 3.

**SUPERIOR AND VASSAL.**

1. In an action against a vassal's representative, at the instance of two parties holding by one title a right of superiority jointly, pro indiviso, concluding inter alia to have the defender ordained to enter with them;—Held that such conclusion was competent, and inferred no multiplication of superiors. *Cargill*, Jan. 21, 1837, p. 408.
2. Terms of a feu-charter which held not to import an obligation on the superior to relieve the vassal from augmentations of stipend. *Hope*, July 11, 1837, p. 1288.

See *Entail*, 13, (3.)—*Judicial Factor*, 3—*Factor Loco Tutoris*, 2, 7, 8—*Property*, 1.

**SUSPENSION.** See *Process*, IX.—A. S. July 6, 1837, p. 1318.

**TEINDS.**

1. In a process of augmentation, a rental was given in, stating the lands of one of the heritors at a certain value, and the heritor was held as confessed, upon which rental the augmentation was granted: Found that this rental did not necessarily form the rule according to which the heritor must be localled upon, but that he was entitled to have the true value of his lands ascertained in the process of locality. *E. of Moray*, Nov. 12, 1836, p. 2.
2. Circumstances in which the Court pronounced a judgment, finding that a certain document, if not affected by a plea of dereliction, might be approved of as a valuation of the teinds, led before the sub-commissioners in the presbytery of Forfar, of as early a date as 4th and 12th June, 1627. *Earl of Airlie*, Dec. 7, 1836, p. 211.
3. Circumstances in which the Court approved a valuation of teinds led before the sub-commissioners in the Presbytery of Perth, who were appointed under the High Commission of 1627; Holding,

(1.) That though dated as late as 1635, the report was not objectionable either on account of the certification in the proclamation by the High Commission, dated March 15, 1633, or the issuing of the new Commission of 1633, but might competently thereafter be signed and approved of.

(2.) That there was reasonable evidence of the valuation having been ac-

portion of the cumulo teind effeiring to the lands of 1837, p. 1120.

5. The ten-pound land of C. was composed of the 10 merk land of C., of old extent; the lands lay continued as one undistinguished property for about two centuries; a decree of valuation of the 10 merk land of C. had been made by the High Court; in a question in 1837 how far that decree applied to the locality, where the 10 merk land could not be located, —Held, that, as the blending of the lands had taken place long before the decree, the benefit of the decree was as nothing appeared to take off the presumption, arising from the fact, that the 10 merk land was two-thirds of the ten pound land of C. could only be localised on, one-third of his land as unvalued, the remaining two-thirds of the land being valued. Johnston, June 13, 1837, p. 1125.
6. After a proof on both sides, a decree of valuation of the lands of C. by the High Commission, in 1697; the heritor was plaintiff and his tacksmen were defenders; the minister of the parish, as stipendiary, was not called:—Held, that, in respect of the decree having been called as a party, the decree was liable to reduction on the ground of non-appearing minister, though no fraud or collusion was proved. Simpson, June 20, 1837, p. 114.
7. The titular of the parsonage teinds of a parish was also the proprietor of the lands within the parish: he feued out the lands and teinds to a cumulo feu-duty; the minister of the parish, as stipendiary, had always levied them himself: in a subsequent question, the minister gave up a proven rental, including both parsonage and lands, and the Court modified a stipend, without distinction between these two classes of teinds, which apparently affected both of them; in the locality, the above-mentioned vassal was entitled to 15s. 5d. of stipend, exhausting the whole parsonage and lands; by a process of valuation the respective proportions of the parsonage teind were fixed at 11s. 10½d. for parsonage, and 4s. 5½d. for vicarage; the vassal fell into arrears of the cumulo feu-duty, and raised an action for the amount, deducting the annual stipend.

**TESTAMENT.**

1. A lady, advanced in life, and possessed of considerable estate, executed a deed narrating that she had acquired by purchase the whole life interest right of certain bank stock which her father, by his settlement, had destined to be enjoyed equally by her and a brother, now bankrupt, and by the survivor of them: and she conveyed the said life interest right to her brother, as an alimentary provision, in the event of her death without having assigned the same in prejudice of that conveyance: in the following month, she executed a general settlement of her whole estate, "dispensing with the generality hereof, and declaring the same to be as valid and effectual as if every sum and subject belonging to me had been herein specially made over:" this settlement was in favour of her brother's children, and it appointed him sole trustee and executor: she died in a few months afterwards: Held (in a question between her brother's children, after his decease, and certain alimentary creditors of his) that the special alimentary provision in his favour was not meant to be revoked by the general settlement in favour of his children. Thomson, Nov. 18, 1836, p. 32.
2. A testator, who died abroad, left certain special legacies which were administered by his executors, along with the rest of his estate, as a cumulo fund, during a considerable period which was requisite for extricating the settlement, and realizing the estate: the special legatees claimed and obtained a share of accumulations of interest, and profits accruing on the cumulo fund, proportioned to the amount of their legacies, as compared with the rest of the cumulo fund:—Held, that a share of the expenses of administering the cumulo fund should be laid on them in the same proportion, and that, in the special circumstances, it should not be laid on the residuary legatee. Trustees of Mrs F. B. Macalister, Nov. 30, 1836, p. 170.
3. Terms of a trust-deed of settlement, according to which held,
  - (1.) That certain annuities provided by the deed, were not to be burdened, on a deficiency of funds, with the interest of two special legacies.
  - (2.) That certain residuary legacies were not so vested in the legatees as to enable them effectually to dispose thereof.
  - (3.) That the children of a residuary legatee who had predeceased the term of payment had right to the legacy as conditional institutes. Pearson, Dec. 16, 1836, p. 275.
4. A testator appointed his trustees at the expiry of fourteen years from his decease, to dispose of certain lands, and divide the proceeds among his surviving children, the shares of those predeceasing without issue, accreting to the survivors equally; the deed provided "that the shares falling to each should not be liable to be affected by their debts or deeds, while in the hands of the trustees, and should only be liable to such contingencies after the same is actually paid over and discharged;" shortly after expiry of the term, three sons and three daughters of the testator then surviving, the trustees, with consent of the sons, entered into a minute of sale, whereby they bound themselves, on payment of the price, to dispose the lands to the daughters, the entry being at Martinmas following; some days thereafter one of the sons died, having, previous to the date of the minute, disposed his right of succession to his sisters;—Held that the share of the price or value of the lands accruing to the deceased had not vested in him at the date of his death, so as to be carried by the disposition to his sisters, but that it accreted equally to them and their two brothers. Wilkie, Jan. 27, 1837, p. 430.

See *Settlement—Succession—Legacy—Trust*.

**TITLE TO PURSUE.**

- 1.—(1.) An action of damages for personal injury sustained by a pupil, was raised in a Sheriff Court at the instance of the pupil nominatim, with concurrence of his father, as his administrator-at-law, and also at the instance of the father nominatim, as such administrator; the conclusion was for payment of damages and expenses to the pupil nominatim; the Sheriff dismissed the ac-

## TITHE TO PURSUE (Continued).

tion, as defective in the instance;—Held, in an advocacy, that the was erroneous, and remit made to the Sheriff to proceed in the case be just.

(2.) Opinion by the Lord Ordinary, that though "a pupil, by no persona standi in judicio, yet as soon as his tutor or administrator in the action, the defect of his nonage is supplied, because there is insisting who has a persona standi." Keith, Nov. 24, 1836, p. 11.

2. It was fixed by a final interlocutor, that the bankrupt pursuer of could only insist, on finding caution for expenses: he found a and attester, but the attester became bankrupt during the preparatory cause: Held that the defender might object, before the Lord Ordinary further procedure, until a new attester should be found; and that 11th July, 1828, § 118, did not apply to the case. A. B., Nov. p. 158.

3.—(1.) Under the statutes of 2 and 3 Will. IV. c. 112, and 3 and c. 69, the Commissioners of Woods and Forests have no title to production of a royal grant of an office of chamberlain and collector of dietary revenues of the Crown.

(2.) The Lord Advocate has no title, without a special warrant sign-manual, to institute an action regarding the patrimonial of Crown.

(3.) Such action not validated by a royal warrant of ratification subsequently obtained.

(4.) Circumstances in which a preliminary defence of want of reduction held not to be foreclosed, notwithstanding the early production and pleading on the merits. King's Advocate, Dec. p. 314.

4. Commissioners under a Burgh Police Act having authorised the a certain sum out of the funds under their management in liquidation expenses of opposing a bill in Parliament, and having imposed an for the current year, proceeding on consideration of an estimate prices of the preceding year, in which this sum was included, rate payers having brought an action for setting aside the resolution of the Commissioners as in violation of the statute, and for having them pay back the sums so voted away by them into the funds of the police burgh, and also to have them interdicted from including the any assessment to be imposed or levied by them—Held that the police burgh had no such direct or indirect interest as to entitle them to insist in such suits. Erving, Jan. 19, 1837, p. 389.

5. A party raised a reclamation of a sacred feudal investiture of land the title of heretofore and under a certain deed; the action for declaration that the lands still formed part of a trust-estate, left by the testator, under a separate deed of trust, and also for accounting to the estate, an objection being taken to the title, the pursuer proposed not as heretofore, but as beneficiary under the trust deed, and a decree appeared ex facie of the summons to show that the heretofore also the beneficiary under the trust-deed action dismissed, in respect was no sufficient title, and motion refused for leave to amend. Ross, March 9, 1837, p. 780.

6. An heir of title left two sons and three daughters; his eldest son, he had executed a bond of provision in favour of his younger daughters, alleging that the bond was ultra vires of their father, and that the effect of altering the succession of their father's brother, was to reduce the bond, or at least to have it declared void, as it was paid out of the rents of their father's brother's estate, and he assigned to him, and kept up as a debt against the next heir;

**TITLE TO PURSUE (Continued).**

concluded also for the appointment of a curator to the fatuous brother of the pursuers, and for an order on him to concur in the action; a curator was appointed, who adopted the declaratory, but refused to adopt the reductive conclusions; the youngest son objected that the pursuers had no title to insist, their interest as presumptive-executors being merely contingent on surviving their fatuous brother, and they being wholly superseded by the appearance of that person and his curator: Held, that, though the interest of the pursuers was contingent they had a good title to pursue those conclusions which were not adopted by the fatuous person and his curator. *Viscountess of Strathallan*, May 23, 1837, p. 971.

7. The pursuer and defender, in a process of reduction, ultimately derived right to a heritable subject from a common author; the defender was in possession; assuming the common author to have been in the right of the subject, and duly infeft therein, the pursuer had a title to insist; but such assumption would have been contrary to the fact:—Held competent for the defender, though deriving right from the common author, to maintain possession, by founding on the defects in the common author's right, to the effect of cutting off the pursuer's title to insist; and judgment pronounced accordingly. *Irving*, May 25, 1837, p. 993.

8.—(1.) Held under a local statute, in conformity with *Ewing*, Jan. 19, 1837, that residents in a city liable in police assessments, had no sufficient title to complain of resolutions of the Commissioners of Police authorizing a certain appropriation of the funds alleged to be illegal; and that parties who, besides being rate-payers, were the minority of the Board of Commissioners on occasion of passing these resolutions, but whose character as such was not expressly set forth, were in no better situation as to title.

(2.) Question, whether the minority of the Board, if their character as such were properly set forth, would have a good title to complain of the resolutions of the majority in regard to the matter in dispute? *Morrison*, June 13, 1837, p. 1128.

9. A party in Newcastle ordered a puncheon of spirits from a dealer in Edinburgh, who shipped the puncheon on board a steamer plying from Leith to Newcastle, and transmitted a bill of lading to the purchaser, along with an account charging him with price, freight, and insurance; the seller, at the same time, drew a bill for the amount, which the purchaser accepted: the puncheon was lost during the voyage; the seller afterwards sent a second puncheon, of rather greater value, to the purchaser, and charged him only with the price of the second puncheon, which he intimated was to replace the first; the seller then raised an action against the shipowners, libelling that the first puncheon had been lost through improper stowage, and that he had "undertaken by his agreement, and was answerable to the purchaser for the safe delivery of the said puncheon:" the purchaser deponed, as a witness, "that the said puncheon was to be safely delivered on the quay at Newcastle before he was to consider it as his property;"—Held, that, by the contract of parties, as proved scripto, the first puncheon, when shipped, as above, at Leith, became the property of the purchaser, constructively delivered to him, and was at his risk during the voyage; that the fact of its being at his risk, and understood to be so, was confirmed by his having directed an insurance to be effected on it, and accepted a bill for the amount; that the oath afterwards emitted by him, pending the action, did not take off the effect of this proof as to the party at whose risk the puncheon actually was; and therefore, that, as the puncheon was lost to the owner (the purchaser), and not to the seller, the seller had no title to pursue for the value of it. *Dunlop*, June 30, 1837, p. 1232.

See *Bankruptcy*, 3.—*Deathbed Deed—Entail*, 13, (1.)—*Property*, 3—*Trust*, 8, (2.)—*Heir and Executor—Partnership*, 2.

**TOWN-CLERK.** See *Public Officer*, 1, 3.

## TRANSACTION.

Three parties having entered into an agreement compromising their claims to the succession of a relative deceased, and a reduction been brought by one of the parties on the ground that she was threatened, and was led into it in ignorance of her rights, and, in consequence of erroneous advice from her professional agent, who was also agent for other parties;—Circumstances in which held that grounds of reduction had not been established, and Observed that a transaction or arrangement involving doubtful rights was of all agreements the most difficult to set aside. Nov. 22, 1836, p. 112.

TROUT-FISHING. See *Property*, I.

## TRUST.

1. A testator who had no heir or next of kin, conveyed his whole heritable and moveable, to trustees who were also named executors, and was given to sell "all or any part" of the heritage, which power they were required to exercise; the purposes of the trust were to be declared in a separate writing, and that writing specified a variety of legacies to the debts and legacies more than exhausted the moveables left by the testator; after selling the heritage, and paying all debts and legacies, a considerable residue remained unappropriated—Held by the Lord Ordinary, that this residue, consisting of the proceeds of the sale, could not be intromitted with by the trustees, qua executors, but was to be held in trust for the testator's creditors, and that they had no claim on any part of it qua creditors under 1617, c. 14; but that the Lords Commissioners of the Treasury, now in right of the crown, as ultimus heres, ought to be preferred. Nov. 30, 1836, p. 165.
2. The residue of an estate conveyed by trust-deed was declared to belong to A on the occurrence of a certain event, the deed likewise specifying a sum of £2000 to be invested on heritable security, in the hands of the trustees, to A in life, and her children in fee; the necessary expenses of management were to be defrayed out of the trust funds; A assigned her claim to the residue of the estate; thereafter the event in question occurred, and certain expenses were subsequently incurred necessary for keeping up of the trust and the management of the special provision that these expenses fell to be deducted from the residue payable to the assignee; sum allowed to be reserved by the trustees to meet the future expenses of management. *Laurel and Company's Assignees*, Nov. 24, 1836, p. 158.
3. Circumstances in which the grantor of a trust-conveyance for behoof of his creditors held not entitled to insist against his trustees in an action of reduction. *Martin*, Dec. 8, 1836, p. 227.
4. Trustees under a settlement bought lands to be entailed, but delaying the entail, and, in the mean time, took the conveyances in their own favour; the party who, by the trust deed, was made first heir of entail entered into the natural possession of the lands, and, after some years, an onerous condition and assignation for behoof of his creditors, a ward became insane, his disponent, in the mean time, had entered into possession, in a bill of suspension and interdict at the instance of the ward, the disponent, the Court, in the circumstances, refused in the bill to prohibit him from uplifting the rents, but passed the bill to try the question. *Dalrymple*, Dec. 23, 1836, p. 306.
- 5.—(1.) A trust held not to have been evacuated by the death of one of the deponents or another from the country, and the bankruptcy of the managing trustee, though a curator bonis had been thereafter appointed by the Court at the instance of parties beneficially interested.  
(2.) Circumstances in which held that certain provisions only subjected to a power conferred on trustees of regulating their investment and disposition; and that that power, though for a long time neglected to be exercised, had not become inoperative. *Cowan*, Jan. 20, 1837, p. 398.



**TRUST (Continued).**

6. Circumstances in which, where a trustee infest, had come under large advances and obligations for the truster, and had advertised part of the lands for sale, in virtue of powers in the trust-deed—the Court, on caution, passed a bill of suspension and interdict at the instance of parties who alleged that the land in question had been sold to them by the truster, that they had already consigned a large portion of the price, that the trustee was participant in the sale, and that his security and relief was fully provided for; at the same time that their Lordships refused to grant any interim interdict. Ker, Jan. 27, 1837, p. 425.
7. Construction under the terms of a testamentary trust-deed, of the “necessary charges” to be deducted from the annual proceeds of the trust-estate, before the residue could be held to be “free rents,” divisible as directed by the deed. Morrison, Feb. 15, 1837, p. 560.
- 8.—(1.) A trust-donation was vested in the corporation of the town council of a royal burgh, on condition that they were to apply the annual dividends “in the support and maintenance, from time to time, of schools” in the burgh, taught on the Madras System: the council made an agreement with the several kirk-sessions in the burgh, binding themselves and their successors to pay over the dividends, equally among the kirk-sessions, each of whom, on the other hand, became bound annually to lodge with the council a written vidimus, “showing definitely that the dividend was to be strictly applied in the promotion of the system of education proposed by the donor, and accompanied by an obligation binding the kirk-session to apply the same accordingly:” it was declared that, so long as each kirk-session did so, “and satisfied the town council” that the obligation was carried into practical execution, it should have right to its share of the dividend, but should forfeit such right, on failure to fulfil these conditions: provision was made for admitting members of the town council to the annual examination of the schools, “to satisfy themselves of the bona fide and legitimate application of the dividend,” and that this was done “strictly in terms of the deed of donation:” the town council of a succeeding year refused to sanction this agreement—Held that the agreement was not ultra vires of the preceding town council; that it was no devolution of the trust, but a judicious mode of carrying it into practical execution; and that it was a valid contract, binding on the town council, so long as duly implemented by the kirk-sessions.  
 (2.) An action was raised by one contracting party to enforce implement of a contract against the other; the defenders alleged that the pursuers were a kirk-session only quoad sacra, and had no title to pursue;—Objection repelled. Forbes, Feb. 21, 1837, p. 628.
9. Trustees were directed, after the lapse of a specified period, to expose certain lands to sale, and to bind the representatives of the truster in absolute warrandice; the sale did not take place at the time appointed, delays having been interposed chiefly at the instance of one of the trustees; in an action to have this trustee ordained to concur in a sale, the Court found that the trustees were bound to proceed immediately to expose the lands in terms of the trust-deed; thereafter articles of roup were approved of by the Court containing a clause of warrandice in terms thereof; objections having been stated by intending purchasers to the sufficiency of the title to the lands, which were not without foundation,—Held, that the lands must be exposed to sale, under the conditions as to warrandice in the articles of roup, and that it was incompetent in the circumstances to take measures, by declarator or otherwise, for removing the objections to the title. Darling, Feb. 24, 1837, p. 672.
10. Where a trust-settlement was conceived in favour of the trustees, and the survivor of them; and one of two surviving trustees became insane; the Court granted authority to the other trustee to wind up the trust, with the full powers conferred on the trustees, or survivor, but only on condition of his finding caution. Fraser, March 1, 1837, p. 692.



TRUST (Continued).

- 11.—(1.) In a declarator of trust to which the Act 1696, c. 25, is applicable is competent to prove trust by writings under the hand of the purporting an acknowledgment or admission of trust, although not a formal bond of trust.  
(2.) Evidence which held sufficient to prove that certain properties to which were taken wholly in name of one individual, was held to the extent of a half, in trust.  
(3.) Opinion intimated, that, in a declarator of trust it is not necessary to prove the constitution of a trust *ab initio*, but that proof of an existing trust will support a conclusion for declarator of trust. *M'Farlane*, 1837, p. 978.
12. Question whether, in special circumstances, a private sale by trust of one of their own number, was not reducible. *Browning*, May 2, 1837, p. 999.
13. Under a post-nuptial contract in 1754, the husband "bound himself to convey and settle the fee of the lands of Kirkbuddo to and in favour of the male to be procreated betwixt him and his present spouse; whom if the heir-male to be procreate of his body, in any subsequent marriage failing, to the heir-female to be procreate of this or any other marriage, the eldest always succeeding without division:" the contract contained no mention of the lands, and no procuratory or precept; the husband was put in possession of the lands, in fee-simple; he died in 1776, leaving one son and two daughters; the son immediately executed a trust-disposition of the lands, in pursuance of the powers of sale, chiefly for the purpose of paying his father's debts, and under an obligation to re-convey "to him, his heirs or assignees," the lands were sold (or the balance of price if the lands were sold), after the trust was fulfilled; the trustees, as empowered by the trust-deed, conveyed the lands to the son as nearest and lawful heir to his father: they then conveyed the lands, base, under the precept in the trust disposition, and possessed the lands for 10 years, after which, their whole advances being paid, they re-disposed of the lands to the son, with a procuratory of resignation in remanentiam, for consolidating their right of property, with the right of the son, and extinguishing the trust, which was accordingly done; the son died, without a settlement, in 1834:—Held, that the right of the son, under the obligation in the marriage-contract, was unlimited with his right as nearest and lawful heir of his father under the old investiture of the lands, his possession under the latter character infer the prescription of that obligation; and that the obligation being in force, the eldest sister's representative had now right to the whole of the lands, to the exclusion of the younger sister. *Ogilvy*, May 26, 1837, p. 1027.
14. A party executed an entail of heritable property and at the same time conveyed to trustees certain other heritable and moveable property: the trust-deed provided that, after fulfilling the primary purposes of the trust, the trustees should invest the funds in the purchase of lands, which they were to dispose to and in favour of the heir of entail in possession at the time of the death of the testator and who should have attained majority, and to the other heirs of entail in order, under the burden of subsisting annuities and provisions; the testator died two months after attaining majority, leaving an infant child—Held, that on the majority of the first heir succeeding, a right vested in him and the other heirs to obtain from the trustees an effectual denuding and discharge of all lands which might have been purchased with the trust-funds, and that they were entitled to the whole interest and proceeds of the lands principal should be invested, and that no farther accumulation for investment could take place. *Stewart*, June 16, 1837, p. 1153.
15. A trust was constituted in a post nuptial contract in favour of the wife, who was deaf and dumb, but *sui juris*, and the heirs of the marriage; the

**TRUST (Continued).**

died, and the only heir of the marriage passed the years of majority; Held, although there was no provision in the deed for the trustees denuding in the event which occurred, yet as the widow and the heir had in themselves the entire right to the trust-property, they were entitled to discharge the trust, and require the trustees to denude. *Craigie*, June 17, 1837, p. 1157.

16. Terms and provisions of a trust-deed of settlement, which held not sufficient to import a postponement of the vesting and payment of the residue of the trust-estate in unlimited fee-simple, beyond the death of a liferentrix and the majority of the residuary legatees. *Tait*, July 11, 1837, p. 1273.

See *Bankruptcy*, 9.—*Bill of Exchange*, 2, (2.)—*Fee and Liferent*, 2, 3.—*Succession—Outlawry—Process X.*, 29.

**TRUSTEE.** See *Bankruptcy—Trust*.

**TUTOR.**

A party while in an infirm state of health having been served tutor-at-law to his infant nephew, and having two years afterwards applied by petition to be relieved of his office, on the ground of his health having become still more infirm, the other relatives of the pupil making no opposition, the Court allowed the tutor to renounce, and appointed a factor loco tutoris. *Munnoch*, July 7, 1837, p. 1267.

See *Title to Pursue*, 1.

**UDAL.**

Circumstances in which held that a party who had been, for several years, in possession of udal lands, had no title to them, and consequently that the right of a disponee to whom he sold them must be set aside at the instance of the heir of the last proprietor. *Rendall*, June 15, 1837, p. 1145.

See *Property*, 2.

**ULTIMUS HÆRES.** See *Succession*, 1.

**VALUATION.** See *Teinds*.

**VERBAL SLANDER.** See *Reparation*, 1, 4—*Slander*.

**VERDICT.** See *Process III*.

**VESTING.** See *Fee and Liferent—Testament*, 3, 4.—*Trust*, 5, 13, 14, 16.

**WAKENING.** See *Process X.*, 12.—*A. S.*, June 27, 1837, p. 1317.

**WITNESS.** See *Bastard—Proof II*.

**WRIT.**

1. A settlement of a heritable estate was made by three relative deeds—(1.) a deed of entail, containing a disposition to certain heirs, “whom failing, to any persons to be named by the entailer, in any nomination to be executed by him at any time of his life;” (2.) a relative deed of nomination of heirs, in the form of a probative writ, which excluded the nearest heir, and declared the order of heirs who were called, but contained no dispositive words; and (3.) a trust-disposition for certain temporary purposes, under burden of which, the other two deeds were granted: These deeds were all executed on the same day, and a duplicate of each deed was executed at the same time; the testing clause of each deed specially referred to the simultaneous execution of the duplicate, and vice versa; there were numerous erasures and superinductions in the deeds and duplicates, but, with two immaterial exceptions, no erasure occurred in the same place of both the deed and its duplicate, the deed being entire wherever the duplicate was erased, and vice versa; no notice of the erasures was taken in the testing clause of any of the deeds or duplicates; Held, in a reduction,

(1.) That the deeds were, in the circumstances, unchallengeable; and

(2.) That the combined effect of the disposition in the entail, and of the relative deed of nomination of heirs, was, to form an effectual conveyance in favour of these heirs, just as if they had been originally inserted in the entail. *Earl of Strathmore*, Feb. 1, 1837, p. 449.

- 2.—(1.) A holograph acknowledgment in these terms, “Received from A. B.

## WRIT (Continued.)

£186, (Signed) C. D."—imports in dubio the constitution of a debt, general obligation to repay.

(2.) The above acknowledgment, though unstamped, along with circumstances held to establish resting owing. Allan, June 13, 181130.

3. In a reduction of a deed on the ground that the instrumentary witness neither saw the granter subscribe, nor heard him acknowledge his subscription, one of the instrumentary witnesses, A, swore that the granter had subscribed when he (A) signed, and that he neither saw the granter subscribe nor heard him acknowledge his subscription; the other instrumentary witness was tendered, but held inadmissible; there was other evidence to the jury, intended to support the alleged ground of reduction; the jury for the pursuer, and a bill of exceptions was taken, in respect that the siding judge "did direct the jury, in point of law, that if they believe witness A, in point of fact, though a suspicious witness to the execution of the deed, they ought to find a verdict for the pursuer:"—Held,

(1.) That the Court must take the tenor of the direction, precisely as stated in the bill of exceptions.

(2.) That the direction, there stated, imported that it was the duty of the jury to find a verdict for the pursuer, if they believed the witness A, though they disregarded all the other evidence in the case.

(3.) That this direction was not well founded in the law of Scotland, being a general rule that a pursuer cannot prove his case by a single witness, and there being nothing in the nature of this action to raise an exception to that general rule. Observed, that, where an exception is taken against a portion of a charge, it is important that every other part of the charge (if not excepted against) should be given in the bill of exceptions, so far as necessary to bring before the Court the true import of the portion excepted against, such as it was actually given to the jury. Cleland, July 6, 1846.

See *Fraud—Right in Security*, 3.

WRONGFUL IMPRISONMENT. See *Process X.*, 30.—*Reparations*, n. 6.







